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POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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PRIVATE PROPERTIES ISSUES FOLLOWING THE CHANGE OF POLITICAL REGIME IN FORMER SOCIALIST OR COMMUNIST COUNTRIES

STUDY

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PETITIONS

Private properties issues following the change of political regime in former socialist or communist countries Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia

STUDY

Abstract

Some transformations occurred in the area of private property ownership following the change of political regime in former socialist or communist countries. The six analysed countries (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia) illustrate well the whole range of contentious problems in a region where the Communist regimes have varied tremendously in their approach to private property, intensity of social control, repression and overall legitimacy. This diversity of situations poses today different types of dilemmas for the property restitution process and these six countries responded in different manners to these general challenges, in the context of their own peculiar social and economic history.

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DISCLAIMER

FOREWORD

The present research deals with private properties issues in Romania, Bulgaria and the Western Balkans. It consists of two studies: the first one has the title "Private properties issues following the change of political regime in former socialist or communist countries" (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia) and the second one has the title "Private properties issues following the regional conflict" (Bosnia and Herzegovina, Croatia and Kosovo).

The aim of the first study is to analyse the transformations that occurred in the area of private property ownership following the change of political regime in former socialist or communist countries. The six countries looked at are: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia. These countries illustrate well the whole range of contentious problems in a region where the Communist regimes have varied tremendously in their approach to private property, intensity of social control, repression and overall legitimacy. This diversity of situations poses today different types of dilemmas for the property restitution process, dilemmas which are approached by each country in a different manner.

The second study - besides sketching out the legal background of international and EU law for property restitution/compensation in the context of the conflict or war in former Yugoslavia - deals with the effects of this conflict in terms of the property issues arising from it; it covers Bosnia and Herzegovina, Croatia and Kosovo. In a civil war or regional conflict, like the one in former Yugoslavia, the members of an ethnic group may be dispossessed by the 'winners' and forced to leave their property or may leave for fear of reprisals; both alternatives result in ethnic cleansing. In the post-conflict phase property restitution/compensation has become a crucial component of the return of internally displaced persons to their homes of origin.

The main question for the countries in both studies is how an emerging democracy can "respond to public demands for redress of the legitimate grievances of some without creating new injustices for others."1 Moreover, property rights and transparency represent the very bases of a functioning market economy: each of the countries faces the difficult task of finding a balance between remedying violations of property rights and guaranteeing a functioning land market, which enables or will enable full freedom of movement of capital in the EU.

[1] Solomon, R.H., 'Preface', in: Kritz, N.J. (ed.), *Transitional Justice,* vol. III, 1995, p. xv.

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LIST OF ABBREVIATIONS

ADS	Agency for Public Domains
AKKP	Albanian Property Restitution and Compensation Agency
BCC	Bulgarian Constitutional Court
BiH	Bosnia and Herzegovina
BMAFLR	Bulgarian Ministry of Agriculture, Forestry and Land Reform
BSP	Bulgarian Socialist Party
CAP	Agricultural production cooperative (Cooperative Agricole de Productie in Romanian)
CASBI	State Commission for the Administration of Assets from Enemies
CCEC	Central Commission for Establishing Compensations
COM	Council of Ministers
CSD	Centre for the Study of Democracy
DFJ	Democratic Federal Yugoslavia
DPA	Dayton Peace Accord
EC	European Commission
ECJ	European Union Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
FNRJ	Federal People's Republic of Yugoslavia
FRA	Fundamental Rights Agency
GDP	Gross Domestic Product
GERB	Citizens for European Development of Bulgaria (Bulgarian abbreviation)
IAS	State owned farms (Romanian abbreviation)
IDP	Internally displaced persons
LCONA	Law on the Compensation of Owners of Nationalised Assets
LOUAL	Law on Property and Use of Agricultural Land
LRNIP	Law on Restitution of Nationalised Immovable Property
LTPSCE	Law on Transformation and Privatisation of State and Communal Enterprises
MP	Member of Parliament
MRF	Movement for Rights and Freedoms
NARP	National Agency for Restitution of Property in Romania
OECD	Organisation for Economic Cooperation and Development
OHR	Office of High Representative for Bosnia and Herzegovina
OJ	Official Journal
OSCE	Organisation for Security and Cooperation in Europe
OTR	Occupancy/tenancy rights
RS	Republic of Srpska
SAA	Stabilisation and Associations Agreements
SAR	Romanian Academic Society
SFRJ	Socialist Federal Republic of Yugoslavia
TEC	Treaty establishing the European Community
TFEU	Treaty on the Functioning of the European Union
TKZS	Agricultural labour cooperative farms (Bulgarian abbreviation)
UDF	Union of Democratic Forces
UNHCR	United Nations High Commission on Refugees
WW II	2nd World War

EXECUTIVE SUMMARY

The restitution of confiscated property to former owners in the ex-communist states of Central and Eastern Europe was a policy decision with momentous consequences, as the level of assets concerned was huge and the impact of handing back to former owners residential or commercial property, four decades after nationalization, was difficult to anticipate. The solutions adopted – relatively quickly, or slowly and incoherently, in many steps spanning a long period of time – were very different from country to country.

The historical legacies explain some of this variation in approach. The implementation of the Communist project was uneven and country-specific. In societies with little established aristocracy and fewer large real-estate owners, the nationalization of residential houses and farming land was more difficult to justify in political terms, so it took about a decade or more after taking power for the Communist governments to consolidate sufficiently to enable them to embark upon the expropriation of millions of peasant farmers or urban lower-middle classes. By contrast, large real-estates and the factories tended to be confiscated earlier. In mountainous areas, confiscation of property was less frequent than in lower, more productive areas.

The determination of the political push towards property nationalisation, especially in the rural sector, was another diverging factor. At one end of the scale, in Romania or Albania the state took control of almost all properties, either directly or through the cooperatives. By contrast, in Yugoslavia (as in Poland) most of the land had remained in individual family farms during the socialist period. In addition, some regimes (Yugoslavia, Hungary) started to relax central control in the '70s or the '80s, trying to simulate a market economy through ”competition” between two or more state-owned enterprises. Therefore the search for a way to put property into private ownership started earlier in some of the Communist countries, while others remained totally unprepared up until 1989.

Still, unlike in the former Soviet Union, in the Western Balkans, Bulgaria and Romania legal records of previous owners still existed, for both commercial and residential property, so the restitution of the actual assets – buildings, land, industrial assets – was a feasible option. In practice, however, there were many practical difficulties. Often the land became unavailable: for example in urban localities which changed and expanded during Communism, when whole neighbourhoods were erased in order to make room for the socialist housing units. Land improvement works, artificial lakes of experimental farms lie today on top of former plots. In consequence, land swaps or compensation arrangements had to be made.

In the countries that pursued this strategy, the restitution did not necessarily lead to land fragmentation, but it may have facilitated the transition from socialist cooperatives to corporate farms. In other countries such as Romania and Bulgaria (and many in Central Europe) some large state farms were downsized, but managed to survive as corporations. But in general the social pressure to dismantle the agro-cooperatives was so high that no post-1989 cabinet could have resisted it.

There are a number of **fundamental difficulties and dilemmas** the post-Communist governments in Bulgaria, Romania and the Western Balkans had to face:

- How far back in time should the process go? Should only Communist expropriations (or "collectivization") done through law or decree be considered, or cases that occurred during World War II or immediately after, sometimes through unlawful abuse (as in the case of the Jewish community, for example) be included?
- Should former owners be given back their same physical property, or another one of similar value, or should they be compensated financially instead? In the last case, should the compensation be in cash, or in vouchers which are the equivalent of shares in some specially-established funds or in existing state companies? Should the

amount of the compensation be at full value, or should it be capped (i.e. some confiscation and redistribution may occur)? Should vouchers be immediately tradable, or should temporary restrictions be imposed?

- Related to the point above, how far can we go with the argument that the state is liable and should redress the wrongs done forty or fifty years ago to some individuals? Do the post-Communist generations have a moral obligation to finance the restitution process fully, or are there other social considerations that should play a role? For example, if a building nationalized in 1950 still exists, but is occupied by many tenants, can it be restored with no restrictions attached to the (inheritors of the) former owner? Can absentee landlords be reinstated on their land, even if this would mean evicting families with no title but who have used the land for decades (the case of many Roma communities)? Such concerns of inter-generational redistribution are legitimate in any sort of public policy and formed the crux of the argument, even though not always explicitly, when the issue of restitution was discussed in the early nineties.
- Can the restitution process follow fully the inheritance rules from the Civil Code, or should eligibility be more restricted, for instance only to the original owners and their children? Should only individuals who are residents of the country be eligible, or should émigrés qualify too?
- Regarding industrial assets or agricultural land, how can the opposing goals of justice and economic efficiency be reconciled, since in many cases restitution is likely to result in a fragmented and unmanageable ownership structure?
- Finally, can the post-Communist public administrative apparatus be trusted to discharge in a reasonably fair and effective way the daunting task of identifying the lawful owners, assessing properties and compensating the eligible individuals for their lost properties? What procedures and institutions must be created, at the central and local level, to ensure property restitution proceeds accurately and expeditiously?

This report outlines the manner in which six South-East European countries – Romania, Bulgaria, Croatia, Bosnia, Serbia and Albania – responded to these general challenges, in the context of their own peculiar social and economic history. Like Central Europe, they all had to confront these dilemmas in the first years after the fall of the Communist regime, because the more the process of restitution dragged on, the more complicated the situation became. The liberalization of the economies after 1990 created a market for all types of assets and as a result of this natural pressure, transactions proliferated, even in situations where ownership rights were not certain. It was obvious from the start that delays or piecemeal strategies tended to create more conflicts, overlapping property rights and actions in courts.

The similarities and differences are all highlighted in the report and the answers given to the dilemmas highlighted above. Both nationalisation and restitution policies varied significantly, and these variations had an impact for the structure of the case-studies presented in this report. The main structure of the case studies includes an overview, the historical background of the expropriation process, the restitution/compensation process and conclusions. However, the inner structure of each topic is not the same in all countries – for instance because some of them have adopted legislation for restitution, while others have not.

Most of these countries (with the exception of Serbia) attempted to restore in kind or compensate the previous owners for the property confiscated during the communist regime. However, the restitution or compensation process has been inconsistent, the procedures (legal, administrative) have not been coherent, and the process itself has generally been slow. **The main common problems** related to restitution in the six countries under scrutiny, as they resulted from our analysis, are:

- Belated adoption of property restitution policies;
- Unclear and unpredictable policy on property restitution;
- Weak institutional capacity to implement the policy;
- The emergence of conflicting rights on the same property;
- Ineffective compensation systems.

All these problems have caused a lot of discontent among previous owners or current tenants, and generated waves of complaints to external institutions such as the European Court of Human Rights (ECtHR) and petitions to the European Parliament (EP).

However, the issue of restitution or compensation for property confiscated by the former communist regimes does not fit into the sphere of competence of the European Union, so that any future developments linked to the accession of EU to the ECHR will be completely neutral to it.

The role of the European Court of Human Rights.

The ECtHR can examine applications only to the extent that they relate to events which occurred after the Convention entered into force. In those cases where the property was confiscated in the period 1949-1989, that is, before the date of the entry into force of the Convention with regard to all six States, the Court is not competent *ratione temporis* to examine the circumstances of the expropriation or the continuing effects produced by it up to the present date.
Therefore, in the absence of domestic laws providing for restitution or compensation for lost property or of domestic courts' final judgments providing for restitution or compensation, none of those who had lost their possessions before 1989 can have a chance to win a case before the ECtHR.

The judgments finding a violation of Article 1 of Protocol No. 1, in cases of property lost during the communist regime, are related not to the fact of the nationalisation or confiscation by the authoritarian power, but to the actual failure of the States to comply with their own legislation providing for compensation or restoration of property or with final judicial or administrative decisions restoring property or awarding compensation, rendered by domestic authorities in favour of the applicants, during the period following the ratification of the Convention.

This amounts to the paradoxical, but nevertheless real situation that if a post-communist state refuses to take any steps to address in law the issue of properties nationalized before 1989, that state is fully insulated against claims before ECtHR. Only once a country begins to pass national legislation on the matter can it become liable in international courts. However, it must be said that, in spite of this strong institutional incentive for non-action, most post-communist countries in CEE and SEE [abbreviations not explained] could not avoid passing some sort of legislation on property restitution, as a result of domestic political pressure. It is the difference in timing and quality among these bodies of national law that explain the wide variation in the number of claims (and, subsequently, successful claims) coming before ECtHR from each state.

When comparing the judgments rendered by the Court in cases involving each of the countries, some common patterns emerge for all (or only a subgroup), in addition to a relatively less important set of specific features for each country. With regard to those countries that have a significant number of judgments, a leading judgment can be identified. These are normally followed by dozens of similar judgments, which address the same legal issue and give place to well-established case-law.

The main issues under the Convention are the non-enforcement of final judicial decisions; the quashing of final judicial decision and failure by the courts to respect the final character of judgments; the failure of the domestic authorities to provide compensation to which the applicants were entitled under domestic law; deprivations of property in the context of special protected tenancy and access to court in order to ask for restitution of confiscated property.

The role of the European Union.

The countries under scrutiny differ as regards their status vis-à-vis the European Union: Romania and Bulgaria are already members, Croatia is a candidate country, while the other three countries, Albania, Bosnia and Herzegovina and Serbia, are potential candidates. In this respect it follows that the **European Union has at present different leverage and different mechanisms to influence the process of property restitution in each of them**. The issue of property restitution has been always addressed in country reports of the European Commission from the perspective of human rights; concrete examples of country reports are given in each of the case-studies presented in Part II of the present study.

Generally speaking, the leverage of the EU on national policy is stronger in the years before a milestone is reached: either as a condition to be fulfilled before the country can start accession negotiations; or during this process, as a benchmark to be monitored before negotiations can be concluded. However, there are peculiarities about the issue of property restitution – it is a particularly sensitive national issue in every country, very political in nature, grounded in moral and historical judgments, with a huge amount of resources at stake. This and the fact that it exceeds the explicit mandate of the EU, tends to limit the Union to the role of guardian of procedures, rather than reviewer of the substance of the national decisions adopted. On the other hand, a reasonable and timely solution to the problem of property in every post-communist state willing to join the EU is crucial, one way or another, as a building block of the rule of law, which is a membership prerequisite. This is the dilemma confronting the EU institutions: encouraging a fair policy on restitution, but only using indirect instruments for this goal.

Recommendations:

In our opinion, the European Union should continue to use its traditional monitoring mechanisms and conditionality systems to assess the extent to which countries have implemented policies to address the issue of property restitution. In this process the EU should not limit its assessment to the review of legislation, but should also request concrete action plans with clear benchmarks, budgetary allocations and responsible institutions, once the national governments have adopted a law. In other words, the Union cannot impose a solution on East European societies, but once such a solution is agreed by the legitimate authorities of the particular country, it can request that the government and the administration do not undermine the policy through implementation flaws.

This would be a good strategy bearing in mind a well-known phenomenon: it is often easier for the national voters and the public to make the government embrace the broad principles of a policy, and even to adopt a law, but much more difficult to monitor their implementation. External monitoring of administrative performance in this field, as well as the performance and fairness of other structures, such as the judiciary, which play a role in the process of property restitution, may be an important contribution to an increased level of accountability in the candidate / prospective candidate country, and thus a tool to improve the quality of governance.

On the particular case of property restitution, the solutions do not come without significant costs (which would be lower if restitution in kind were to be the solution adopted by the countries). In this context the EU may explore together with the countries concerned a mechanism for financing such costs in a manner which is both practical and morally acceptable. Various arrangements may be considered, from linking restitution

with the privatization process, to mutual funds, selling of state assets, special purpose loans, etc. Due consideration must also be given to the implications for the national budgetary deficit likely to be impacted.

National cases

1. The section on **Albania** deals with the complex problems concerning property restitution in a country that for almost a decade suffered from social turmoil and unstable governments. First, the legal framework has been volatile and incoherent over time. The financial burden that the amount of compensation to former owners would place on the state has never been estimated. Furthermore, as described in the relevant section of the report, there have been serious issues regarding the methodology for establishing the compensation sums. The current law on restitution allows for restitution in kind or compensation in cash at the property's market price, and the methodology to establish the compensation value has been approved by the National Property Restitution and Compensation Agency. However, it has been criticised by international organisations, because it makes the value of compensation dependant on the income the property would have generated if it had been in the possession of the rightful owners. The chapter also describes the administrative procedure of the restitution process.

The 2008 EC Progress Report highlighted that, despite the problems created by the lack of property registration and the legalisation of informal use of land, Albania had registered some advance in the restitution process and the enforcement of property rights. In the same year, a report issued by the European Parliament on the property restitution process in Albania discussed thoroughly the problems created by the disruptive legal framework and the inefficient institutional setup for the management of property issues after 1990. Its conclusions and recommendations were in line with those of the EC 2009 progress report, according to which Albania showed little progress on issues related to property rights in general. The report urged the adoption of a comprehensive working plan in order to improve the situation regarding property rights.
Another report, made by the Property Restitution and Compensation Agency in October 2009 for the use of the Prime Minister's office, shows that no decisions have been taken after July 2009, since the deadline stated in the law had not yet been postponed. This means that besides new claims the Agency will have to provide an answer to pending claims, the administrative investigation of which has not yet been finalized. Usually claims are still pending due to missing documents or procedural mistakes which impeded or delayed the adoption of a final decision. However, human resources are not available to speed up the process or support better communication with beneficiaries. At this moment the number of requests is already too large for the current administration to handle.

The lack of personnel is reflected in the number of judicial appeals on property restitution issues. Only one third of all appeals were dealt with so far, which reflects a low capacity, to a large extent due to the lack of trained personnel. This issue needs to be addressed by future reform plans.

