

SOME ASPECTS OF PROPERTY RIGHTS

IN A EUROPEAN CONTEXT

Background

1. Respect for private property remains the foundation of our political, economic and social system. Property rights are fundamental for sustainable economic growth and a good environment. There is ample evidence from the former Communist states of Eastern Europe where neglect of property rights resulted in significant economic and environmental decline.
2. That property and the rights connected therewith cannot be enjoyed without any restraint is also evident. An owner must not use his property in a way that causes damage to a neighbour or his property. Over time, claims to restrict the use of property against the perceived public interest have been recognised. Such restrictions can be identified in two broad areas:
 - those restrictions imposed by a state or community to make its functioning possible, e.g. the imposition of rights of way or the expropriation of property for public purposes;
 - the restrictions imposed by a concern for a properly balanced environment in the broad sense, e.g. the imposition of zoning and environmental regulations.
3. In judging whether a restriction should be imposed on the use of a propertyright, it is accepted that a fair balance between the private and the public interest must be made. However, opinions differ on where this point of fair balance lies.
4. One mechanism to uphold the respect for private property, and to ensure a balance between public and private interests, is the obligation to pay and the right to receive compensation for the loss, when there is an intrusion on property rights. The criteria for compensation vary and are in most European countries subject to legal definition.

European Provision

5. The European Union's treaty system has left the matter of property ownership, and property protection, to the Member States. Indeed, article 222 of the European Economic Community treaty provides that: „*This treaty shall in no way prejudice the rules in Member States governing the system of property ownership.*“ Whilst this article does not grant a fundamental right to the European citizen it is in no way a barrier to the introduction of a genuine European property law.
6. In the context of the Council of Europe's European Convention for the Protection of Human Rights, art.1 of the First Supplemental Protocol provides that every person has a right to property protection. It is further stated that nobody may have his property taken except for public interest purposes and pursuant to law and generally

accepted international principles of law. The provision does not, it also states, limit the right of states to put forward and apply legislation which regulates property use in the general interest.

7. The provision thus sets forth three distinct matters:
 - the right of each person to the respect of his goods (including, after the *Pressos Compania Naviera S.A. case of November 1995, a debt*),
 - that any taking must be for public interest purposes - in this regard, the European Court of Human Rights operates, case by case, a *fair balance* principle between the requirements of the general interest and the respect for an individual's goods; and
 - the right of states to put in place - "as they deem it necessary", was, significantly, stated in the *Spadea et Scalabrino* case of 28 September 1995 - legislation on property use in the general interest.

Case Law

8. The European Court of Human Rights in Strasbourg may show, acting as it does on the basis of article 1 of the First Supplemental Protocol, a case record is of particular interest. In the Swedish case *Sporrong and Lönnroth* of 23 September 1982, the Court at Strasbourg decided that a long delay in action on an expropriation permit violated article 1. Similar cases such as *Jacobson* of 25 October 1989 and *Matos e Silva, Lda.* of 16 September 1989 have at least indicated that the Court at Strasbourg requires a regular review of decisions such as the issuance of expropriation permits, violating article 1 if they are not acted upon within a reasonable time.
9. In a second series of cases, the Court at Strasbourg decided on the redivision of agricultural land under various national schemes. While in two Austrian cases (*Erkner und Hofauer and Poiss* of 23 April 1987) this led to convictions, in other cases e.g. *Wiessinger* of 30 October 1991 or *Hakanson and Sturesson* of 21 February 1990, it did not. The issue here appears to be a correct appreciation of the proportionality -- the fair balance issue -- taking, often, into consideration whether the aggrieved parties knew of a certain risk they were taking when entering into a scheme, or whether parties were aware of the applicable legislation.
10. With regard to the annulment of a building permit, the Irish *Pine Valley Development Ltd*, case of 29 November 1991 is of interest in that it founded itself, with regard to its consideration in light of article 1, on the "legitimate expectations" that the buyers of the land could have had to realise their plans; in the end, however, it was for a difference of treatment - discrimination - that the Court condemned the Irish Republic.
11. In a fourth category of cases, the Court defined, first, via the *Papamichalopoulos* case of 24 June 1993, a *de facto* expropriation as the "loss of all availability". Second, in the *Zubani* case of 7 August 1996 -- a *de jure* expropriation -- Italy was condemned as its expropriation did not hold to the fair balance principle because the legislation ultimately used to effect it had been issued only some years after the beginning of the dispute, and because the length of procedures for the award of damages was considered excessive.
12. Finally, in the *Katte Klitsche de la Grange* case of 27 October 1994, the Strasbourg Court decided that, among others because of the fact that there was no absolute interdiction to build in a development, and because the aggrieved party could still seek certain permits, there remained a fair balance between public interest and private property rights.

