

**CONFLICTS
BETWEEN OWNERSHIP RIGHTS
AND THE IMPLEMENTATION
OF THE «NATURA 2000» NETWORK**

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**I. – PROTECTION
GRANTED TO THE OWNERSHIP RIGHTS
IN NATIONAL CONSTITUTIONAL LAW**

According to Art. 14 GG (Grundgesetz – Basic Law or Constitution) private property is guaranteed. The notion of property reaches beyond civil law property in immobile and mobile «real» objects. It also includes obligatory rights to land such as lease and tenant rights, as well as the real assets and know how of an enterprise.

The following guarantees are innate in the constitutional protection of property :

1. Reservation of the law : Any governmental action encroaching upon property rights must be based on a law.

2. Determination of property content by law : The legislator has wide discretion to shape what the content and limits of property shall be. On the other hand he has nevertheless to observe certain requirements. He must be aware that private property is a core institution of society (therefore he would, for instance, not be allowed to abandon the very notion of property in immobile or mobile objects). Secondly, he must respect the proportionality principle, i.e. when imposing burdens on private property the goal must be important enough to justify the measure (1). If there are several

(1) This doctrinal construction is somewhat paradoxical: on the one hand the legislator has the power to define and shape property, on the other hand he is bound by some «pre-legal» characteristics of property.

measures suited to reach the goal only the least burdensome measure can be adopted. If the burden resulting from the least intrusive measure is still significant, the legislator may be under a duty to provide compensation. Should the intrusion more or less exclude the profitable use of an asset the proprietor shall be given the right to request that the government acquires the property. (It is on the basis of this construction that nature protection laws provide compensation for very burdensome restrictions of land use in nature protection areas).

3. Compensation for sacrificing property interests in the public interest: If administrative action imposes a significant burden on private property thereby treating the proprietor differently and sacrificing his individual interest for the better of the public interest, and if the law does not provide a duty to compensate in such case according to judge made-law compensation must be provided.

4. Bounded expropriation: The law may empower the administration to take a property, if this is required in the public interest and if compensation is provided. The definition of expropriation is a formal one: expropriation means the transfer of a right from a private person to the public authority (or some other private person acting in the public interest) (2).

Besides compensation for lawful administrative action (nos. 2. - 4.) there is also compensation for unlawful administrative action. Two different rights are provided in this respect:

1. Liability for breach of official duties: The state is liable if an official intentionally or negligently causes damage acting in breach of official duties. The compensation may include lost profit.
2. Non-fault liability for unlawful action: The state must compensate damage caused by an official in breach of a law. The compensation does not include lost profit.

(2) Therefore the restriction of the use of property is not considered as expropriation, even if the restriction leads to the complete loss of profitability. Such restrictions are considered as determination of property content which may however involve the duty to provide compensation in certain cases.

II. - BASIC POLICY INSTRUMENTS LIKELY TO BE USED IN THE SCOPE OF THE IMPLEMENTATION OF THE «NATURA 2000» NETWORK

1. Expropriation: The BNatSchG provides that the Laender may introduce legislation empowering the administration to expropriate land property if this is required in the interest of nature protection in nature protection areas. Some Laender have done so. The relevant provisions relate to nature protection areas as such. There is no specific rule concerning Natura 2000 habitats.

2. Right of preemption: Although rights of preemption are known in the area of construction and planning law a right of preemption is not foreseen in the nature protection realm.

3. Right to ask for acquisition of property: the Laender laws provide that the proprietor can ask the responsible administrative agency to acquire his land property if the nature protection regime is such that any profitable use of the property is made impossible.

4. Compensation for restrictions of property use: the Laender nature protection laws provide for compensation if the restriction of property use is significant. There is no precise line distinguishing between significant and non-significant restrictions.

The older case law has developed a doctrine of «situational bounds» («Situationsgebundenheit»). If for instance a wetland area shall be preserved the farmer cannot argue that he is now hindered to grow wheat on the land. He is bound by the natural «situation» of the land, i.e. its character as wetland.

Another criteria developed more recently is called «situational vested right» (Situationsberechtigung). For instance, if the farmer had previously drained the wetland and has used it for growing wheat the «situation» is characterised by the new use pattern. Should the nature protection regime require him to fall back to the wetland situation he would have to be compensated.

A third test developed by the courts looks at the profitability of exploitation of the land. If the use restriction makes the use of the land unprofitable even in a long term perspective compensation is due. The proprietor may also choose to ask for acquisition of the property.

Following this case law of the courts some Laender laws have codified some major reasons for compensation, i.e. if

- a previous use of the land is excluded;
- investment was made which cannot be used anymore;
- the use of the land is rendered unprofitable for a long term;
- a use of the land which corresponds to its natural situation is restricted.

The compensation is not meant to cover every loss. It is meant to make good the burden. In calculating the amount due the private interest can be balanced against the public interest (e.g. the kind of nature protected, the budgetary conditions, etc.)

Besides such *rights* to compensation the Laender laws also provide the administration with *discretionary powers* to pay compensation in cases of particular hardship. In such cases the relevant ground for public support is the individual economic situation of the private party rather than the «objective» exploitability of the land.

Note on administrative practise :

The legal provisions described above are not very often used in the administrative practise. In very few cases applications submitted by farmers or other land users are successful. This is explained by that the administrative agencies are afraid to establish precedents which will encourage others to also apply. Normally the amount of compensation is determined together with the designation of a nature protection regime. The duty established by law to compensate sometimes deter the authorities to designate nature protection sites from the outset.

It is a wide-spread practise that the authorities enter into contractual relationships with the farmers. Contracts are concluded where a nature protection regime has been established, but they are sometimes also used as an alternative to the formal designation of a protected site. In the contract nature preservation measures are fixed in exchange for some payment.

From a critical perspective it may be noted that the consensus strategy is less transparent (the contracts are not accessible for the public). In general there is not much clarity about the baseline from which it can be decided if compensation shall be due or not. Recent German legislation has abandoned the previous standard which

defined the «normal» agriculture (i.e. intensive agriculture) to be compatible with the overall goal of nature protection and established more ambitious standards of «good agricultural practise». But this has not yet entered the discourse about the baseline for compensation.