Making the process of evaluation of restitution claims more efficient is crucial, since unsolved claims end up in judicial courts, a trend that is accelerating: between August and October 2009, 187 lawsuits were initiated against the Agency's decisions. The demand for highly trained staff is urgent, both for dealing administratively with the files and to represent the state in courts. A property fund out of which compensation in kind could be made does not yet exist. Five years after the adoption of the current law on restitution and compensation, despite additional legal acts that aimed at clarifying the procedure, restitution in kind has never been made.

According to the law, property used in the public interest cannot be returned to its owners. This required initial registration of immovable property that could be used for restitution all over the country. The Albanian Assembly took a recent decision to verify

property titles, including those belonging to the State. The institution in charge identified a high level of uncertainty related to registered titles, including the ones in state ownership. Thus, setting up a Property Fund based on the records of the Immovable Property Registration Office is not legally secure.

A yearly fund for cash compensation was included in the state budget. For 2009 this fund reached 10 million Euros and it was used to cover compensations for 211 out of the 521 owners who had their property rights restored that year. The compensation process is made according to the distribution of the claimed land across the value maps of the Agency. These maps need to be continually updated by the final compensation deadline in 2015. Considering the dynamics of the real estate market and of the number of filled and solved claims, the budget needed to cover compensation can be expected to grow.

2. The chapter on **Bosnia and Herzegovina** highlights the special situation of a country with split governance. A law on the denationalisation of property seized during the Communist regime was adopted at the state level, but immediately suspended, thus producing no legal effects. The study describes the events after World War II and the Bosnian war of the '90s which had important implications for the restitution process, and reviews critically the final draft of the proposed law on denationalisation, as well as the governmental and institutional challenges to the implementation of the proposed law. It examines the existing policy conflicts and problems that the proposed law could aggravate, including the complications arising from the Dayton Peace Accords. Then it moves on to predict the impact of government and administrative corruption in the implementation process.

Even though the current draft form of the restitution law has weak points, they can be addressed in by-laws, codes of conduct, and the administrative tools and mechanisms that do not have to be a part of the formal law. Adopting this Law would at least establish an institutional framework, after which there is a six-month period before the actual implementation begins. The adoption of the Denationalisation/Restitution laws in each entity (they are in progress) should be in line with the state level law. The ideal solution, though probably the least likely, would provide that Entity laws be in accordance with the state law, and that they empower the state level law in terms of speed and quality of implementation by creating specific regulations on registering property at municipal/city/district levels and making such data available to the public and all interested parties. New registers of property (a register of confiscated property subject to denationalisation, a register of property that shall be used for the purpose of natural compensation, and a general register of all municipal property) should be in place in each of the municipalities in Bosnia and Herzegovina or at the cantonal or entity level. Such registers, aside from simple counting of the property, should contain data that is in the possession of the public bodies (location, type and size of the property, under which law the property was confiscated and the legal basis for confiscation, who is in possession of such property or who has occupancy rights and on what basis, approximate commercial value of the property). Such registers should be available to the public as well as to all interested parties. In addition, a combined register of persons and companies that have been compensated for their property through bilateral agreements (such as the Agreement between the U.S. Government and SFRJ) should be established and made available to the public and interested parties.

Municipalities should be required by law to establish registers of property which is unaccounted for and provided a binding deadline within the law for beginning of procedure before the court by the relevant public office (public defender) in the name of the targeted municipality, and stating that all property which is unaccounted for after the deadline belongs to the State of Bosnia and Herzegovina.

Transparency and access to data should be improved at all levels, in the policy-making process (draft laws, future by-laws and other relevant policy documents, registers of property subject to restitution law, decisions in the process of denationalisation as well as statistical and other relevant data). Integrity and anti-corruption measures should be

imbedded either in the law or by-laws and codes of conduct of relevant bodies, as requested for the implementation of the Dayton package of property laws. Special attention should be given to conflict of interest-related issues in the appointment of members of the municipal commissions, as well as the appointment of members of the Appellate Commission, with both soft (prevention) and hard (ban on appointment to public service employment) measures against those that breach the codes of conduct or other similar instruments.

The international community should give special attention to the issue, as it is one of the last issues in Bosnia and Herzegovina that precedes the beginning of the development of a free market – corruption aside. Therefore, the denationalisation issue, as well as effective, timely, fair and just implementation of the Law and international treaties, should become a criterion for Bosnian progress in accession to the EU.

By the end of the denationalisation process, Bosnia and Herzegovina should consider a special approach to the property that belonged to victims of the Holocaust or the last war in Bosnia and Herzegovina. Even though the country is in a difficult economic situation, no state should benefit from sufferings of the past. Such measures pay tribute to the victims of tragic historical events, and at the same time prevent special interests within the State from making money and taking precedence over the interests of all citizens. In complex situations, the tenants should be given the right to buy such apartments as guaranteed under the law. Bosnia and Herzegovina can consider a solution similar to the one in Macedonia, and create a fund out of the money received through the sale of public property to be used for paying compensation to victims and their descendents. The fact that proper and fair denationalisation is not a condition for the BiH roadmap to the EU raises suspicions that this matter will never be adequately or fairly resolved. Since there is almost no leverage from the international community in relation to denationalisation policies, it is expected by many that the final outcome of denationalisation will be a failure.

3. In the chapter on **Bulgaria**, we describe and analyse the restitution process against its historical and political background. The process of nationalisation of agricultural land, or urban, industrial and other property in the early communist period and the subsequent practices of alienation of property are also briefly presented in order to facilitate the understanding of subsequent developments. The legislation, the judicial practice and the decisions of the Bulgarian Constitutional Court on property restitution in the transition period are discussed in detail. The social, economic and urban development consequences of this process are also outlined with a special attention given to the minorities, with an emphasis on the restitution of property to the Bulgarian ethnic Turks.

The restitution of property in Bulgaria over the last twenty years has been one of the most far-reaching and complex social processes. It has been shaped by and has itself shaped Bulgarian politics. Issues of the balance between retributive justice and the general public good, issues of evaluation of the past and projections for the future, and indeed issues of political identity were all entangled in this process. Therefore, any overall judgment is necessarily partial and controversial. One thing is clear, however: the process of restitution has determined the outlook of contemporary Bulgaria in a variety of important ways.

In terms of *economic efficiency* the restitution of agricultural lands in their real boundaries has fragmented the plots, and has created a serious need for consolidation of lands. Bulgarian agriculture, partly as a result of this fragmentation, has been one of the sectors with the most severe difficulties to recover after the crisis of the 1990s. This fragmentation also creates problems in absorbing EU funding in the sector.
The benefits of the restitution process should therefore be sought mostly in the area of social (retributive) justice and the legitimacy of the transition to liberal-democracy and

market economy. Here, the restitution efforts of the political elite indeed created a significant constituency of owners supporting the political transformation.

4. The chapter on **Croatia** reviews the various positions of the European bodies and other international organisations such as the Organisation for Security and Cooperation in Europe (OSCE), ECtHR etc, in relation to the process of restitution and compensation. It further covers the legal framework and analyses critically the Law on Compensation, weakened by the inherent conflict of interest of the County Administration Offices. There are also important issues with the implementation of the legal framework: the slow pace of procedures in the County Administration Offices and the decisions taken by the national courts that affect the process of restitution and compensation.

A number of problems stem from the choice of the County Public Administration Offices as the responsible body for the arbitration of claims to restitution and compensation: (i) the inherent conflict of interest; (ii) the different principles applied to the administrative procedure, and (iii) the slow pace of the procedure. The conflict of interest problem is the greatest threat to the just settlement of claims to restitution and compensation. However, it is also at this point in time the most difficult to change because 71% of all cases have been settled by this administrative mechanism. The recommendation here must then be generalized to the politics of the Republic of Croatia in the future. A possible solution to prevent future conflict of interest problems could be by introducing a practice that would permit the Committee for the Prevention of the Conflict of Interest to consider and point out any potential areas of concern before any act of legislation is presented to the Parliament. Of course, the Committee would not have the power to change the legislation but at least it would have oversight and whistle-blower status. This would also work towards giving the Committee a more prominent position within the structure of government.

The problem of the different principles of procedure being applied in different counties could be solved by the passing of additional regulations and the changing of the contradictory wording in the Law on Compensation by the legislature. This sort of solution should at least be contemplated for the most contentious issues. The less controversial issues must continue to rely on the Administrative Court for their resolution as foreseen by the legislative framework.

The third problem of the slow pace of the administrative procedures calls for Government pressure to be placed on the counties to complete the administrative stage of the process of restitution and compensation. The European Commission and the European Parliament could also encourage the Croatian Government to the complete the process.

The last recommendation is based on the general problem of ownership and tenancy rights. These problems can be partially remedied by a proactive organisational policy by the Republic of Croatia. Three different registers for the categorisation of property for the restitution and compensation process could be created: (i) one register would document the current property whose restitution is requested; (ii) the second register would document the property that is set aside for compensation by the state or counties; (iii) the third register would document the current owners of the property whose restitution is requested and when these ownership rights were gained.

These three registers would avoid a plethora of problems that surround the tenancy and ownership issues: tenants who have requested to be granted ownership rights of privately owned apartments could be easily identified. These cases would obviously be dismissed because they are based on a basic misunderstanding of the Croatian civil law. The second problem that would be solved is that the tenants who have legitimately requested ownership rights for state-owned apartments could also be easily identified. The conclusion of these cases would then depend on the pace of the administrative procedure. The tenants in these cases would receive the right to purchase the property and the original owner would receive compensation.

The third problem that would be placed in a clearer light is the minority of cases where corruption or a conflict of interest within the legal or administrative bodies is in question. The cross- referencing of the first and third register would clearly identify the property that has been given to individuals through illicit means. Since the third register would contain both the owner and the date their ownership rights where granted this would set the stage for a more detailed investigation by the authorities of those individuals who gained property without proper tenancy rights or the rights to restitution and compensation. This final recommendation would require a political action to regulate and sanction corruption within the Republic of Croatia.

5. **Romania** is distinctive among the countries in the region because of the combination of widespread nationalisation, high expectations – the target was *restitutio in integrum* – and weak institutions to implement these challenging tasks. The restitution policy was designed and re-designed gradually, over a period of almost 20 years, so it lacked a coherent vision. The report highlights the frequent changes in legislation which lead to overlapping entitlements provided by the law at various moments in time. The outcome was a slow process with a disjointed practice both in the administration and the judicial system. The restitution in kind of agricultural land and forestry is slowly coming to an end, but the process of compensation for the claims that could not be addressed in this way is very protracted. The restitution of urban property has barely reached half way, again with a major delay in providing compensation. The prospects are not encouraging because at the current pace the restitution process is likely to be prolonged over several decades.

The poor implementation of the restitution policy made Romania a leader in the number of cases taken to the ECtHR and also in the number of sanctions applied in respect of property issues. The failure of the administration and judiciary to comply with the rules created by this intricate framework and the different interpretation given to the rules triggered a clear reaction from the international organisations Romania adhered to, especially the ECtHR.

The most important idea emerging from this research is the fact that a lack of political vision and frequent changes in the legal framework were the main causes of the existing uncertainties regarding the restitution of property. Therefore, there is an obvious need for the political class to refrain from major policy shift. The key word should be consolidation of the legal framework by a clear-cut interpretation of the law by the Constitutional and High Courts, in order to provide the lower courts with the necessary basis for a unitary practice.

Secondly, increasing the capacity of the administrative bodies in charge of restitution should become a priority. Institutional audits for the central level, Bucharest City Hall and other laggard institutions are recommended in order to find pragmatic ways for speeding up the bureaucratic process by eliminating redundant checks and streamlining the procedures. The compensation mechanism should become truly effective. Payment titles should be directly enforceable, and the Proprietatea Fund should be listed on the stock market as soon as possible.

Another important aspect to be considered is the capacity of the state to pay the promised compensation. The economic crisis greatly affected the Romanian treasury, with the public budget facing high deficits and lower incomes at a time when the social expenditure is rising. As the payment of compensation is already a cumbersome process, it is not advisable that budgetary constraints should add to this delay. In addition, the value at which the shares in the *Proprietatea Fund* are traded now on the unregulated market indicates that the real price of the shares may be significantly lower than the nominal value used for compensation. As compensation will be at the trading value, a higher rate of transfer of the shares owned by the state to private recipients should be anticipated. The Fund has already transferred about 40% of the value of assets into titles to claimants.

Under these circumstances, it is advisable to have more restitution in kind or compensation with other properties of equivalent value, which are not claimed back by former owners. However, the laggard local authorities such as Bucharest have not finalised an inventory of properties, although the deadline provided by the applicable law expired years ago. A better enforcement of such laws and an improvement in the performance of other institutions, such as the land register (cadastre) or archives, are crucial for reducing the total monetary cost of the restitution process to the rest of the society, by maximizing the in-kind or equivalent options.

6. In **Serbia**, property restitution has not yet been fully addressed in legislation or administrative practice, but similar issues are expected to arise if the country's government makes the same mistakes as its neighbours in designing the restitution/compensation policy. The first step towards denationalisation was the Law on Declaring and Registration of Seized Property in 2005. The Law regulated the procedure for declaring and registering seized property, as the first step in the process of returning property to its owners. The purpose was to quantify the property seized by means of nationalisation, expropriation, confiscation etc, applied after 1945 in Serbia, in order to establish the appropriate manner of returning it to the owners by enacting the law on denationalisation.
About 73,000 applications were filed within the deadline, and some more submitted after the deadline with the expectation that it would be extended. Up to September 2009 it is estimated that around 76,000 claims submitted by approximately 130,000 individuals were collected. There are 49,400 applications containing the requested documentation, and 16,100 without sufficient data for identification of the nationalised property.

In 2007 Serbia produced a second important draft law, this time called by its proper name: the Law on Denationalisation. It entered the adoption procedure, it was accepted by the Government of Serbia and released for public debate. During the public debate many objections were raised, however, such as those related to violation of the rights of current owners, as the law provided for the seizure of assets from the current owners without compensation. It also contained provisions on the restitution of construction land by establishing a dual ownership between the building owners and land owners. After sharp criticism during the public debate, the Government withdrew the draft law from the legislative procedure.

Such a delay of almost two decades is likely to make Serbia a very special showcase for the difficulties of the restitution process in South-Eastern Europe. The market pressure has produced situations which, after successive transactions, will be hard to disentangle. In addition, the government is pressed to come up with a separate law, dealing with the division of public property between the state and Serbia's 174 municipalities. It plans to do this in 2010, largely because without clarifying the situation of municipal property, many investment projects, including those financed by the EU, cannot proceed. But securing municipal property in law before the broad lines of restitution are set is likely to complicate the matter further.

The assessments as to the financial implications of restitution or compensation are rather blurry and give rise to disputes between various stakeholders and the Government. In-kind restitution could decrease the direct financial costs to society, as this method would eliminate monetary compensations. However, the more the issue drags on, the more difficult it will become to use this mechanism, as Serbia delays a clear decision on this matter.

INTRODUCTION

The restitution of confiscated property to former owners in the ex-communist states of Central and Eastern Europe has been in general little discussed and analyzed in the policy and the political literature of transit in spite of the heated and polarising debates around the issue in the societies concerned. Things stand in marked contrast with the subject of privatization, which is much better known and has produced an impressive body of written analysis. This is just one among the many paradoxes and dilemmas outlined in this report – because the stakes in the restitution process were similarly high and the broader social consequences of handing back in a way or another buildings, land, forests or industrial assets to their original owners, four decades after they were nationalized, could be momentous and, to some extent, difficult to anticipate at the moment when such a decision to restitution was made.

Not only the subject was under-researched in theory, but even the practical details of the decisions made by the legitimate authorities installed after 1989 were muddled to a large extent. The big moral and public policy dilemmas implied were addressed mostly by default, without having a consistent discussion in society, or at odds with the direction of this discussion. The solutions reached were as a result different, adopted relatively quickly, or slowly and incoherently, in many steps spanning a long period of time.

The historical legacies explain some of this variation in approach. The Communist project was aimed to function as a great social equalizer, within – but also across – societies in the region, but its unique general framework was pressed upon different social, economic and cultural realities in the aftermath of the World War II. The motives for nationalization were political as well as economic. It was a central theme of the state socialist policy that the means of production, distribution and exchange, should be owned by the state on behalf of the people or working class to allow for rational allocation of output, consolidation of resources, rational planning of the economy and changing the patterns of living in urban and rural areas. Private property was regarded as the main impediment to these goals of the Communist regime, and as a result it had to be severely curtailed.

However, the implementation of the Communist project allowed for substantial cross-country – and, sometimes, intra-country – variation. In societies with little established aristocracy and even fewer large real-estate owners, the nationalization of residential houses and farming land was more difficult to justify in political terms, so it took about a decade or more after taking power for the Communist governments to consolidate enough until they were able to embark upon the expropriation of millions of peasant farmers or urban lower-middle classes. By contrast, large real-estates and the factories tended to be confiscated earlier. In mountainous areas, confiscated property was less frequent than in lower, more productive areas.

In Romania, Bulgaria and the countries of the Western Balkans, we are dealing precisely with the type of historical social structure where nationalizations were bound to be ideologically difficult: nations of smallholders, predominantly rural, with a thin layer of urban middle strata just emerging in the decades before the Communist takeover[2]. The states themselves were quite young, a result of a fervent process of nation-building in the second part of the 19th century, and the rural smallholder had been exalted in the fledgling national cultures as the backbone of the young polity. What is more, some governments had already redistributed some agricultural land to the poorest peasants immediately after 1945, before the full Communist take-over. Reversing the trend and going against this class in the name of social justice was difficult, at least at the beginning.