13. From this overview, clearly there are several aspects that appear to activate the Strasbourg Court's interest: length of uncertainty over the destination of property or the outcome of procedures, as affecting property rights. Also, discrimination and use of new legislation when a dispute is already existent appear to disturb the fair balance between the general interest and property rights; while knowledge of legislation and of the risks taken by the property owner in entering into a scheme, and his ability to still use the land or seek permits for its use, appear elements that are weighted against the aggrieved owner in a balancing act of judging.
14. The provisions of the European Convention for the Protection of Human Rights, including article 1 of the First Supplemental Protocol are declared applicable on Community matters via article F paragraph 2 of the European Union Treaty. This article proclaims the respect of fundamental rights by the Union, as a declaration of intentions, but article L excludes it from the competence of the Court of Justice. That means that in case of violation of a fundamental right, it is not possible to go to the Court of Justice. And the European Court of Justice at Luxembourg has never judged these provisions more than an indicative guide. Since the EU is not a signatory to the Convention an alleged violation of that Convention can not be submitted to the control of the Strasbourg Court.
15. The Luxembourg Court of Justice has attempted to formulate, by its decisions, a bill of fundamental rights. The slowness of the process is marked but some advances can be perceived. It was only in 1969, in the *Stauder* case, that the Court spoke of fundamental rights of the European citizen. In *Nolde*, in 1974, the Court recognised that the right to property was a fundamental right, to be protected by European law. In this case, the Nolde company complained of certain restrictions by the European Coal and Steel Community which tainted its property rights and the right to freely exercise its business under the German constitution, the constitution of the other Member States and the European Convention for the Protection of Human Rights and its First Supplemental Protocol. The Court of Justice, in its decision, made for the first time reference to these instruments and indicated that it was bound to inspire itself on the constitutional provisions of the Member States, and that it therefore could not admit measures that would be incompatible with the fundamental rights granted by these constitutions.
16. In *Hauer*, in 1979, the Court of Justice built on what it had decided five years earlier in the *Nolde* case. Madame Hauer had, in 1975, requested her Land, Rheinland-Pfalz, to allow her to plant a vineyard. After some toing and froing by the *Land*, the permit was given, but a Regulation of the Council of Ministers intervened: for three years no more vineyards could be planted. In its decision, the Court of Justice cited article 1 of the First Supplemental Protocol of the Convention for the Protection of Human Rights as if it were a part of European Union Legislation. It stated that restrictions based on the general interest should not go further than needed, and should not touch the substance of property rights. The Court, in effect, made a distinction between what constitutes a taking and what constitutes regulation of usage. In the case of Madame Hauer, the Court decided that the restriction did not constitute a taking, as she still could use the land for other economic purposes.
17. After *Hauer*, one had to wait until the eponymous *Wachauf* case, decided in 1989, important because the Court of Justice introduced, *in casu* with respect to the allocation of milk quota's, the idea of financial compensation for an infringement on property rights. In *Deetzen II* (1991), as confirmed in *Kühn* (1992), the Court of Justice declared that the non-allocation of milk quota's could constitute a violation of a fundamental right to property.

Constitutional Legislative and Regulatory Change

18. All European Union law originates from some at the time politically very advanced, but in hindsight modest goals of a customs union that meant free trade within its borders, which supplemented itself into principles of free movement of goods, capital

and workers and a stable price climate for products and producers. The treaty arsenal and other instruments naturally originate from this sphere. Fundamental rights, including property rights, remain still largely absent from the instrumentarium despite the pervasive influence of European law on property use and rights, through *inter alia* the CAP and environmental and health Regulations and Directives. This means in practice, for example, that allocations of rights and duties are by and large to producers, not to property owners. As in a number of quota cases, a tenant farmer may depart, leaving the owner quota-less and the property bereft of much of its use and value.