[2] Joyce Gutteridge (1952). Expropriation and Nationalisation in Hungary, Bulgaria and Romania. International & Comparative Law Quarterly , Volume 1 , Issue 01 , pp 14-28 Published online by Cambridge University Press, 2008.

Nevertheless, it happened, sooner or later, in all these countries. In rural areas the metaphor of "collectivization" imported from USSR helped making the things look acceptable politically: the farming land would not be technically nationalized, but "consolidated" in larger exploitations "managed collectively" by the former owners. In Yugoslavia, a similar structure was adopted even for many industrial plants. However, this was nationalization in all but name, because the state and party bodies performed a centralized control over the decisions made, exit was not possible and micro-management from the top became the norm.

While Communism was a common blueprint for the whole region, however, the determination of the political push towards property nationalisation, especially in the rural sector, varied a lot from one country to another. At one end of the scale, in Romania or Albania the state took control of almost all properties, either directly or through the cooperatives. By contrast, in Yugoslavia (like in Poland) most of the land had remained in individual family farms during the socialist period. In addition, some regimes (again, Yugoslavia, or Hungary) started to relax the central control in the '70s or the '80s, attempting to simulate a market economy through ”competition” between two or more state-owned enterprises trying to act as private enterprises would. Thus the search for a process that would put property into private ownership started earlier in some of the Communist countries, while others remained totally unprepared to explore the issue up until 1989.

Still, unlike in the former Soviet Union, in Western Balkans, Bulgaria and Romania legal records of previous owners still existed, for both commercial and residential property. Restitution of the actual assets – buildings, land, industrial assets – was a feasible option, had the post-Communist governments decided to pursue it. People lost the right to utilize their land, but they did not lose the nominal title to the land[3]. Over the years, as rural residents moved to the city or died, some land became the property of the cooperative.

In actual practice, it was not always possible to return the exact plot of land or building to an individual or to his/her descendents. Often other pieces of property were offered to former owners in compensation, either to avoid agricultural fragmentation or because the property ceased to exist as such – for example in urban localities which changed and expanded a lot during Communism, and whole neighbourhoods were erased in order to make room for the new socialist housing units. In the countries that pursued this strategy, the restitution did not necessarily lead to land fragmentation, but it may have facilitated the transition from socialist cooperatives to corporate farms. In other countries such as Romania and Bulgaria (and many in Central Europe) some large state farms were downsized, but managed to survive as corporations. But in general the social pressure to dismantle the cooperatives was so high that no post-1989 cabinet could have resisted it.

There are a number of **fundamental difficulties and dilemmas** the post-Communist governments in Bulgaria, Romania and the Western Balkans had to face:

- How far back in time should the process go? Should only Communist expropriations (or "collectivization") done through law or decree be considered, or cases that occurred during the World War II or immediately after, sometimes through unlawful abuse (like in the case of the Jewish community, but not only) be included?

- Should former owners be given back their very same physical property, or another one of similar value, or should they be compensated financially instead? In the last case, should the compensation be in cash, or in vouchers which are the equivalent of shares in some specially-established funds or in existing state companies? Should the amount of the compensation be at full value, or should it be capped (i.e. some

[3] Dudwick, N., Fock, K., and Sedik, D. (2007): *Land Reform and Farm Restructuring in Transition Countries. The Experience of Bulgaria, Moldova, Azerbaijan and Kazakhstan*, World Bank Working Paper No. 104, (Washington, DC: World Bank)

confiscation and redistribution may occur)? Should vouchers be immediately tradable, or temporary restrictions must be imposed?

- Related to the point above, how far can we go with the argument that the state is liable and should redress the wrongs done forty of fifty years ago to some individuals? Do the post-Communist generations have a moral obligation to finance the restitution process fully, or there are other social considerations that should play a role? For example, if a building nationalized in 1950 still exists, but is occupied by many tenants, can it be restored with no restrictions attached to the (inheritors of the) former owner? Can absentee landlords be reinstated on their land, even if this would mean evicting families with no title but who have used the land for decades (the case of many Rroma communities)? Such concerns of inter-generational redistribution are legitimate in any sort of public policy and made the crux of the argument, even though not always explicitly, when the issue of restitution was discussed in early nineties.

- Can the restitution process follow fully the inheritance rules from the Civil Code, or eligibility should be more restricted, for instance only to the original owners and their children? Should only individuals who are residents of the country be eligible, or émigrés should qualify too?

- Regarding industrial assets or agricultural land, how can the opposing goals of justice and economic efficiency be reconciled, since many times restitution is likely to result in a fragmented and unmanageable ownership structure?

- Finally, can the post-Communist public administrative apparatus be trusted to discharge in a reasonably fair and effective way the daunting task of identifying the lawful owners, assessing properties and compensating the eligible individuals for their lost properties? What procedures and institutions must be created, at the central and local level, to ensure property restitution proceeds accurately and expeditiously?

This report outlines the manner in which six South-East European countries – Romania, Bulgaria, Croatia, Bosnia, Serbia and Albania – responded to these general challenges, in the context of their own peculiar social and economic history. Like Central Europe, they all had to confront these dilemmas in the first years after the fall of the Communist regime, because the more the process of restitution dragged, the more complicated the situation would became. The liberalization of the economies after 1990 created a market for all types of assets and as a result of this natural pressure, transactions proliferated, even in situations when ownership rights were not certain. It was obvious from the start that delays or piecemeal strategies tended to create more conflicts, overlapping property rights and actions in courts.

The similarities and differences are all highlighted in the report and the answers given to the dilemmas above emphasized. Both nationalisation and restitution policies varied significantly, these variations having an impact also for the structure of this case-studies presented in this report. The main structure of the case studies includes an overview, the historical background of the expropriation process, the restitution/compensation process and conclusions. However, the inner structure of each topic is not the same in all countries, for instance because some of them have adopted legislation for restitution while others have not.

Part One - International law and the role of the European Union

Chapter 1 - The role of the European Court of Human Rights

1. THE RELEVANT INTERNATIONAL LAW PROVIDING FOR THE PROTECTION OF PROPERTY: THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND ITS MECHANISM OF ENFORCEMENT

1.1 The Council of Europe and the European Court of Human Rights

Sooner or later after the fall of the communist regime, all the six countries became members of the Council of Europe, a political intergovernmental organisation, created in 1949, which has now 47 member States[4], namely almost all the European Countries, except Belarus, but including Russia and Caucasian countries. The main objectives of the Council of Europe are to develop and maintain democracy and respect for human rights and rule of law. Several important international treaties were concluded by the Council of Europe member States, in order to guarantee that the three objectives were met.

The **most important piece of international law created within the Council of Europe is** the Convention for the Protection of Human Rights and Fundamental Freedoms (also known under a shorter title, as the **European Convention of Human Rights**), of 1950. The Convention is not only a declaration of the most important civil and political rights, but provides an efficient mechanism of collective enforcement of those rights, by the means of the European Court of Human Rights. Fourteen Protocols amended the Convention during the last 60 years. Protocol No. 1, of 1951, provided in its Article 1, for protection of property - a right which was not initially included in the Convention. Once the six countries acceded to the Council of Europe, they also ratified the European Convention of Human Rights and its Protocols, as a requirement for membership.

Table 1. Dates of Accession to the Council of Europe

Country	Albania	Bosnia-Herzegovina	Bulgaria	Croatia	Romania	Serbia
Date of ratification ECHR	2.10.1996	12.07.2002	7.09.1992	5.11.1997	20.06.1994	3.3.2004

Any person or group of persons[5] under the jurisdiction of all the 47 Countries of the Council of Europe can file an individual application against one or more of those countries, to the European Court of Human Rights, which, in 1998, after the entry into force of Protocol No. 11 to the Convention, had become the unique judicial body[6] competent to supervise the respect for the European Convention of Human Rights. Following such an application, the Court can state, by a reasoned judgment, that there was a violation by the State of one or more of the human rights and fundamental

[4] For the dates of accession, see Council of Europe's internet site: www.coe.int.
[5] See Article 34 of the ECHR.
[6] Before the entry into force of Protocol No. 11, there were two judicial bodies: the European Commission of Human Rights, competent to deal with the admissibility of the applications and the Court.

freedoms provided for in the Convention. The Court can also award a just satisfaction[7] to the applicant, in respect of the violation of his rights. According to the Court case-law cited in the judgment *Brumărescu v. Romania* on just satisfaction (Article 41) of 23 January 2001[8]"a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach". The Court also stated that "the Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach" because "this discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed". Moreover, "if the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate"[9].

The Council of Europe's executive body, namely, the Committee of Ministers is competent to supervise the execution of the ECtHR judgments by the respondent States, as far as the individual measures in order to redress the violation are concerned, but also with regard to general measures, as changes of legislation or administrative practice, in order to prevent similar violations of human rights.

1.2 The accession process to the European Union: a vector for the ECtHR judgments enforcement

A couple of years after their accession to the Council of Europe, Bulgaria and Romania expressed their willingness to become members of the European Union (EU), which seemed to offer them prospects of economic relief and greater political stability. The preparation for accession to the EU was a long process of institutional and legal changes by the mechanism of law approximation, aimed to ensure that the two countries were able to comply with the criteria for membership[10]. Those criteria were either economic, such as having a functioning market economy, or political, i.e 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.'

Bulgaria and Romania joined the EU in 2007. The negotiation for accession with Croatia began in 2005. Stabilisation and Associations Agreements (SAA)[11] were subsequently signed with Bosnia and Herzegovina, Serbia and Albania[12] with the prospect of membership once they are ready for it.
The progress of each candidate country towards accession was or is constantly monitored by the European Commission. Regular reports are released to the public, in which the European Commission deals with the level of protection for human rights, including the right to property, by candidate countries. The main indicators for the EU institutions, in this area, are the judgments of the European Court of Human Rights. Thus, the **commitment toward accession to the EU became eventually a platform for enforcing the ECtHR judgments** and preventing other violations of human rights.

[7] According to Article 41 of the ECHR:" If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."
[8] Application no. 28342/95, published in *Reports of Judgments and Decisions 2001-I.*
[9] See also *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, pp. 58-59, § 34.
[10] The criteria were laid down by the Copenhagen European Council, in June 1993.
[11] More information available on the European Commission website: http://ec.europa.eu/enlargement/potential-candidates/index_en.htm
[12] For general information about enlargement, see www.europa.eu

The EU Reform Treaty (Treaty of Lisbon) which entered in force from 1st of December 2009 says that 'the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'[13]. Once the EU will be a party to the Convention, individuals will be able to bring applications against EU before the European Court of Human Rights, if they can argue that EU institutions violated their human rights provided for in the Convention and its Protocols. By virtue of Article 35 of the Convention, such applications could be brought only after exhaustion of 'domestic remedies'. At the EU level, actions before the Court of Justice of the European Union (ECJ) could be seen as domestic remedies. Such a judicial mechanism is now only a matter of future legal development. In any event, the area of the **restitution or compensation for property confiscated by the former communist regimes does not fit into the sphere of competences of the European Union**, so that any future developments linked to the accession of EU to the ECHR will be completely neutral to it. According to the Treaty of Lisbon, 'such accession shall not affect the Union's competences as defined in the Treaties'[14].

2. RESPECT FOR PROPERTY THROUGH ECtHR GENERAL FIGURES

2.1. Statistics concerning ECtHR judgments on property issues and pending applications

The relevant general figures published in the last European Court of Human Rights' annual report[15] refer to the period between 1 November 1998[16] and 31 December 2009[17].

In respect to Bulgaria, 'only' 35 out of 272[18] judgments are about property (slightly over 10 %); meanwhile Bulgaria had, during the relevant period, 110 judgments which concerned length of proceedings (violation of Article 6 of the Convention) and 201 judgments concerning the right to liberty and security (violation of Article 5 of the Convention) – see Tab. 2. Similar figures show that Croatia had 'only' 4 out of a total of 133 judgments finding a violation, namely less than 5%, concerned property. Meanwhile, Croatia had 72 judgments concerning length of proceedings (violation of Article 6).

However, in respect to Romania, the Court's statistics show a different situation: 372 out of 582 judgments finding a violation, which represent almost 65 %, concerned property issues (Tab. 2).

These statistics include all the cases of violation of Article 1 of Protocol No. 1, not only the cases concerning property confiscated during the communist regime. The Court does not provide any official statistics about the particular number of judgments concerning property lost during the communist regime as a separate issue in property related cases. However, the Court's database available on its Internet site[19] offers the complete collection of judgments, including those concerning property lost under the communist regime. Therefore, the Court's Internet site can be the source of unofficial statistical data. The total number of judgments concerning property lost under the communist regime can be obtained from it, as well as the figures related to various subgroups, determined by the nature of the legal issues at stake.

[13] Article 6 of the TEU.
[14] Idem.
[15] See the provisional version of the *Annual Report 2009*, published on 29 January 2010 on www.echr.coe.int and the *Annual Report 2008 of the European Court of Human Rights, Council of Europe* (2009) Strasbourg.
[16] Creation of the new Court, following the entry into force of Protocol no 11 to the Convention. There were only 4 judgments of the former Court, against Bulgaria and Romania; only one of them – *Vasilescu v. Romania,* of 22 May 1998 – concerning property (gold coins confiscated during the communist regime).
[17] *Annual Report 2009*, p. 144-145.
[18] Only those judgments finding a violation are reported here.
[19] http://www.echr.coe.int/

Table 2. Statistics on cases before ECtHR, all six countries

	Total number of application pending at 31.12.2009	Number of applications declared inadmissible	Total number of ECtHR judgments	Number of judgments finding violation	Judgments finding a violation of Article 1 of Protocol No. 1 (Right to property)	Systemic problem (Article 46 applied)
Albania	228	139	20	18	9	Yes
Bosnia-Herzegovina	2,071	861	13	13	7	Yes
Bulgaria	2,728	4,164	292	272	35	No
Croatia	979	4,332	170	133	4	No
Romania	9,812	19,417	646	582	372	Yes
Serbia	3,197	2,455	40	38	5	No

Before discussing those special cases, it should be noted that Albania, Bosnia-Herzegovina and Serbia – namely half of the states covered by the study – do not have yet a significant amount of judgments rendered by the European Court. This situation can be partially explained either by the fact the Convention was relatively recently ratified by Bosnia-Herzegovina (on 12 July 2002) and Serbia (on 3 March 2004) – i.e. some ten years after Bulgaria or Romania – or by the fact that only a relatively small number of applications are brought before the Court, as is the case with Albania, which had 228 applications pending on 31 December 2009. However, it is important to see that almost half of the judgments given by the Court with respect to Albania and Bosnia-Herzegovina were about property issues.

The relatively low figures, for those countries, of ECtHR judgements finding a violation of property should not be seen as an indication that this issue is not important. The number of applications pending before the Court should also be taken into consideration for each of those countries. Only Albania has a relatively low number of applications. The other two countries of the first group, Bosnia-Herzegovina and Serbia, had a relatively high number of applications pending at the relevant time compared with their population. Despite the fact that there are no official statistics on pending applications concerning property lost during the communist regime and related restitution, it is likely that this kind of complaints are filled in significant numbers.

There are no data available concerning the number of pending applications referring to property issues, but the proportion of judgments concerning property can be an indicator; another indicator could be the number of cases communicated to the respondent Governments concerning property issues[20]. If the number of applications pending is relatively high and many applications about property were communicated to the Governments, therefore, potentially, there is room for new violations of property to be found in the future. So, despite the fact that countries like Bosnia and Herzegovina, Serbia or Albania do not have a significant number of judgments concerning property, the evolution of number of judgments against these three States should be monitored for the next few years, in order to have an adequate picture of the situation and the real scale of the confiscated property problems.

[20] Available on Court's website, http://www.echr.coe.int/

In contrast to Albania, Bosnia-Herzegovina and Serbia, **Romania** has the **largest number of judgments finding a violation of property rights**: almost ten times more than the second place, Bulgaria. Romania has also the largest number of applications pending before the ECtHR, which is almost three times more than the second ranked of the six relevant countries, Serbia.

Bulgaria and Croatia have comparatively low records of ECtHR judgments finding a violation of property, when it comes to the proportion of those cases within the general figures of judgments finding a violation. This seem to indicate that property – whether lost during the communist regime or not – is not currently an important issue for those countries, given the fact that both ratified the Convention more than a decade ago. However, before jumping to conclusions, further analysis of the relevant judgments should be conducted in order to see if violations of property rights are only isolated issues or not.

A significant part of the judgments finding a violation of Article 1 of Protocol No. 1 of the Convention concerns property lost during the communist regime. Before going into details of those cases, it should be mentioned that a high number of the applications concerning the property lost before the ratification of the Convention by the respective States are declared inadmissible (see Tab. 3).

2.2. Inadmissible cases

Between 1st November 1998 and 31 December 2009, a significant number of applications were declared inadmissible by the Court[21].

Table 3. Number of applications declared inadmissible before the ECtHR

	Total number of applications allocated to a judicial body	Number of applications declared **inadmissible**	Ratio
Albania	380	139	36%
Bosnia-Herzegovina	2,948	861	29%
Bulgaria	7,099	4,164	58%
Croatia	5,455	4,332	79%
Romania	28,883	19,417	67%
Serbia	5,356	2,455	45%

Nearly 70% of the applications against Romania were declared inadmissible, as well as almost 80% of the applications against Croatia, or some 60% of those against Bulgaria. There is no statistical information about how many of those applications concerned property lost during the communist era. The Court's database offers to the public only those inadmissibility decisions taken by a chamber of seven judges, but not those which are taken by a committee of three judges[22], which are only communicated to the parties. The number of inadmissibility decisions of a chamber, concerning property lost during the communist regime, can only be an indicator of the real number of this kind of inadmissible cases.

The applications are declared inadmissible by the Court for various reasons, according to the admissibility criteria which are laid down by Articles 34 and 35 of the Convention, as being introduced outside the **six months time limit** or without the previous **exhaustion**

[21] *Annual Report, 2009,* p. 144-145
[22] Articles 27 to 29 of the Convention.

of domestic remedies, or as being incompatible *ratione temporis* or *rationae materie* with Article 1 of Protocol No. 1 to the Convention. The Court can examine applications **only** to the extent that they relate to **events** which occurred **after the Convention entered into force**[23]. In those cases where the property was confiscated in the interval 1949-1989, that is, long before the date of the entry into force of the Convention with regard to all six States, **the Court is not competent** *ratione temporis* **to examine the circumstances of the expropriation** or the continuing effects produced by it up to the present date. In this regard, the Court considers that deprivation of ownership or of another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of 'deprivation of a right'[24]. Moreover, in the Court's view 'possessions', within the meaning of the Article 1 of Protocol No. 1 can only be '**existing possessions**' or assets, including, in certain well-defined situations, claims. For a claim to be considered an 'asset' falling within the scope of Article 1 of Protocol No. 1, **the claimant must establish that it has a sufficient basis in national law**, for example where there is settled case-law of the domestic courts confirming it or where there is a final court judgment in the claimant's favour[25].

Therefore, in the absence of domestic laws providing for restitution or compensation for lost property or of domestic courts' final judgments providing for restitution or compensation, none of those who had lost their possessions before 1989 have a chance to win before the ECtHR.

This amounts to the paradoxical, but nevertheless real situation that if a post-communist country refuses to take any steps to address in law the issue of properties nationalized before 1989, the respective state is fully insulated against claims before ECtHR. Only once a country begins to pass national legislation on the matter can it become liable in international courts. However, it must be said that, in spite of this strong institutional incentive for non-action, most post-communist countries in CEE and SEE could not avoid passing some sort of legislation on property restitution, as a result of domestic political pressure. It is the difference in timing and quality among these bodies of national law that explain the wide variation in the number of claims (and, subsequently, successful claims) coming before ECtHR from each state.

3. MAIN LEGAL ISSUES UNDER THE CONVENTION

3.1. Overview

The judgments finding a violation of Article 1 of Protocol No. 1, in cases of property lost during the communist regime, are therefore related not to the very fact of the nationalisation or confiscation by the authoritarian power, but to the **actual failure of the States** to comply with their own legislation providing for compensation or restoration of property or with final judicial or administrative decisions restoring property or awarding compensation, rendered by domestic authorities in favour of the applicants, during the period following the ratification of the Convention.

These judgments often find, in addition to the violation of Article 1 of Protocol No. 1, a second violation of **Article 6** of the Convention (right to fair trial) regarding a number of particular issues, as for example, the **excessive delays** due to the lack of efficiency of compensatory legislation and proceedings, the breach of the **access to court** requirement because of the lack of enforcement of final judicial or administrative

[23] The European Convention of Human Rights entered into force with regard to Albania, on 2 October 1996; with regard to Bosnia and Herzegovina, on 12 July 2002; with regard to Bulgaria, on 7 September 1992; with regard to Croatia, on 5 November 1997; with regard to Romania, on 20 June 1994 and with regard to Serbia, on 3 March 2004

[24] See, among many others, *Malhous v. Czech Republic,* decision of 13 December 2000 (application no. 33071/96).

[25] See, among many others, *Ramadhi and Others v. Albania*, judgment of 13 November 2007 (application no. 38222/02).

decisions ordering restitution of lost property or the breach of the **principle of legal certainty** because of the quashing of final judicial decisions ordering restitution of property.

When comparing the judgments rendered by the Court in cases involving each of the countries, some **common patterns** emerge for all (or only a subgroup), in addition to a relatively less important set of specific features for each country. With regard to those countries that have a significant number of judgments, a leading judgment can be identified. These are normally followed by dozens of similar judgments, which address the same legal issue and give place **to well-established case-law**.

The **main issues** under the Convention are the non-enforcement of final judicial decisions; the quashing of final judicial decision and failure by the courts to respect the final character of judgments; the failure of the domestic authorities to provide compensation to which the applicants were entitled under domestic law; deprivations of property in the context of special protected tenancy and access to court in order to ask for restitution of confiscated property.

3.2. Access to court in order to ask for restitution of confiscated property

Outside the scope of Article 1 of Protocol No. 1, but within the sphere of the legal protection of the property lost before 1989, the ECtHR addressed also the issue of the lack of access to court for those persons who wanted to ask for restitution of confiscated property, because of high court fees[26] or other legal obstacles[27].

3.3. ECtHR finding of a 'widespread problem affecting large numbers of people'

Facing a large number of similar applications, the Court found with respect to Romania and Albania that the violation of the applicants' rights guaranteed by Article 1 of Protocol No. 1 in the context of restitution/compensation for confiscated property[28], originated in a widespread problem affecting large numbers of people, namely the unjustified hindrance of their right to the peaceful enjoyment of their property. The Court found that 'there are already dozens of identical applications before the Court. The escalating number of applications is an aggravating factor as regards the State's responsibility under the Convention and is also a threat for the future effectiveness of the system put in place by the Convention, given that in the Court's view, the legal vacuums detected in the applicants' particular case may subsequently give rise to other numerous well-founded applications. (…)'[29]. General measures were required under Article 46 of the Convention, in order for those countries to be able to redress the systemic problem[30].

Consequently, the low number of judgments rendered to date against some States is not at all an indicator for the actual magnitude of the problems (especially with regard to Albania) related to confiscated property, which is far more significant. Moreover, given the finding of the Court in respect of the 'deficiency in the procedural system', other similar applications may be potentially successful.

[26] *Weissman v. Romania,* judgment of 24 May 2006 (application no. 63945/00) and *Iorga v. Romania,* judgment of 25 January 2007, (application no. *4227/02*).
[27] *Lupaş v. Romania,* judgment of 14 December 2006 (applications nos. 1434/02, 35370/02 and 1385/03) published in *ECtHR Reports* 2006-XV (extracts) and *Faimblat v. Romania* judgment of 13 January 2009 (application no. 23066/02).

[28] Article 46 of the Convention was also applied in respect to Bosnia and Herzegovina (see the cases *Čolić and 14 others v. Bosnia and Hertzegovina,* judgment of 10 November 2009, but outside the context of immovable property lost during former regime.
[29] The case *Ramadhi and Others v. Albania*, cited above.
[30] See also the cases *Faimblat v. Romania* and *Viaşu v. Romania* cited above and *Katz v. Romania,* judgment of 20 January 2009 (application no. 29739/03).

3.4. Non-enforcement of final judicial decisions and deprivation of property in the context of special protected tenancy

In view of the number of relevant judgments and the extent of this problem among the majority of the six States, the most important issue in this area is the non-enforcement of final judicial decisions ordering the restitution of immovable goods (plots of lands, buildings, apartments) or awarding compensation for lost property (*e.g.* certain amount of money or equivalent goods)

The Court, in its well-established case-law, has examined the non-enforcement of a decision recognising title to property, as interference within the peaceful enjoyment of property[31]. The ECtHR concluded several times, in respect of Albania, that Article 1 of Protocol No. 1 had been violated because of the failure to enforce final judicial decisions concerning the applicants' right to compensation for plots of land which had been nationalised under the communist regime[32]; pleading lack of funds, as the government had done, did not justify the situation[33].

In similar judgments against Bulgaria, the Court had to deal with failure to enforce final court decisions awarding compensation[34] or ordering the restitution of houses, which had been expropriated during the communist regime, (in one case the house was converted into a museum and classified as a national historic monument, before the Bulgarian National Assembly voted, in June 1994, a moratorium on the laws concerning the restitution of properties with historical monument classification, which prevented the applicants from obtaining restitution of their property[35]) or plots of land[36].

The Court had to deal with the same issue, with regard to Romania, concerning failure to enforce or delays in enforcing, by the administrative authorities, final judicial decisions ordering the restitution of property (plots of land, buildings or apartments) lost during the communist period. The leading case *Sabin Popescu* (judgment of 2 March 2004) was followed by more than fifty other similar judgments.

With respect to the non-execution of judgments ordering not the restitution as such, but that the administrative body (*e.g.* Land Commission, in Albania) take a decision regarding the applicants' claims[37] on land appearing to have belonged to their parent and confiscated during the communist period, the ECtHR found a violation of Article 6 §1 of the Convention. However the Court rejected the claim under Article 1 of Protocol No. 1 as incompatible *ratione materiae* with the provisions of the Convention recalling 'that there is a difference between a mere hope of restitution, however understandable that hope may be, and a legitimate expectation, which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision (…)'. The Court concluded that 'in the context of their restitution claim, the applicants had no 'possessions' within the meaning of the first sentence of Article 1 of Protocol No. 1', so that the guarantees of that provision do not therefore apply to the present case.

The Court examined a particular situation of non-enforcement of final judicial decisions with regard to Bosnia-Herzegovina. The judicial decisions in question ordered private banks to release 'old savings', namely the foreign currency savings deposited prior to

[31] see *Burdov v. Russia*, no. 59498/00, ECHR 2002-III, *Jasiūnienė v. Lithuania*, judgment of 6 March 2003 (application no. 41510/98).
[32] ***Ramadhi and 5 others v. Albania,* judgment of 13 November 2007** (application no. 38222/02); *Hamzaraj v. Albania (no. 1)*, judgment of 3 February 2009 (application no. 45264/04); *Nuri v. Albania*, judgment of 3 February 2009 (application no. 12306/04); *Vrioni and Others v. Albania and Italy*, judgment of 29 September 2009 (application no. 35720/04 and other joint applications).
[33] *Beshiri and others v. Albania,* judgment of 22 August 2006 (application no. 7352/03).
[34] *Zaharievi v. Bulgaria*, judgment of 2 July 2009 (application no. 22627/03).
[35] *Debelianovi v. Bulgaria,* judgment of 29 March 2007, (application no. 61951/00).
[36] *Mutishev and others v. Bulgaria,* judgment of 3 December 2009 (application no. 18967/03)
[37] *Gjonbocari and others v. Albania* (judgment of 23 October 2007 (applocation no. 10508/02).

dissolution of the Socialist Federative Republic of Yugoslavia[38]. Although it is questionable to equivalate such cases of property lost because of the fall of the former regime, with cases involving property lost during the communist regime, mention should be made of them.

Another violation of Article 1 of Protocol No. 1 found by the ECtHR originated in the special legislation protecting special tenancies or allowing tenants of nationalised houses to buy the apartments they were occupying despite the fact that the former owners had obtained the restitution of their houses by final court decisions.
The failure to restore or compensate for property sold by the State to third parties (tenants) was examined by the Court in the leading case *Străin v. Romania* (judgment of 21 July 2005)[39]. The ECtHR judgment was followed by more than one hundred similar judgments that concerned the sale by the state of apartments nationalised under the communist regime to third parties (tenants) without compensation to the legitimate owners, although the domestic courts declared, after 1994, that the acts of nationalisation had been illegal and ordered the restitution of the houses to their original owners.

The impossibility of obtaining eviction orders against former State tenants occupying applicants' flats was the other issue addressed by the ECtHR in this particular area. The Court concluded that the applicants' right to the peaceful enjoyment of their possessions had been violated in that, for a protracted period, they were prevented from controlling their property and from receiving rent, despite the fact that the Romanian courts had ordered the return of their apartments nationalised during the communist period[40]. Following the tenants' refusal to sign a new lease with them, the former owners applied for eviction orders. However, due to the initial failure to comply with the formalities laid down by Emergency Government Order No. 40/1999 on the protection of tenants and the fixing of rents for residential accommodation, the existing leases were extended for five years, preventing the applicants from receiving any rent. The Court considered that to penalize landlords who failed to comply with the formal conditions laid down in the emergency order, by imposing on them such a heavy obligation as that of keeping tenants in their property for five years without any realistic prospect of being paid any rent, had placed them under an individual and excessive burden such as to upset a fair balance between the competing interests.

The similar issue of non-enforcement of final eviction orders to enable repossession of the flat was also addressed by the ECtHR in a case against Serbia[41] concerning the violation of the applicant's right to the peaceful enjoyment of his possessions due to the authorities' failure to enforce a final eviction order issued by a Belgrade municipality in administrative proceedings in the context of a special 'protected tenancy regime'. The order provided for the applicant's repossession of his flat. Domestic courts have themselves held that the municipality was not only under a legal obligation to enforce the order at issue but also had sufficient funds and available flats to provide the protected tenant with adequate alternative accommodation. Lastly, the domestic courts noted that there were no legal means by which the applicant could have compelled the municipality to honour its own eviction order.

[38] *Jeličić v. Bosnia and Herzegovina*, judgment of 31 October 2006 (application no. 41183/02); *Pejaković and Others v. Bosnia and Herzegovina*, judgment of 18 December 2007 (applications nos. 337/04, 36022/04 and 45219/04).
[39] Application no. 57001/00.
[40] *Radovici and Stănescu,* judgment of 02 November 2006
[41] *Ilić v. Serbia,* judgment of 9 October 2007 (application no. 30132/04).

3.5. Quashing of final judicial decisions and failure by the courts to respect the final character of judgments

The quashing of final judicial decisions ordering the restitution of immovable goods (such as plots of lands, houses or apartments) or awarding compensation, which constituted *inter alia* a breach of Article 1 of Protocol No. 1, was an endemic problem for Romanian and Albanian legal systems[42] before relatively recent legislative changes.

The case *Brumărescu v. Romania,* (judgment of 28 October 1999) is the leading case out of nearly a hundred other similar judgments concerning the Supreme Court's quashing of final court decisions ordering restoration of confiscated property, following a supervisory review lodged by the Prosecutor General on the ground of Article 330 of the Code of Civil Procedure which allowed him to challenge final court decisions.

The Court had also to deal with similar Albanian cases[43] of the quashing of final decisions in favour of the applicants which concerned plots of land awarded by way of compensation for the nationalisation of the applicant's property before 1989, by the Supreme Court in supervisory review proceedings[44].

With regard to somewhat similar situations, the ECtHR addressed the failure by the Bulgarian courts to respect the final character of judgments ordering the restitution of certain plots of land to the applicants[45]. In subsequent proceedings brought by the local authority, the Supreme Court reconsidered the issues already determined by final judicial decision and found that the applicants were not legally entitled to the land in question and that the final decisions in their favour did not have *res judicata* effects for the administrative authorities, as this decision was given in proceedings which were administrative by their nature, with the participation of the restitution commission. The effect of those subsequent proceedings was to deprive the applicants of their possessions, in violation of the principle of legal certainty. Those cases are similar to Romanian and Albanian cases described before, the only difference being that the Romanian and Albanian legislation, unlike the Bulgarian law, provided for a special extraordinary appeal (supervisory review). But despite the fact that different means were employed, the same effect, consisting in a deprivation of property in violation of the principle of legal certainty, was achieved.

3.6. Failure of the domestic authorities to provide compensation to which the applicants were entitled under domestic law

Another important issue within the area of the right to property, related to compensation for the confiscated property provided by the law, concerns the failure of the authorities to provide compensation – or even to determine its nature or amount – to which the applicants were entitled under domestic law for the expropriation, during the communist regime, of properties which had belonged to them or their ancestors.

In Bulgarian cases, at the time of the expropriations the applicants were awarded compensation in the form of flats[46] which the authorities undertook to build but which had still not been finished or handed over to the applicants when the ECtHR delivered its judgments. The Court noted in particular that the uncertainty the applicants faced for many years was coupled with the lack of effective domestic remedies to rectify the situation and the reluctance – even active resistance – of the competent authorities to provide a solution to the applicants' problem.

[42] See, for example, *Ryabykh v. Russia,* judgment of 24 July 2003 (application no. 52854/99).
[43] *Driza v. Albania*, judgment of 13 November 2007 (application no. 33771/02).
[44] *Vrioni and Others v. Albania*, judgment of 24 March 2009 (application no. 2141/03).
[45] *Kehaya and others v. Bulgaria,* judgment on merits of 12 January 2006 (application no. 47797/99 and others linked to it).
[46] *Kirilova and others,* judgments on merits of 09 June 2005 (joined application no. 42908/98, 44038/98, 44816/98 and 7319/02).

In Croatia and Romania, the main problem was the continuing failure of the authorities to determine the final amount of the compensation and to pay it to the applicants entitled under domestic law for the expropriation of their properties decided before 1989. The ECtHR noted that most of the delays were caused by the successive postponements which, in the Court's view, reveal a deficiency in the procedural system[47]. The case also relates to the lack of an effective remedy under domestic law which would have enabled the applicants to obtain a decision determining the amount of their compensation. It consequently found also a violation of Article 13 of the Convention.

The case *Viaşu v. Romania* (judgment of 9 December 2008)[48] is the leading case of dozens of judgments concerning the failure of the Romanian authorities to determine the amount and to pay compensation for property lost during the communist regime. These cases concern the ineffectiveness of the proceedings provided for in the legislation on compensation, namely Laws Nos. 1/2000 and 10/2001 and their subsequent modifications, including Law No. 247/2005.

[47] The case *Vajagic v. Croatia* , judgment of 20 July 2006 (application no. 30431/03).
[48] Application no. 75951/01.