19. So, to balance the absence of European legislation in this matter, the Court of Justice has recognised property rights as a fundamental right. It has constructed this and other fundamental rights without a firm basis in the European treaty system, relying on national constitutional provisions, on international principles of law and directly on the article 1 of the First Supplemental Protocol of the European Convention for the Protection of Human Rights (for the first time, the Court of Justice applied this article in the Hauer case and interpreted it as if it was a provision of European law). But, the dogmatic fundament of this jurisdiction is quite poor. In most cases the *ratio decidendi* remains obscure and there is only little discussion of the arguments brought forward against the violation of property rights. For property rights in a European Union context to be firmly grounded, it would need a Treaty provision.
20. The treaty of Maastricht has introduced article F to the Treaty of Rome which provides in paragraph 2 that "the Union respect fundamental rights such as guaranteed by the European Convention for the safeguard of human rights and fundamental freedoms signed in Rome on 4th November 1950 and such as a result from common constitutional traditions of the Member States as general principles of community law".
21. Taking into account, among others, the Declaration of Fundamental Rights and Freedoms of 12 April 1989 by the European Parliament and particularly in its article 9, the treaty of Amsterdam reinforced article F and modified article L. The revision of article L would allow all the acts of the Community which have constricting judicial effects to be subjected to the same control of law as fundamental rights.
22. Relatively little debate is going on, in Europe, about the limits of a legitimate - public interest - restrictions of use. Indeed, the debate that is going on at the instigation of the New Property Rights movement in the United States - a movement that does not lack in stridency of tone - is lacking in Europe. In any event, the idea of a "dam of property rights" or of a discussion on an equilibrium between property rights, and environmental and economic or health concerns has somehow not yet taken off in a dramatic way in Europe.
23. In some European countries there has been an increased recognition of the importance of property rights and improved protection has been given to these rights. In Sweden for instance the constitution now stipulates: "*The property of every citizen is protected in such a way that no-one may be compelled, by means of expropriation or any other such disposition, to surrender his property to the public administration or to any private person, or to tolerate restriction by the public administration of the use of the land or buildings, other than when necessary to satisfy urgent public interests.*

Any person, who is compelled to surrender property by means of expropriation or other such disposition, shall be guaranteed compensation for his loss. Such compensation shall also be guaranteed to person whose use of land or buildings is restricted by the public administration in such a way that ongoing land use in the affected part of the property is substantially impaired or injury results which is significant in relation to the value of that part of the property concerned. Compensation shall be determined according to principals laid down in law."

24. A positive position in favour of fundamental rights in Europe including property rights has been adopted already by the European Parliament: the Declaration of Fundamental Rights and Freedoms of 12 April 1989 (Journal Official No. C 120/51).

Article 9 of this declarations reads: “.....*The right of ownership shall be guaranteed. No one shall be deprived of their possessions except where deemed necessary in the public interest and in the cases and subject to the conditions provided for by law and subject to fair compensation.....*”

Conclusion:

25. At a European level it is clear that the current article 222 of the European Economic Community Treaty only asserts that nothing in the Treaty shall affect Member State's varying property law systems and traditions. It is inadequate. The revision of the Treaty of Rome at the next Inter-Government Conference provides an opportunity for remediation. The ELO proposes that; as a minimum level of protection for property rights in the EU the standard of Article 9 of the 1989 EP-Declaration be included in the European Treaty System (as in paragraph 24 above), and that these standards be respected in European Legislation and programmes that affect property use and values. The public interest should be significant and the compensation should reflect fully the economic loss to the owner.

26. The ELO also propose, as further minimum protection of property rights, that the European Union becomes a signatory to the European Convention of Human Rights. Although the treaty of Amsterdam reinforced the dispositions of the Treaty in order to increase the respect of the fundamental rights by the European institutions, the adherence of the European Community to the HRC remains a vital guarantor for the protection of fundamental rights. In fact, the adherence to the HRC is the only means of remedying an anomaly : the community judicial order is the only judicial system in Europe which is not subject to external jurisdictional control over the respect of fundamental rights and the Court of Justice is the only supreme court whose decision cannot be contested before the Commission and the European Court of Human Rights. Moreover, the legal implications of the article F of the Treaty remain very uncertain because nobody has yet examined the question, since all Member States have not ratified the Treaty of Amsterdam and because no case invoking article F has yet come before the Court of Justice. The HRC remains the best means of defence for fundamental rights in case of jurisdictional recourse, the general principles of community law (article F of the Treaty) can be invoked only if the fundamental rights which has been violated is not specifically targeted by the HRC. This is not the case over property rights which are specifically targeted in the 1st article of the first Additional Protocol.

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**Any comments or queries on this submission should be addressed to the
Secretary-General of the ELO at the address below**

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