Chapter 2 - The potential role of the EU

This report presents an analysis of the property restitution process following the change of political regime in former socialist or communist countries. Unlike in the case of restitution of property after a regional conflict where extensive international legislation has been developed, in the field covered by the present study relevant international norms are mostly absent. This is due to the ideologically difficulties to promote at international level rules that would refer to political arrangements in various countries and regulate what should happen in the field of property rights once the political regime of a given country shifts from socialism/communism to democracy. Moreover, should such international rules be developed, the likelihood of socialist or communist countries signing and ratifying them is extremely low. Consequently, apart from the role of the ECHR to which the countries covered by this study are parties and of the ECtHR as accepted jurisdiction to apply the Convention (addressed in the previous chapter), the implications of the Treaty on the Functioning of the European Union must also be assessed.

Article 345 from the Treaty on the Functioning of the European Union (previously article 295 of TEC) reads: *"The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership"*. This article has been interpreted by the European Court of Justice in the case 182/83, Robert Fearon and Company Ltd v. The Irish Land Commission, judgment of 6 November 1984, [1984] ECR 3677. The issue there was related to the adoption by Ireland of a system of compulsory acquisition of land and was referred to the ECJ by the supreme court of Ireland for a preliminary ruling. The ECJ held that *"Although article 22[49] 2 of the Treaty does not call in question the Member States ' right to establish a system of compulsory acquisition by public bodies , such a system remains subject to the fundamental rule of non-discrimination which underlies the chapter of the Treaty relating to the right of establishment".* It follows that Member States may design their own systems provided that they comply with the non-discrimination rule[50]. It is however not clear to what extent this ruling will also cover the issue of property restitution for new Member States that have witnessed a significant change of political regime.

An in-depth analysis - which is also relevant for the present report - of the issue of fundamental freedoms and the implications of the property restitution process for the full enjoyment of these freedoms have also been analysed in the report on *LOT2: private properties issues following the regional conflict*[51]. The issue of fundamental rights and the changes introduced by Treaty of Lisbon which makes ECHR legally binding are also relevant, especially since the European Court of Justice will apply to acts of the Member States when they apply EU law[52]. A poor track record of compliance with ECtHR decisions is by no mean a commendable situation, neither for member states nor for candidate countries to the European Union, as it reflects on the country's capacity to respect and enforce human rights on its territory. While the ECtHR is, as we have seen in the previous chapter, not part of the European Union institutions, the importance of complying with its decisions has often been emphasised during the pre-accession process.

A possible role could be envisaged here also for the Fundamental Rights Agency. The EU has also a special agency, the Fundamental Rights Agency (FRA), competent to undertake researches and formulate opinions concerning the situation of human rights in

[49] Corresponding to art. 345 TFEU
[50] An extensive analysis of the ongoing debates as to the interpretation of article 345 TEU has been provided by the report on LOT2: private properties issues following the regional conflict, pages 25 to 28
[51] Report on LOT2: private properties issues following the regional conflict, pages 28 to 31
[52] Report on LOT2: private properties issues following the regional conflict, pages 31 to 39.

the EU[53]. The reports and opinions given by FRA are not legally binding, but they can offer valuable indicators about the scale of human rights problems in the EU.

The restitution of property in the region over the last twenty years has been one of the most far-reaching and complex social processes. It has been shaped by and has itself shaped politics. Issues of the balance between restorative justice and the general public good, issues of evaluation of the past and projections for the future, and indeed issues of political identity are all entangled in this process. Therefore, any overall judgment will be consequently partial and controversial. One thing is clear, however: the process of restitution, or lack of it, has determined the outlook of the region in a variety of important ways. The research showed a common set of issues that have had an impact on property restitution policy:

Belated adoption of property restitution policies: in some of the countries analysed the political decision in this respect has not yet been taken. Countries that dealt with this issue in the early '90s in a satisfactory manner proved that it is more efficient, including from an economic perspective, to address the issue sooner rather than later, avoiding complications that are partially generated by the passage of time. Continuous hesitations that prolong past injustices are in the end detrimental, as the clarification of the status of property is key to economic development and to respect of human rights. Often privatisation and property restitution are seen as two antagonistic movements, but in reality this is only an issue of timing. Only if privatisation is done before the property issues are settled does it generate conflicts. Otherwise property restitution can be an added value to the process of economic transformation which is the final goal of privatisation.

On the other hand, one could also speak here of a reverse causality: it may not be that certain deliberate decisions about property restitution in the early '90s created confusion and weakened the rule of law – but, on the contrary, those states with weaker institutions and poorer governance were also less likely to adopt a reasonable framework for property restitution. Why some post-communist states were "stronger" than others (in an institutional sense) and more able to implement consistent policies, is a long discussion in the literature of transitology. However, it is clear today that the inconsistent process of property restitution correlates with poor governance in other areas too, all having as common denominator a defective policy-making process and an ineffective public administration.

It was only later, in the second part of the transition (after 2000) and largely under the pressures of the EU pre-accession monitoring, that the quality of governance in these countries improved to some extent. The process of property restitution could not make exception from this general trend. However, in this area in particular the mistakes made in the early '90s created consequences which are hard to reverse today.

Unclear and unpredictable policy on property restitution: in the same vein, frequent changes in the policy on restitution were identified as a vulnerability of the system. Often the shifts in policies were dramatic and highly unpredictable, generating substantive changes in a process of property restitution which was under way. It followed that similar cases received sometimes completely different solutions, depending on the moment when they were initiated, forcing the beneficiaries of the respective decisions to look to the national justice system or to the ECtHR in an attempt to remedy administrative and legal discrimination.

[53] The FRA's duties are to collect, analyse and disseminate objective, reliable and comparable information related to the situation of fundamental rights in the EU; to develop comparability and reliability of data through new methods and standards; to carry out and / or promote research and studies in the fundamental rights field; to formulate and publish conclusions and opinions on specific topics, on its own initiative or at the request of the European Parliament, the Council or the Commission and to promote dialogue with civil society in order to raise public awareness of fundamental rights.
http://fra.europa.eu/fraWebsite/about_us/activities/tasks/tasks_en.htm

Weak institutional capacity of the entities that had to implement the restitution policy, apart from the general state of the public administration in a particular country. The general low administrative performance is extremely visible in this area in all states analyzed. Responsible institutions tend to be new and with a mandate limited in time, so having an air of provisory arrangement than may demotivate their personnel. They are often understaffed and lack real leadership: since the issue is marred by controversy, no top politician in the region has become famous or popular for being seen to push it. The institutional path that must be followed by the beneficiaries of restitution laws is cumbersome, bureaucratic and unclear. Support documents, such as cadastre registries and clear confiscation documents, are often missing or prove to be inaccurate (which, to some extent, is also a reflection of the state of development and the administrative discipline in the respective country *before* the Communist period). As a result of all these, real political determination is often lacking, sending a signal to the administration that delays are not going to be punished, while speeding up the process may create risks. Shifts between the political powers generate changes in the overall policy and legislation, which in turn modify the procedures while the process is ongoing, thus increasing the administrative burden on the competent authorities.

The same forest of issues apply to the justice system, more or less, with a significant impact on property restitution. Courts are overloaded and understaffed, trials are long and costly, and the final decision is often unpredictable due to the lack of unified jurisprudence of the judges. Given the importance of evidence gathering in these cases, the duration and cost of the trials is furthermore increased by the unavailability of reliable data and documents in the administration.

Conflicting rights on the same property. With the passing of the years, the legal situation of immovable property becomes more and more complicated, as what was initially confiscated by the state is later on used as a basis for land ownership or agrarian reforms and thus transferred by the state to new private owners. The same is true for commercial properties which are being sold or concessioned after the privatisation of former state-owned companies. Houses and apartments are often sold to the tenants that occupied them for many years (the price paid often being significantly less than the market price). State property is split by tier of governance – national, regional, municipal – and so additional players appear into the picture, which make the eventual court cases substantially more complex. Through all these decisions the governments create more obstacles to property restitution, increasing also the costs entailed by such a policy once adopted: irrespective of which party will be favoured – the initial owner or the new owner – compensation mechanisms must be envisaged for the other party.

In countries with a multilayered and autonomous polities – such as Bosnia and Herzegovina – a policy on property restitution proves to be even more difficult to design given the decision-making freedom of the constitutive entities. Problems might arise from divergent policies implemented at different levels. The same difficulties arise when the nationally designed policies are to be implemented primarily by local and regional administration – which at some point becomes de facto owner of the property to be given back. Here there is a natural tendency to delay the process so that the administration does not lose its assets.

Ineffective compensation systems. In countries where compensation for nationalised property is awarded to initial owners (or the new owners when conflicting rights exist, depending on the policy choice as to who will get the assets and who will be compensated) it is mainly given in "shares" or "bonds". The case of Romania is illustrative: the *Proprietatea Fund* is still not listed on the stock exchange many years after its establishment, and as a result the shareholders are forced to trade their shares on the non-regulated market at a price equal to one third of the nominal value. In Bulgaria, the people that received securities could only use them to buy economically unattractive state-owned companies.

The countries under scrutiny differ insofar as their status vis-à-vis the European Union is concerned: Romania and Bulgaria are already members, Croatia is a candidate country, while the other three countries, Albania, Bosnia and Herzegovina and Serbia, are potential candidates. In this respect it follows that the European Union has at present different leverage and different mechanisms to influence the process of property restitution in each of them. The issue of property restitution has been always addressed in country reports of the European Commission from the perspective of human rights; concrete examples of country reports are given in each of the case-studies presented in Part two of the present report.

Generally speaking, the leverage of the EU on national policy is stronger in the years before a milestone is reached: either as a condition to be fulfilled before the country can start accession negotiations; or during this process, as a benchmark to be monitored before negotiations can be concluded. However, the peculiarities of property restitution – it is a particularly sensitive national issue in every country, very political in nature, grounded in moral and historical judgements, with a huge amount of resources at stake – and the fact that it exceeds the explicit mandate of the EU, limits somehow the Union to the role of guardian of procedures, rather than reviewer of substance on the national decisions adopted. On the other hand, a reasonable and timely solution to the problem of property in every post-communist state willing to join the EU is crucial, one way or another, as a building block of the rule of law, which is a membership prerequisite. This is the dilemma confronting the EU institutions: encourage a fair policy on restitution, but only using indirect instruments for this goal.

The European Union should continue to use its traditional monitoring mechanisms and conditionality systems to assess the extent to which countries have implemented policies to address the issue of property restitution. In this process the EU should not limit its assessment to the review of legislation, but should also request concrete action plans with clear benchmarks, budgetary allocations and responsible institutions, once the national governments adopted a law. In other words, the Union cannot impose a solution on East-European societies, but once such a solution is agreed by the legitimate authorities of the particular country, it can request that the government and the administration do not undermine the policy through implementation flaws.

This would be a good strategy aware of a well-known phenomenon: it is often easier for the national voters and the public to make the government embrace the broad principles of a policy, and even to adopt a law, but much more difficult to monitor their bureaucratic implementation. External monitoring on the administrative performance in this field, as well as the performance and fairness of other structures, such as the judiciary, which play a role in the process of property restitution, may be an important contribution to an increased level of accountability in the candidate / prospective candidate country, and thus a tool to improve the quality of governance.

On the particular case of property restitution, the solutions do not come without significant costs (which in any case would be lower if restitution in kind would be the solution adopted by the countries). In this context the EU may explore together with the countries concerned a mechanism for financing such costs in a manner which is both practical and morally acceptable. Various arrangements may be considered, from linking restitution with the privatization process, to mutual funds, selling of state assets, special purpose loans, etc. Due consideration must also be given to the implications for the national budgetary deficit likely to be impacted.

Chapter 5 - Romania

1. OVERVIEW

The restitution of property confiscated during communism is a process prolonged over nineteen years, yet unfinished. It is particularly difficult firstly because of the wide coverage of the initial nationalisation and secondly because of the weak state mechanisms responsible for the implementation of restitution or compensations. However, probably the largest contribution to the existing chaos is the lack of unitary political vision on this issue and the delayed, piece-meal approach in developing the legal framework.

In the first part of the '90s the denationalisation of the property confiscated during communism had a strong distributive scope. The denationalisation of both agricultural and non-agricultural properties created new ownership rights rather than restated the rights of the former owners. After the shift in power of the political parties, the restitution of property had a significant change in scope enforcing the rights of the former owners to regain their properties confiscated by the communist regime. Consequently, this lack of unitary vision lead to overlapping rights for the same property, multiple owners considering themselves entitled to it. Under these circumstances the restitution process has taken a very complex turn, as one owner wins and the other loses. Therefore, no matter what policy decisions are taken now, a significant number of people will be discontent.

The European Commission's (EC) reports cover this issue of property restitution from the first opinion issued on Romania's accession in 1997 until the Monitoring report of 2006. Property restitution was considered in the context of civil and political rights, justice reform and the functioning market economy hindered by the low enforcement of property rights. In the 1999 Regular Report[233] the EC notes that the 'restitution of property confiscated by the state remains a slow process. The adoption of required legislation is still hampered by lack of political consensus' (p.17). In 2000, the EC[234] observes that 'a law on restitution of agricultural land and forests was promulgated in early 2000 but the implementation of the law has proved to be complicated and is behind schedule. In the case of other types of property (mainly real estate), proposed legislation to clarify those instances where restitution/compensation is due has been blocked in the Senate. Judicial practice in this area continues to lack uniformity and procedures are cumbersome' (p.22). Further on, the 2001 Regular Report notes on one hand the disappointing implementation of the restitution laws, but also points to the intervention of the Ministry of Justice that issued a circular letter to courts asking them to pay attention to the social consequences of restitution, which breaches the principle of an independent judiciary. All reports issued by the EC from 2002 to 2006 mention the slow progress in restitution and the weak capacity of the administration to deal with it. A more recent study conducted in 2008 by a Romanian think-tank[235] finds the outcomes of restitution as very poor while the process has to deal with major institutional weaknesses and even lack of political will, especially at local levels.

Regarding the ECtHR, Romania stands out by the number of plaintiffs per capita and the concentration of judgments on property related issues. Furthermore, the ECtHR found a systemic problem in the case of property restitution in Romania (see the section on the role of the ECtHR). In February 2010, ECtHR has decided to apply the pilot-judgement procedure to deal with large groups of identical cases stemming from the same structural problem in the restitution of property in Romania. Two major issues are covered by this procedure: the right to a fair fearing within a reasonable time (access to court to claim

[233] EC, 1999, "Regular Report from the Commission on Romania's Progress towards Accession", p.17
[234] EC, 2000, "Regular Report from the Commission on Romania's Progress towards Accession", p.22
[235] SAR, "Restituirea proprietăţii: De ce a ieşit aşa prost în România?", Policy Brief 34, 2008

ownership and the delay on the part of the administrative authorities in ruling on the restitution request) and the protection of property, more precisely the ability to obtain compensations under the restitution laws.

The report on Romania will further give an overview of the confiscation process during communism which in this country was more intensive and widespread compared to neighbouring countries. It analyses the separate confiscation paths for agricultural, residential and industrial property and the special situations for minorities (especially Jewish and German). The next section covers the restitution process that took place after the fall of communism, observing the fluctuations in the vision of restitution from a distributive privatisation approach towards a policy closer to restitution as a mean of redressing former abuses. It also provides a picture of the mixed outcomes resulting from the implementation of the restitution laws. The report concludes with the main challenges of the restitution of properties confiscated during communism in Romania and policy recommendations for the improvement of the process.

2. HISTORICAL BACKGROUND OF THE EXPROPRIATION PROCESS

Officially, expropriation was for the communist regime an instrument used to achieve several objectives: to replace private property with state or collective ownership; to replace the free market with a centralized command economy; and to achieve wealth redistribution from the 'very rich' to the 'very poor'. In practice, expropriation went beyond the principles set in laws. There are two core problems with the expropriation and restitution claims, originating in the expropriation mechanisms:

the fact that expropriation took place without proper compensation (even when the law formally provided for compensation), so that now previous owners claim either due compensation or restitution;

the fact that more property was confiscated than was covered by the laws, resulting in a *de facto* expropriation while the property rights remained legally with the owner. In these situations the owners were obviously not compensated in any way.

The expropriation framework was set in the Constitution of 1948, which stipulated that all natural resources, forests, waters, and infrastructure (railways, communication, and radio) would be transferred to the state, whereas production means, banks, insurance companies in private ownership could be expropriated if this was done to serve 'the public interest'. Expropriations for different types of property were based on special laws, most of them enacted between 1948 and late '50s. There is no comprehensive assessment of the value of the confiscated property.

2.1. Nationalisation of industrial property

Law 119/1948 expropriated **industrial property**, based on 77 criteria. It mentioned that compensation would be paid except for the 'individuals who, being employed by the State, communes or counties, had made illicit gains' and those 'who have fled the country'. In practice, no compensation was paid, as most owners qualified under one of the above (e.g., by having been imprisoned on mostly alleged political or criminal charges), or else the state simply seized the property even when the legal requirements were not met. In 1948-1949 a wide range of commercial activities were expropriated by special laws or decrees (banks, insurance companies, cinemas, railways, laboratories, hospitals, restaurants, taxis, manufactures etc.).

2.2. Nationalisation of residential property

Residential property was expropriated by Decree 92/1950, which stated that houses and hotels owned by rich people would be expropriated without compensation. The Decree specified that houses belonging to public servants / clerks, small owners/middle class and pensioners were not to be expropriated, but in practice they were nevertheless

seized by the State. Also, this Decree confiscated property belonging to people that fled the country illegally. Later on, Decree 223/1974 also seized the properties of people who legally left the country and refused to return. Other nationalisation acts confiscated the properties of those convicted for political reasons and of those that failed to sell the second property (any family was entitled to own only one dwelling). These were acts of similar abuses, however affecting a much smaller number of people. Still political dissidents who, during communism, lost their properties when imprisoned (as part of the sentence) cannot claim their right unless they can prove in courts their conviction had political reasons[236].

Table 9. Residential property confiscated, nationalised and expropriated by Romanian communist authorities, 1945 – 89

Decade	Legislative framework	Number
1940s	Law 187/1945, Decree 83/1949	1,263
1950s	Decree 92/1950, Decree 111/1951, Decree 224/1951, Decree 513/1953, Decree 409/1955	139,145
1960s	Decree 218/1960, Decree 712/1966, Law 18/1968	4,662
1970s	Law 4/1973, decree 223/1974	62,116
	Unspecified	33,882
	Total	241,068

Source: Stan (2006)[237] quoting the Official Journal part II, 11 June 1994, p.9.

2.3. Nationalisation of agricultural property

In **agriculture**, the nationalisation process took place between 1945 and 1959, starting with the land reform in 1945 and continuing with the so-called 'collectivisation'. In 1945, under the agricultural reform, the land was explicitly expropriated only from owners that held large properties (over 50 ha). 1.5 million ha had been expropriated and redistributed to peasants, so that the agricultural land would be administered mainly through properties below 5 ha. Later, for the collectivisation, all landowners were targeted with no regard to the dimension of the property, with the exception of a number of small peasant households in the mountain areas who remained un-collectivised. The process of 'collectivisation' consisted in 'persuading' peasants to enter collective farms (until 1948, by imposing a production quota to be transferred to the state on those who refused the transfer of their land to the collective farm; afterwards by intimidation, forced repossession, deportations, imprisonment, particularly after 1952, for those who were still opposing collectivisation). Despite the name, the collective farms were acting as state companies; the people that contributed with their properties in the farms had no control over any aspects of the management, no possibility to pull out and no benefits whatsoever. The collectivisation was actually a nationalisation of the agricultural properties. By the end of 1989 collective farms included 86% of the farming land in Romania[238].

Apart from these collective farms, which were nominally owned by their members (though in practice this made very little difference, since the central state control was complete), proper state owned farms were also created (IAS), in general on larger and more productive estates confiscated in 1945 from the large private owners. These state

[236] Cartwright Andrew, 2000, "Against 'de-collectivisation' land reform in Romania, 1990-1992", Max Planck Institute for Social Anthropology, Working Paper no. 4, Halle/Saale.
[237] Stan, L. 2006 "The Roof over our Heads, Property Restitution in Romania", *Journal of Communist Studies and Transition Politics*, Vol.22, No.2, June 2006, pp.180–205
[238] Constantin, Florentina, *Privatisation of Agriculture in Some East-European Countries (Hungary, Poland, Romania, Bulgaria)*, PhD Thesis Academy of Economic Studies, Faculty of International Business and Economics, Dept History of Economy and Geography, 2005.

farms incorporated in subsequent decades land reclaimed or improved through public investment, for example through drainage in the Danube floodplain which produced very good quality land.

Table 10. Collective ownership of agricultural land

	1949	1950	1955	1956	1957	1958	May 1959
Land surface	14.693	288.900	1.301.200	1.837.500	3.607.600	4.501.700	5.601.760
Number of families	4.042	67.700	390.400	683.300	1.458.300	1.848.000	2.100.000

Source: Iancu (2001)[239]

2.4. Nationalisation of property belonging to minorities

The confiscation practice gave rise to two categories of restitution claims nowadays originating from: those who have been 'expropriated without title' – who claim that the expropriation had been illegal even according to the expropriation laws in force under the communist regime - and those 'expropriated with title' – who contest the initial expropriation laws.

Regarding the minorities, nationalisation of immovable property most affected the Germans and the Jewish. There were three waves of confiscation: the first one during the war (Jewish) or immediately after the war (Germans, Hungarians), the second one during the general nationalisation and the third one (up to 1989) when emigration to Israel or Germany was conditioned in practice by the donation of properties or their taking over by the communist state.

In the 40's the Jewish were expropriated successively by both authoritarian regimes: the extreme-right one before 1945, through special anti-Semitic legislation; and the Communist one afterwards, through general nationalisation laws. Starting with 1938 and throughout World War 2, 'aryanisation' of the Romanian economy meant confiscation by the state and redistribution to the 'ethnic Romanian element' of commercial and residential property of Jewish families[240]. In Transylvania after August 1940, when this province came under the control of the Hungarian authorities, the same thing happened, just with different beneficiaries of the redistribution. In some cases the Jewish families were also deported – to concentration camps in Transdniester or to Auschwitz-Birkenau, respectively – in other cases they were left in place as tenants in their former property (or managers of the business on behalf of the new owners). Finally, there were also instances when Jewish property was taken over by intrepid 'Aryans' without any involvement from authority, by sheer private abuse.

At the end of 1944, when Romania shifted sides and was occupied by the Soviet army, a law[241] was quickly passed providing for the return of possession of property to the Jewish population without any extra formalities (i.e. by default). Though well intended, this law subsequently created more problems than it solved, because it meant that no documents were produced for those whose property had been confiscated and ownership documents destroyed. What is more, not all Jewish people who were entitled to take back their properties managed to do so in reality before the general Communist nationalisation, either because of disorganisation or lack of enforcement capacity at that time. Moreover, another act[242] was adopted in 1948 that made the Jewish Democratic Committee (subsequently the Federation of Jewish Communities) the legal inheritor of those who

[239] Iancu, G. "Aspecte din procesul colectivizării agriculturii în România (1949-1960)", *Anuarul Institutului de Istorie din Cluj –Napoca*, 2001, p. 210-238.
[240] *Comisia Internationala pentru Studierea Holocaustului in Romania - Raport Final*, Polirom 2005
[241] Law 641/1944, chapter III
[242] Decree 113/1948

died in concentration camps without family inheritors. With the tacit approval of the Communist Party, which by that time strictly controlled every minor aspect of the social and economic life in Romania, the Committee / Federation allegedly sold most of this property to private owners between 1948 and the mid-'50s.

Hungarians and Germans were officially declared 'enemies' in 1945 and their assets (land, estates, forests) were taken over by State Commission for the Administration of Assets from Enemies (CASBI)[243], a state institution that was supposed to administer these assets. In 1948 the assets were transferred to state property by the communist regime[244]. This successive confiscation has created difficulties in the restitution as the restitution laws after '90s concern only the properties confiscated after 1948. In many cases the administrative bodies refused the restitution, while the judiciary ruled in favour of the claimants, though with no unitary application.

The Jewish people who survived and came back from deportation, or who remained in Romania during the war, lost most of the private property through the general nationalisation laws passed by the Communist regime in 1948-50. There is no indication that ethnic discrimination may have occurred in the process. However, a more subtle form of expropriation took place in the case of Jewish and Germans in the following decades, until 1989, when they were applying for passports to emigrate to Israel or Germany. The Communist authorities reportedly forced them to sign 'donation acts' for the benefit of the state, and there are signs that at least in some cases this was a process of blackmail (property-for-passport). In other cases financial compensation was paid, set according to technical norms, but only after the fleeing owners had renovated the house at their own expense. Since no proper real estate market was functioning at that time, it is difficult to tell if the compensation was paid at fair value or not. Reportedly, in some instances the sum was smaller than the cost of renovation[245].

As a result of this complex situation, Romanian citizens of Jewish origin – or Jewish originating from Romania but who are no longer citizens – have come before courts after 1990 with very different cases. This happened especially after 2001 (when Law 10/2001 was adopted) which made it possible to contest the take-over based on the ground that the financial compensation was unfair. Today there is a mixture of argumentation and supporting documents (or, rather, lack thereof) from those who: (i) had the right to take back their 'aryanised' property but did not manage to do so before 1948; (ii) had their property nationalised by the Communist regime through general legislation in 1948-50; (iii) donated or sold their property to the state and emigrated between 1950 and 1989.

The Romanian courts have adjudicated very differently in these cases, with diverging solutions for apparently similar cases of 'expropriation with compensation', for example. However there is no systematic data about the number of claims for property restitution or court cases involving former owners of Jewish or German origin, because ethnicity is not recorded in these situations and no independent and reliable study was made on this sensitive matter.

[243] Law 91/1945
[244] Decree 228/1948
[245] Interview with Damiana Oţoiu, researcher at the Institute for Political Studies of the Bucharest University, author of a PhD thesis (due in March 2010) on restitution of property to the Jewish community in Romania.

3. THE RESTITUTION/COMPENSATION PROCESS

The Romanian framework for the restitution of property lacks coherence and unity. The progressive development of the restitution policy has lead to different approaches in restitution for different types of properties with separate institutional set-ups for implementation. The result is a luxuriant legal framework, creating an uncertain and ineffective system with three administrative instruments in addition to the judicial tools, and very mixed outcomes.

3.1 Legal framework

3.1.1 Agricultural property and forestry

Agricultural land was the subject of the first restitution initiative after the fall of communism. It was first regulated by two Governmental Decrees (42 and 43 in 1990) by granting property rights to members of the collective farms (Cooperative Agricole de Productie – CAP[246]) within the limits of 0.5 ha per plot. One year later, the main law on the restitution of agricultural land (Law 18/1991 on land resources) was issued. It abrogated in part the decree 42/1990 and provided the first legal framework for restitution of agricultural property to former owners and their heirs providing only for restitution in kind. The law introduced limits regarding the amount of land that could be restored and the eligibility of applicants, namely non-citizens were explicitly excluded.

For the restitution of agricultural land the law 18/1991 provided for the establishment of local commissions at the level of each commune, town or municipality, under the supervision of a county level commission appointed and lead by the prefect[247]. The local commission is lead by the mayor/ deputy mayor and was formed of the general secretary of the town hall, citizens - representatives of property owners, specialists in forestry, water, agriculture, legal advisers working in the town hall or other state institutions including local farm cooperatives (in the early version). The role of the local commission was to analyse the files submitted by the claimants and propose the award of property title and also to keep records of the available and restored land. The role of the county level commission is to supervise, control and validate the solutions proposed by the local level commission and to award the property titles. If a claimant was discontent with the decision taken at County level commission, then he could challenge it to the Court.

In 1991, the claimants could receive back plots of up to 10 ha per person with additional limits on land ownership to 100 ha per family, but no less than 0.5 ha, even if they brought into the CAP a piece of land smaller than that. In addition they were forbidden to sell these plots for the next 10 years. However, this law aimed not only to ***restore*** the old ownership over land, but also to explicitly ***create*** property rights: many individuals were eligible even if they did not bring any land into the CAP in the '50s. This was the case with the victims of the 1989 Revolution (1 ha and tax exemption); people who were employees of the CAP between 1987-1990, if they had permanent residence in the village; local civil servants (up to 0.5 ha); and, wherever there was enough land left, any family who intended to move and remain permanently in the commune (up to 10 ha). As some observers noted[248], this first wave of post-Communist property restitution was quite redistributive in nature and (unconsciously) followed into the steps of the 1945

[246] Under Communism, the agricultural sector was divided into state farms IAS (28%, 411 state farms), collective farms CAP (65%, 3776 cooperatives) and a very small private sector in small plots or in mountainous regions. The restitution of agricultural land has been done differentiated depending whether the plots claimed back were part of CAP or IAS.
[247] The nomination and activity of the local commissions were regulated by Government Decision 131/1991, amended and completed by Government Decision 730/1992. It was replaced by Regulation from 21/11/2001, valid until the Government Decision 890/2005 was adopted. The latter was further changed by two other Government Decisions in 2005 and 2006.
[248] Lucian Luca, "Sectorul agroalimentar din Romania intr-o perspectiva europeana", Working Paper 39, World Bank, ECSSD, June 2005, Chap. 4.

agro reform, by maintaining the 10 ha cap on the plots allocated. Since many families had more that 10 ha when the collectivisation began, a substantial land reserve thus appeared which enabled authorities to give land to the other categories of beneficiaries of the Law 18/1991.

However, additional complications appeared when new regulations designed from 1997 on (Law 169/1997) raised the restitution cap to 50 ha, increased the limit of 30 ha of forest land per family and extended the limit of land ownership to 200 ha per family. Also this law gave detailed provisions on the procedural pathway for implementation. However, as the law was not accompanied by the usual norms of application, some public authorities halted the restitution invoking the incomplete legal base while others proceeded further.

Three years later, in 2000, a new law was adopted (Law 1/2000) changing the implementation rules but also reducing the limit of restored forest land to 10 ha. The law specified that if the claims exceeded the amount of available land at that moment, the beneficiaries would be compensated in cash. For these compensations, the evaluation of the land, financial sources and how they are going to be paid were regulated only in 2004[249]. The funds necessary for these compensations were allotted to the Prefectures in each county from the state budget and the Prefectures directed the funds further to the claimants. However, this mechanism was hardly used as the procedure for compensation was changed only one year later by the Law 247/2005 that centralized and unified the compensation measures for both agricultural and non-agricultural properties.

According to the Law 247/2005 the compensation rights granted on the basis of Law 18/1991 (republished) and Law 1/2000 were decided upon by the Central Commission for Establishing Compensation and were paid exclusively in equivalent shares to the Proprietatea Fund. In 2007, the Government decided[250] to allow compensation in cash for amounts that did not exceed the threshold of 500.000 lei (approximately €125.000). For amounts higher than the threshold, the claimant could decide whether to receive the entire amount only in shares or a combination of cash (up to the threshold) and shares. Depending on the value, compensation in cash is paid in one or two instalments over a period of two years after the issue of the title.

The deviation from the restitution principle in the first years after the fall of communism (law 18/1991) that not only restored the old ownership rights, but also created property rights for a large number of people lead to many complications later on, as the process of (re)allocation of plots proceeded. The following acts (Law 1/2000, Law 247/2005) enforced the rights of the former owners bringing forward the issue of restitution of the land, preferably on the same plots they owned before confiscation. However, in many cases those plots had been already privatized in the early ’90s. Thus the changes in the legal framework lead to overlapping rights that had to be dealt with in the courts. As it will be detailed later in the paper, the laws on the restitution of agricultural land generated an avalanche of law suits. Under these circumstances the restitution process has taken a very complex turn, as one owner wins and the other loses. Therefore, no matter what policy decisions are taken now, a significant number of people will be discontent.

Regarding the eligibility of the claimants, the initial version of the law 18/1991 allowed Romanian citizens residing abroad to submit claims only if they relocated to Romania and excluded foreign citizens from applying. The limitation on residence was removed by the Law 169/1997. Regarding citizenship the situation was far more complex as the Romanian Constitution adopted in 1991 excluded foreign citizens from the right of owning land – for inherited land they were obliged to sell it within a year. The Constitution of 2003 acknowledged the right of foreign citizens and stateless persons to own land but only under specific conditions: resulting from accession to the European Union (which provided for from five to seven years derogations for property rights over

[249] Government Decision 1546/2004
[250] Government Emergency Ordinance 81/2007

land for European citizens) and other international treaties, as provided by organic laws and by heritage. Following the Constitutional reform of 2003, the ineligibility of foreign claimants under the law 18/1991 was challenged before the Constitutional Court. The Court decided[251] that the Romanian state's decision to limit by law the eligibility of claimants based on citizenship was constitutional and the limitation is applicable also to the heirs. As many members of German and Jewish communities had fled the country during communism, giving up Romanian citizenship, the limitation based on citizenship has affected them most.

All these provisions have applied only to the land that was part of the agricultural cooperatives (CAP) in 1990, at the beginning of the restitution process. The land that was included in the assets of state farms (IAS) followed a different route, even more blurred and lacking uniform application. Regarding the land that belonged to state farms (IAS) the restitution was regulated by the Law 15/1990 that launched a larger privatisation programme of state companies. The state farms have partly changed ownership from state to private by issuing shares. Former owners claiming back their land confiscated during communism received shares in these companies. Gradually, as the IAS failed to become economically viable, they were integrated in the Agency for Public Domains (ADS) under the Ministry of Agriculture and afterwards transferred to local authorities for restitution. By 2005 the process of privatizing the former state farms (IAS) was more or less complete: out of the 739 such entities taken over by ADS, about a third were successfully privatized and the rest were dismantled, with the land leased out through public tender.

The procedures for restitution of agricultural land were subject to multiple amendments, reflecting on one hand an incoherent policy vision and on the other hand the practical difficulties encountered both by claimants and by the authorities in charge. For example, the deadline for the submission of claims was extended 6 times, from 30 days, expiring in April 1991 until fourteen years later in November 2005. The documents required were supposed to prove the right to claim and the amount of land claimed. However, as the amount of land to be legally restored has varied in time, the former owners had to submit multiple claims at different moments in time. Furthermore, both communism (in the '45s land reform) and the restoration of agricultural property from the early '90s have created overlapping rights on the same plots leading to the need for more complex regulations, to more difficult implementation, and in many instances to court cases. By the end of 2009, it is clear that any solution taken in one go and implemented consistently would have been better than the piece-meal approach that occurred in Romania, which changed the rules of the game several times during the process.

3.1.2. Non-agricultural property: a restitution policy subject to major shifts

During the 1990s, the restitution of non-agricultural property, both in public policy and in the jurisprudence of the Courts, was subject to major shifts favouring in turns the former owners and the tenants.

In the early '90s, the only restitution path was the judicial one. Those expropriated without legal titles (that is, abusively even according to the Communist legislation) could obtain their original property by suing first the state, to obtain a confirmation that their property title is still valid and the expropriation had been illegal, and secondly the tenants, to obtain *de facto* ownership. Most of such lawsuits were successful[252]. The

[251] Decision no.630 of 26 June 2007, published in OJ no.518 of 1 August 2007; Decision no.1002 of 6 November 2007, published in OJ no.801 of 23 November 2007

[252] Flavius Baias, Bogdan Dumitrache şi Marian Nicolae, *Regimul juridic al imobilelor preluate abuziv*. *Vol. I: Legea Nr. 10/2001 comentată şi adnotată* (*The Legal Situation of Nationalised Property. 1st Volume: Law 1/2001 discussed and annotated),* Rosetti, Bucharest, 2001.

politicians[253] attempted to block restitutions ruled by Courts, arguing that if a special law does not exist, judges cannot decide the matter on the basis of the Civil Code. It was the exclusive role of the Parliament to pass such laws and the role of the judges was simply to apply the law. They urged against the enforcement of the courts' decisions, adding that these breach the law to benefit the former owners.

In 1995, the Supreme Court of Justice, under political pressures, decided that in the absence of a special law, the courts cannot rule on property restitution cases[254]. On the other hand, in 1995 the Constitutional Court in a constitutional check on the forthcoming law 112/1995 argued that the properties nationalised without a title cannot be considered *de jure* the property of the State[255]. However, the fine delimitation of these situations was cancelled by the practice of supervisory review[256] quashing final judiciary sentences whatever the validity of the property title. The General Prosecutor[257] at the time, as his successors, frequently used the supervisory review practice to change mandatory and final decisions that had already ruled in favour of former owners. These issues lead to an avalanche of complaints to the European Court of Human Rights (ECtHR) ever since Romania signed the Convention in 1994 and a significant number of cases lost by the Romanian State[258]. The institutionalisation of supervisory review was also criticized by the European Commission[259] and was eliminated from the Civil Procedural Code in 2003[260].

As a response to international pressures, the avalanche of law suits and the lack of consistent jurisprudence in the Romanian courts, the first law on restitution was issued in November 1995. Law 112/1995[261] regulated the possibility of restoration to former owners of properties that were confiscated based on Decree 92/1950 (with a valid title) and only to those owners that continued to live in those properties as tenants. The tenants (other than former owners) were allowed to buy the properties they lived in, for an advantageous price equal to the accounting book value. The rest of the former owners were eligible only for financial compensation. Law 112/1995 was extremely controversial and it has been said that many of the political leaders that promoted and voted the law took benefit of it as they inhabited and bought protocol houses that had been nationalised during communism[262].

Following the first decisions of the ECtHR against Romania on the issue of property rights and access to justice, one can notice a shift of both legal framework and legal practice[263]. Adopted in 1998, Law 213 on public property and its legal regime[264] refers to the

[253] The incumbent President at that time took a public stand on the issue and opposed Court restitutions reported in the media. Following this public declarations, the Parliamentary opposition tried to initiate the impeachment of the president, failing on vote.
[254] Currently the High Court of Cassation and Justice, Decision No. 1/2 February 1995 published in the OJ 177/8 August 1995.
[255] Decision 73/1995 published in the OJ 177/8 August 1995.
[256] The supervisory review ("recurs in anulare") was an extra-ordinary appeal mechanism by which the General Prosecutor could request the Supreme Court to re-analyse a final and enforceable decision of another court if that court exceeded the competences of the judiciary or the judges participated in crimes related to that decision (art 330 of the Civil Procedural Code). Although the supervisory review was provided in the 1993 Civil Procedural Code, in 2000 an Emergency Governmental Ordinance expanded the competences of General Prosecutor on this matter as well as the terms of submission of such appeals.
[257] The General Prosecutor is the head of all prosecutors in the country.
[258] *Brumarescu vs Romania*, issued in 1999, and about 80 cases on the quashing of final judicial decision between 1998-2009
[259] EC - 2001 "Regular Report on Romania's Progress towards Accession", p.20; EC - 2002 "Regular Report on Romania's Progress towards Accession" p.24-25; EC - 2003 "Regular Report on Romania's Progress towards Accession", p.18
[260] By Governmental Emergency Ordinance 58/2003, later approved and amended by Law 195/2004.
[261] Law 112/1995, published in the OJ 279/ 29 November 1995
[262] Stan, L, 'The Roof over our Heads, Property Restitution in Romania", Journal of Communist Studies and Transition Politics, Vol.22, No.2, June 2006, pp.180–205
[263] Socaciu E.M., *Problema Dreptatii si Restituirea Proprietatii in Romania Post-comunista*, (*The Issue of Justice and Property Restitution in Post-Communist Romania)* Doctoral Thesis, University of Bucharest; Baias, Flavius, Dumitrache, Bogdan şi Nicolae, Marian, *Regimul juridic al imobilelor preluate abuziv, Vol. I: Legea Nr. 10/2001* comentată şi adnotată, Rosetti, Bucureşti, 2001
[264] Published in the OJ 448/24 November 1998

possibility of retrieving property confiscated by the state, with or without a title, without the need for a special law, but did not provide for an administrative path for restitution. Also the Supreme Court reversed its jurisprudence by deciding that the courts have competence to judge the cases on abuses on property rights and other rights that took place between1944-1989[265].

The first law regulating the administrative restitution of non-agricultural property was adopted only in 2001 – in Law 10/2001 on the judicial regime of the estates confiscated abusively from March 6, 1945 to December 22, 1989 – and amended several times since[266]. The types of properties covered by the law were defined as the land properties with or without constructions that were subject to nationalisation, attempting to cover the variety of abusive seizure of properties during communism:

- properties nationalised or confiscated on the basis of nationalisation laws published or not in Official Journals, including properties belonging to individuals and legal persons
- properties confiscated following court decisions on confiscation of property for political crimes against the regime
- properties seized during war and not restored
- estates confiscated without a valid title or without respecting the nationalisation laws
- donations to the state or to other legal persons done by special laws or donations annulled by Court decisions
- estates taken over without payment of equitable compensation

The law provided for restitution in kind as the rule. The initial exceptions mentioned by law 10/2001 regarding buildings which host public institutions or services such as schools, kindergartens, hospitals etc. were eliminated in 2005 (Law 247/2005). When restitution in kind was not possible, other remedies were available: compensation with other goods and services, or financial remedies, or a combination of the two. The value of the compensation represents the value of the confiscated estate updated to the current market value. However, the payment of financial compensation has a ceiling of approximately €125,000 that can be paid in cash, while any amount above this ceiling will be compensated with shares in a specially set-up investment fund (Proprietatea Fund). Unlike restitution of agricultural property, the eligibility of claimants was more permissive. Restitution requests can be submitted by owners or their heirs without a residence or citizenship test.

Tenants in houses subject to restitution under law 10/2001 are protected by establishing, in accordance with the law, a five-year mandatory renting contract and a ceiling to the rent value. Moreover, if there is no agreement on establishing the value of the rent for a new rental contract, or the surface of the living space, the old contract prevails.

The policy shifts created conflicting property rights of former owners vs. new owners (former tenants). The first law on restitution of urban properties (Law 112/1995) allowed the tenants to purchase the buildings they lived in and former owners were entitled to compensation. Law 10/2001 changed the policy providing for restitution in kind as the rule in restitution to the former owners. However, as many properties had already been purchased by tenants, the former owners either failed to receive back the property title or had to challenge the other title issued to the tenants before courts, with very mixed outcomes. Both administrative and judicial procedures have a non-uniform practice on this issue. In addition, as the restitution process is likely to be prolonged for a long period, it is likely to see a new line of case law as the annulment of the property titles for

[265] Decision 1/28 September 1998
[266] Republished twice in 2005 and further amended by OUG 209/2005, Law 263/2006, Law 74/2007, Law 247/2005, Law 1/2009, Law 302/2009

former tenants after 15-20 years since the purchase of the property may be interpreted as a breach of their property rights.

Recently, **a new law** (Law 1/2009) was adopted to deal with the conflicting property rights of former owners and new owners (former tenants). Thus, a property bought by the tenants based on law 112/1995 could not be returned to its initial owner and the claimant is entitled only to compensation. In addition, the law restricted the types of purchasing titles based on law 112/1995 that could be challenged before the court and the former owner could follow only the administrative path. In addition, tenants who bought the houses they were living in at low prices, and lost them when challenged by the initial owners in court, would receive compensation at the current market value of the houses instead of the reference price adjusted for inflation. The law was promulgated after the Constitutional Court decided that it complies with the Constitution. This law represents actually a new turn in policy direction restating the principles of the early 90's. How this law will impact on restitution process is difficult to judge. The guidelines resulting from ECtHR jurisprudence point to the effectiveness of the compensation mechanism and if the restitution procedures fail to ensure that, any limitation on access to justice could be interpreted as deprivation of property rights, in breach of art. 1 of the Additional Protocol no 1 of the Convention.

3.2 Administrative procedure and outcomes for restitution in kind

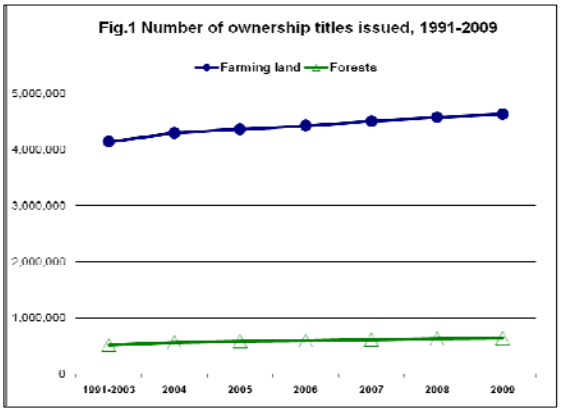
Romania is distinctive among the countries in the region because of the combination of widespread nationalisation, high expectations as *restitutio in integrum* was the target and weak institutions to implement this challenging task. In addition, the political will oscillated in time creating overlapping property rights for both owners and tenants. Also different governance layers involved in the implementation of the restitution policy had diverging interests. The local authorities that owned the nationalised land and buildings had little incentive to give them up easily[267]. Secondly central authorities imposed strict controls over local authorities in order to ensure that the compensation is paid only if restitution in kind was not possible. All these are ingredients for a difficult implementation and explain the massive delays and legal and procedural complications that are so common in the restitution process. To analyse the outcomes, the report will scrutinise each institutional step that is followed in the restitution process and will attempt to identify the main challenges.

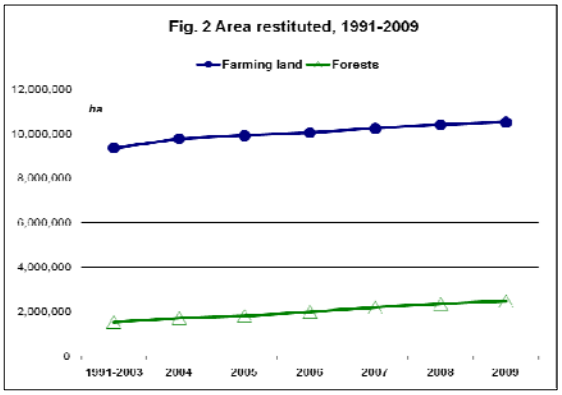
In order to claim back the confiscated properties, the former owners had to submit a request to the authority which held that particular estate on their inventory (in most cases, local authorities)[268]. The file is assessed by a commission that conducts verification on all conditions provided by the law and issues a decision for restitution in kind or compensation measures. There are separate commissions for agricultural-forestry claims and for non-agricultural claims. Subsequently the file is submitted to the county Prefect for a second legality check for non-agricultural property, or to a county-level commission for validation for agricultural land and forestry.

[267] Verdery K (2002) 'Seeing like a Mayor, or How Local Officials Obstructed Romanian Land Restitution' *Ethnography*, Vol 3(1): 5–33

[268] The properties belonging to the communities of the national minorities have been regulated separately by two Governmental Emergency Ordinances 13/1998 and 83/1999 republished in 2005. The laws referred exclusively to immovable properties and provided a different procedure for restitution. At central level a Special Restitution Commission was created to deal with the claims submitted by churches and communities of national minorities. This report does not cover the restitution of these properties.

3.2.1. Agricultural and forestry property





On the basis of the law 18/1991, a total of 3.8 million beneficiaries were given 9.3 million ha of land, and 4.3 million ownership titles were issued. The process was however slow and led to many complaints from people, who claimed their land back precisely in the old locations and blamed corruption in local restitution committees when this was not possible. A special subgroup of former owners found themselves 'captive shareholders' in the incorporated state farms. Nevertheless, by the end of the 90's around 77% of the property titles had been issued, covering about 85% of the area claimed[269].

As a result of implementing Law 1/2000, the total area given back by 2005 reached 10.2 million ha and 98.8% of the property titles had been issued, covering 96% of the claimed area[270].

While the restitution of farming land and forests seems to have come to an end, both in terms of number of titles and area involved (see charts), it is likely that the flow of court cases generated by this process will continue to haunt the authorities for a while yet.

Agricultural property (Law 18/1991; Law1/2000)		2005	2006	2007	2008	2009
Judecatorie	1st instance	10,636	26,802	40,067	37,985	30,599
Tribunale	1st instance					
	Appeal	4,398	11,805	493	235	177
	2nd appeal	1,284	6,375	12,108	11,075	8,564
Curti de apel	1st instance		3	7	13	18
	Appeal	367				
	2nd appeal	3,634	1,757	516	327	222

Source: Superior Council of Magistrates

[269] Lucian Luca, *Sectorul agroalimentar din Romania intr-o perspectiva europeana*, Working Paper 39, World Bank, ECSSD. Iunie 2005. Cap. 4.
[270] Ibidem, p. 36

3.2.2. Restitution of non-agricultural property

The situation is here much more delayed at the first level of decision. According to the data provided by NARP[271] about 45% of the claims are pending at local level, including about 22.000 claims for which the responsible institution is not yet clear. Although the law provided for restitution in kind as the first option for resolving the claims only a quarter of the properties have been given back in kind; for the remainder of the claims the former owners should receive financial compensation (cash or securities at face value). There are several reasons for this situation. The first one is the fact that many of the claimed properties had been demolished in the process of 'urban modernisation' during communism. Another reason is the sale of some of these properties to the tenants in the early 90's, creating therefore overlapping property rights on the same building, leading to a significant number of law suits for comparing the property titles. The number of cases in the courts using the special laws is provided in the table below; while the number of cases based on the Civil Code (including the comparing of property titles) is not available as the existing statistical tools are not sensitive enough.

Non-agricultural property (Law 112/1995; L10/2000; Law1/2009)		2005	2006	2007	2008	2009
Judecatorii	1st instance	1,031	934	863	915	750
Tribunale	1st instance	9,646	10,996	10,490	9,088	8,092
	appeal	264	373	194	108	108
	2nd appeal	58	234	183	73	77
Curti de apel	1st instance		2	13	35	70
	appeal	5,469	4,710	5,220	4,595	3,975
	2nd appeal	1,027	1,325	838	507	384

Source: Superior Council of Magistrates

3.3. The performance of local authorities and the judicial decisions vary significantly

There are counties where the restitution of both agricultural and non-agricultural property is close to the end with very few claims still pending. However, according to NARP[272] there are local authorities which have barely resolved 25% of the claims for non-agricultural property (Bucharest) or between 40-60% (Constanta, Vrancea). Bucharest has a special situation as it concentrates a large number of claims for non-agricultural property. About one out of four properties claimed back is located in Bucharest. For the rest of the local administration that lags behind, the reason for low performance cannot be attributed to the number of claims, which is relatively small. In these cases, the reasons can be found either in lack of capacity or lack of political will. It is also noticeable that local authorities performed better overall (56% of claims have been processed) than the central authorities that have ownership over claimed properties (only 33% of claims have been processed).

[271] A response to a request based on Law 544/2001 on free access to public information. The data refer to end of 2009.
[272] Ibidem

One of the causes for the existing delays in restitution is to be found in the weak capacity of the administration. Romanian administration ranks low in the comparative assessments of the World Bank studies[273]. The general low capacity affects the implementation of all national policies, including restitution. In addition to the existing weaknesses, the bureaucracy has to deal with historical weaknesses. In the Southern regions of Romania, the records of properties from pre-communist time have been very poor, so to prove or verify property rights can be a real challenge. Situations with mismatching descriptions of the claimed property from the property title, cadastre register or equivalents and nationalisation acts are quite common, as mentioned by representatives of local authorities[274].

The combination of lack of capacity and oscillating political will lead to massive delays. Therefore, Law 10/2001 provided for the judicial path to overcome the lack or inadequacy of response on behalf of local commissions. Consequently, the courts have competence to issue a decision regarding the restitution of claimed property as the administrative path failed to provide one, including the restitution in kind[275]. As the administrative restitution path failed, especially in some counties, the courts have to bear the burden of the implementation of restitution policy. For example, in the Tribunal of Bucharest, which is the competent court for solving the disputes on Law 10/2001 for Bucharest, about 10% of all cases are linked to property restitution[276]. Among the most frequent cases brought before the courts are the non-response of the administration, and challenges against the decision of the administration based on Law 10/2001.

The implementation of the restitution policy created non-unitary practice in several aspects both on substance and procedures. The most significant issues are: 1. whose title prevails when overlapping rights were created over time by the numerous legal provisions and 2. whether a judicial path for restitution based on the Civil Code is available to the claimants when an administrative path is available.

In an attempt to solve the issue of overlapping rights the legislation and the courts brought into discussion the good/ill faith of the buyers (tenants) at the moment of purchasing the property. Law 10/2001 provided the possibility for the former owner to challenge the title awarded to the tenant based on law 112/1995. As the law did not provide a clear definition of good/ill faith the courts have applied it very differently. The question posed to the courts was whether the tenant that wanted to buy the apartment should have checked if the state received a notification on that respective property and if so, if the lack of diligence on the side of the buyer may constitute ill faith and therefore invalidate the ownership title. The counter-argument was that the seller was the state, therefore the buyer was of good faith when presuming the state was the owner. The Constitutional Court confirmed this mechanism of evaluation, failing however to define it more precisely, despite several decisions issued on this aspect. In several rulings the ECtHR[277] argued that the sale by the state of a property abusively confiscated to third persons (irrespective of their good faith) represents a deprivation of assets from the perspective of the previous owner. Combined with the ineffectiveness of the compensation mechanism this deprivation breaches article 1of the Additional Protocol 1 of the Convention. Although ECtHR issued several decisions on the issue of good faith, the newly enacted Law 1/2009 mentions again the good faith mechanisms as the key criterion thus prolonging the uncertainty in the legal interpretation of property rights.

[273] World Bank Governance Indicators (1996-2008): http://info.worldbank.org/governance/wgi/index.asp
[274] SAR, "Restituirea proprietăţii: De ce a ieşit aşa prost în România?", Policy Brief 34, 2008
[275] This was a source on non-unitary judicial practice. Some courts ruled directly the in-kind restitution of the property when it was possible, others quashed the administrative decision and asked the administrative bodies to issue a new decision. Following an *appeal in the interest of the law* (see footnote 45) submitted by the General Prosecutor, the High Court decided that Courts can directly decide the restitution in kind if certain conditions are met. High Court Decision no 20/2007 published in OJ 764/12.11.2007
[276] Data obtained via "Portalul instantelor de judecata" (http://portal.just.ro/) on 2008 and 2009, accessed on 30 January 2010
[277] Leading case *Porteanu vs Romania*, no 4596 of 16.02.2006, see also *Gingis vs Romania*

Another contentious aspect of restitution has been the duality of the administrative and judicial routes for the restitution of properties. The courts also hear cases where restitution is sought by claimants on the basis of the Civil Code irrespective whether claimants have used or not the administrative path regulated by the Law 10/2001. Article 480 of Civil Code provides that "property is the right to enjoy and dispose of an asset in an exclusive and absolute manner, within the limits of the law" completed by article 481 that "nobody can by forced to renounce her property, only for public utility and receiving a fair and prior compensation". Based on these articles, starting with early '90s a significant number of claimants challenged the nationalisation or confiscation during communism and claimed back their properties. As mentioned before, in early '90s both politicians and the High Court argued that the courts cannot decide the restitution in the absence of a special law. Later the courts had no common position on whether a plaintiff could claim restitution by opening a lawsuit based on the Civil Code after a special law was enacted or could only follow the procedures of the special law regulating restitution via administrative means. Some courts accepted such claims, others rejected them. The divergence of opinions was widespread.

In 2007, the General Prosecutor submitted an appeal in the interest of the law[278] before the High Court of Cassation and Justice in order to unify the judicial practice regarding admissibility of actions on restitution in courts, while an administrative path is available. The High Court ruled that the special law (Law 10/2001) should be used provided that it complies with the European Convention for Human Rights. Under the recent rulings of the European Court for Human Rights, Romania was sanctioned because the administrative path failed to put into practice an effective system of remedies. Under these circumstances, it is up on the reading of ECtHR jurisprudence by each judge whether to accept or not claims based on the Civil Code. Judges stated that the High Court's decision is not helpful in practice as it fails to provide any guideline. As a consequence the courts continue to accept claims on both legal grounds, though not all courts and not even all panels within one court have the same practice (some of them accept and others reject claims based on Civil Code).

3.4. A lot of complaints to the Ombudsman

The lack of effectiveness in the restitution process is also reflected in the number of complaints filed with the Ombudsman. In 2000, the Ombudsman received 4,379 complaints, most of them referring to alleged infringements of individual rights in the process of restitution of land or residential property by administrative bodies[279]. In 2008[280], almost 1.000 people submitted petitions to the Ombudsman on property restitution issues (representing about 1/8 of the total number). Furthermore out of 42 inquiries conducted by this institution more than half were related to the failure of the administration to answer claims for property restitution.

[278] The appeal in the interest of the law is a procedure provided by the Romanian legal framework to be used when there is inconsistent jurisprudence of various courts on the same point of law. It is initiated by the General Prosecutor and judged by the High Court of Cassation and Justice. The decision of the High Court is mandatory with regard to the interpretation of the legal issue for the entire judicial system and applicable only to future cases

[279] EC – 2000 "Regular Report from the Commission on Romania's Progress towards Accession", p.22

[280] Avocatul Poporului, "Raport de activitate pentru anul 2008" (Annual Report 2008)

3.5. The administrative procedure and outcomes in case of compensation.

If restitution in kind is not possible, for both agricultural and non-agricultural properties, the file is forwarded to the National Authority for Restitution of Property (NARP) that provides the secretariat for the Central Commission for Establishing Compensations (CCEC). The CCEC, using independent evaluators, decides upon the amount to be awarded as compensation to the claimants. Although the CCEC has competence only for legality check on the rejection of restitution in kind, in reality it carries out a full verification of all conditions, even though the file has already been checked twice - at local and county/Prefecture levels. Further, the claimants decide whether to receive compensation in cash or securities at face value. The value of claims that go beyond the €125,000 limit is paid in securities to Proprietatea Fund that will be changed into shares when the Proprietatea Fund is listed on the stock market.

As regards agricultural land and forestry, about 52.030 claims for financial compensation had been forwarded to central level by October 2009. Out of these, 32.000 were returned to the local levels as the files were incomplete or some irregularities were noticed, 9.194 files were approved for compensation while the rest are still pending at central level. The overall value of compensation for agricultural land and forestry awarded by October 2009 was about 2bn lei (€550m).

Regarding non-agricultural land, out of about 52.578 valid claims based on law 10/2001 for properties that could not be given back in kind, at the end of 2008 the NARP had a backlog of 40.905 claims. The Central Commission issued compensation decisions for only 6.513 claims with an average of about 2.000 claims per year. The situation is very discouraging if the same performance is maintained. It seems that the central level needs more than 20 years to deal only with the claims already received. The compensation awarded so far amounted to about 6bn lei (equivalent to approximately 1.7bn euro) paid in cash and securities at face value to the Proprietatea Fund**.** As only 56% of the claims have been processed at local level, the backlog at central level is likely to become even more considerable and the payment of compensation to be an issue for the forthcoming decades.

The delays in the evaluation of compensation at central level, especially for non-agricultural properties, is very likely to increase the number of cases before the Court of Appeal in Bucharest, which is the competent court for disputes with the CCEC. So far about 2 out of the 40 cases handled per session of the administrative complaints courts refer to property restitution, as estimated by independent experts. The number is expected to rise in the future. The most frequent causes refer to the non-response of the central commission. However, it seems that a new line of causes is emerging regarding the obligation to pay the compensation already approved. Law 247/2005 that regulates the compensation measures failed to provide that compensation titles are directly enforceable. If the state fails to pay the compensation approved as cash payments, the claimant needs to open a law suit to oblige the state to comply with its own decisions.

In 2005, the Proprietatea Fund was created in order to provide additional financial means to support the restitution process[281]. The Proprietatea Fund is a closed investment fund, established for ten years, with the possibility of extension on the decision of the General Assembly of the Shareholders. When established it received state participations in 117 companies and the amounts resulting from the sale of 4% of the shares held by the state in the Romanian Commercial Bank and 3% of the shares in Romtelecom SA. Also the fund is the recipient of trade accounts receivable from countries such as Sudan, Syria, Congo, Nigeria, North Korea etc and the receipts from the activity of international trade and cooperation by the Romanian state before the 31st of December 1989.

[281] Regulated by the Law 247/2005 and subsequent Government Emergency Ordinance 81/2007 and Governmental Decision 1481/2005, modified by Governmental Decision 1581/2007. Also, Proprietatea Fund has to fulfill the same conditions as the other players on the capital market as regulated by Law 297/2004

Currently the Fund has a portfolio of 88 companies with a common stock of 14.240.540.675 lei (equivalent to approximately €4bn), out of which €550 m are still in process of transfer from the state institutions. Initially the state was the only shareholder. By January 2010, 40.17% of the common stock had been transmitted to private individuals as compensation for properties confiscated during the communist regime.

The Ministry of Finance is in charge of the administration of the Proprietatea Fund until an independent administrator is selected[282]. The administration of the Fund has three levels: the General Assembly of the Shareholders, in charge of the major decisions including the nomination of the Supervisory Board[283]; the Board of Directors in charge of the management; and a Supervisory Board with a role of control. The voting system in the General Assembly is favourable for the small investors, with the exception of the Ministry of Finance which has a dominating position.

Law 247/2005 provided a four-month period after the law was published in the Official Journal, for the Ministry of Finance to organise an international tender for the selection of the administrator. However it was only in September 2008 that the Government issued Decision no 959/2008 that established the competencies of the selection commission that will manage the tendering process for the selection of the administrator of the Fund. A company has been selected following the tendering process and the contract was signed in February 2010. The delay in transferring the administration of the Fund to a private specialised body fuelled the concerns of the claimants that the Fund is responding rather to the interests of the state than of the shareholders, decreasing therefore public trust in the effectiveness of the remedy of compensation-by-shares.

Other significant issues affecting the credibility of the compensation-by-shares policy via the Proprietatea Fund are the persisting difficulties in trading the securities and their real price. According to the initial provisions of law 247/2005 the Proprietatea Fund was supposed to start the procedures for listing on the Bucharest Stock Exchange[284], to a deadline eliminated two years later by Government Emergency Ordinance 81/2007. Furthermore, the constitutive act of the Proprietatea Fund[285] from 2005 stated clearly that the shares can be sold only on the regulated market. As the Fund was not listed on any regulated market, the shareholders were unable to trade. This issue was sanctioned by the ECtHR considering that the Proprietatea Fund 'does not function at present in a way that may effectively provide compensation to the applicants'[286]. In 2007, the Government amended the Constitutive Act of the Proprietatea Fund[287] eliminating this restriction, thus opening the possibility of selling the titles on the unregulated market. However the ECtHR continued to sanction Romania on these grounds considering that compensation by securities to Proprietatea Fund does not yet represent effective compensation[288] because their market value can't be established.

The effect of the delayed listing of the Proprietatea Fund on the regulated stock market is reflected in the difficulty of evaluating the real transaction value of Proprietatea Fund securities. The conversion of the compensation title into securities uses the rate of 1 RON per share, as provided by the law. In 2009 the shares were sold for 0.1 to 0.3 RON per share on the unregulated market but this is unofficial information collected from owners who sold their shares during the period when the research was conducted and from the

[282] Law 247/2005
[283] According to the GD 1481/2005 the members of the Supervisory Board were nominated by the Ministry of Finance. In 2007 the GD 1581/2007 charged the General Assembly of the Stakeholders to nominate the Supervisory Board.
[284] Law 247/2005, Art 12(4) , title VII.
[285] Government Decision 1481/2005
[286] *Radu v. Romania*, no. 13309/03, § 34, 20 July 2006, and *Ruxanda Ionescu v. Romania*, no. 2608/02, § 39, 12 October 2006
[287] Government Decision 1581/2007
[288] *Suciu Werle v. Romania* no 26521/05§ 20, 13 December 2007

media[289]. One can note the difference between the administrative value of the share at the conversion of the compensation titles and the sale value. The claimants are discontent with the current situation, arguing that the compensation they receive in shares is of far lower value than the State claims. On the other hand, after the listing of the Fund on the stock market, the conversion of compensations into shares will take into account the stock market value. If the value of the shares remains at such low levels, the stock of shares owned by the state will be consumed at a much higher pace, rising questions on the sufficiency of allocations for the property restitution process.

The prospects for listing are unclear. In January 2010 the Proprietatea Fund was not yet registered with the Romanian National Securities Commission, which is a pre-condition for listing on the stock market and the evaluation of Proprietatea actives could be a challenge as about 50% of the companies in the portfolio are not listed either. The current management of the Fund estimates that the listing will be finalized by the end of 2010[290] and the same prospects were mentioned for the press[291] by the new private administrators of the Fund.

Given the difficulties of tackling the issue of restitution in kind because of the created overlapping rights, the effectiveness of compensation for the confiscated property is a key issue. Two aspects are problematic from this perspective. The first one is the long duration in the processing of the claims. For urban property only 56% of the claims have been processed at local level while for the award of compensation the backlog is massive. For agricultural land and forestry, the report identifies significant delays especially in the processing of compensation claims. Taking into account that the restitution of agricultural land has been ongoing for 19 years and of urban property for 9 years, the results are puny and the perspectives are bleak. If the same processing rate is maintained, it is likely that the compensation process will be extended for decades from now on. In addition to this issue, the mechanisms for awarding the cash and share-compensation are dysfunctional. Only a very small number of claimants have actually received cash compensation. Also the securities at face value offered by the Proprietatea Fund are not considered effective compensation as long as the Fund is not listed on the stock market that would provide a transparent valuation tool. Taking into consideration these issues, the administrative path for restitution and for the award of compensation failed to provide effective remedies. As a consequence, the burden for the effective application of the law lies within the courts. However, again the weak capacity of the state institutions failed to provide an adequate answer as the courts proved unable to apply the law in a fair and unified way. ECtHR ruled on several occasions that the domestic legal provisions on compensation mechanisms are ineffective and observed the large scale of the problem[292]. The ECtHR recommended on several occasions that Romania must take legislative, administrative and budgetary measures in order to make the procedure for compensation genuinely consistent, accessible, speedy and foreseeable. As the response on behalf of Romania was not adequate and the ECtHR caseload on such issues is increasing, the Court recently decided[293] to apply the pilot-judgement procedure. This procedure allows the Court to deal with large number of identical cases stemming from the same structural problem. Two pilot cases have been selected under Article 6§1 of the Convention – right to a fair hearing within a reasonable time and Article 1 of Protocol no. 1 – protection of property. The first case Atanasiu and Poenaru v Romania (no 30767/05) refer to applicants inability to obtain access to a court in order to claim ownership of a nationalised property and the delay on the part of the administrative authorities in ruling

[289] *Financiarul*, 12 nov 2009. In March 2010, a derivative product (warrant type) on the Vienna Stock Market indicated the price of 0.428 lei per Fondul Proprietatea title.
[290] Interview conducted with the President of Proprietatea Fund, January 2010
[291] *Ziarul Financiar*, 08 September 2009.
[292] *Viasu v. Romania,* no 75951/01, December 2008; *Katz v. Romania,* no 29739/03, January 2009; *Faimblat v. Romania,* no 23066/02, January 2009.
[293] ECtHR press release no 158/25.02.2010 "The Court Applies the Pilot-Judgement Procedure to Romanian Cases Concerning the Restitution of Properties Nationalised under Communism".

on the restitution request. The second case Solon v Romania (no 33800/06) concerns the applicant's inability to obtain compensation for a nationalised property under restitution law.

4. CONCLUSION

The overall conclusion to be drawn on the restitution of the property in Romania concerns the lack of political decision. The piecemeal approach that occurred in Romania, which changed the rules of the game several times during the process was definitely the weakest point in the restitution process. For both agricultural-forestry and non-agricultural land, the lack of strategic vision is obvious. The policy was built gradually with frequent major changes of directions. All significant features of restitution, such as restitution in kind vs. compensation, *restitutio in integrum* vs. established thresholds, eligibility of claimants, deadlines and other procedural aspects have changed over time leading to a complicated legal framework and to an even more complex implementation, involving both administrative and judicial authorities. The failure of the administration and judiciary to comply with the rules provided by this intricate framework and the different interpretation given to the rules provoked a clear reaction from the international organisations Romania adhered to, especially the ECtHR. The nationalisation process does not fall within the competence of the ECtHR because Romania was not a signatory of the Human Rights Convention at that moment. It follows that the Court cannot compel the state to restore property. However, since the state decided to engage in restitution, after it signed the Convention, the Court takes a view on whether the process is conducted in a fair and effective manner. Romania features among the top countries in terms of the number of plaintiffs to the ECtHR among its citizens and also in terms of the number of sanctions on property issues. In addition to these, the piecemeal approach used by Romania in restitution lead to a number of important aspects such as overlapping rights, non-unitary application of the law, burdens on the already weak institutions and failure to provide effective compensation that provoked a growing discontent in public opinion as to how restitution was handled by the Romanian state.

Considering their findings on the situation in Romania, the experts would like to propose the following recommendations:
The most important issue resulting from this research is the fact that a lack of political vision and frequent changes in the legal framework were the main causes for the existing chaos in the restitution of property. Therefore, there is an obvious need for the political class to refrain from major policy shift. The key word should be consolidation of the legal framework by a clear-cut interpretation of the law on behalf of the Constitutional and High Court to provide the lower courts with the direction in the application of the law that is so much needed.

Secondly, increasing the capacity of the administrative bodies in charge of restitution should become a priority. Institutional audits for the central level, Bucharest City Hall and other laggard institutions are recommended in order to find pragmatic ways for speeding up the bureaucratic process by eliminating redundant verifications and by streamlining the procedures. The compensation mechanism should become truly effective. Payment titles should be directly enforceable, and the Proprietatea Fund should be listed on the stock market as soon as possible.

Another important aspect to be considered is the capacity of the state to pay for compensation. The economic crisis greatly affected the Romanian state, the public budget facing high deficits with lower incomes while the social costs are rising. As the payment of compensation is already a cumbersome process, it is not advisable that budgetary constraints should add to delays in the process. In addition, the present value of the securities to the Proprietatea Fund as they are traded now on the unregulated market indicate that the real price of the shares will be significantly lower than the current face value used for compensation. As compensation will be at the trading value, a higher rate of transfer of the shares owned by the state to private recipients should be

anticipated. The Fund has already transferred about 40% of the value of assets into titles to claimants. Under these circumstances, it is advisable to have a better enforcement of the restitution in kind rule or compensation with other properties of equivalent value which are not claimed back by former owners. However, the laggard local authorities such as Bucharest have not finalized an inventory of properties, although the deadline provided by the applicable law expired years ago. A better enforcement of such laws and an improvement in the performance of other institutions, such as cadastre or archives, is likely to generate better conditions for application of the in-kind or equivalent options.