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Some Aspects on the Deprivation of Property in European Union Law

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Abstract

In the framework of European Union law, the right to property is one of the general principles of EU law and is enshrined in Article 17 of the Charter of Fundamental Rights of the European Union. However, the right to property does not enjoy absolute protection, but must be viewed in relation to its function in society. Consequently, the exercise of this right may be restricted, according to the objectives of general interest pursued by the Union, going as far as the deprivation of this right. The deprivation of property must only be done "in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss."(Article 17 of the Charter)

Key words: the right to property, European Union law, objectives of public interest, restrictions on the right of property, possessions, deprivation of property

Introduction

Although initially community law[1] did not acknowledge fundamental rights, the right to property had been regulated by the Treaty that established the European Community (herein named TEC) under articles 295 (article 345 of TFEU) and 30 of TEC (article 36 TFEU). However, in this context, the right to property was not considered an individual right, but a negative limit to the competency of the Community, as an exception to the application of the dispositions of community law[2]. Consequently, the regulation of the right to property (be it public or private) pertained to the competency of member states, thus excluding, in principle, the possibility of the Union's intervention in this area. In time, the protection of fundamental rights became a

[1]Since the Treaty of Lisbon has come into force on the 1st of December 2009, the European Union is a legal person and took over the competences previously attributed to the European Community. As a result, community law became the European Union Law in the previous version of the Lisbon Treaty. In the presentation that follows, the expression "community law" will be employed to refer to the jurisprudence of the Court of Justice previous to the entry into force of the Lisbon Treaty, www.curia.europa.eu.

[2]Article 345 of TFEU (ex-article296 TEC) stipulates that: "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership".

must, further to the pressure of national jurisdictions, mainly of German and Italian courts which would have questioned the supremacy of community law had it not respected fundamental rights guaranteed at national level.[3]

Regarding the right to property as general principle of law in the *Hauer* decision (case C-44/79), the Court of Justice of European Union (herein called "CJEU") shows that fundamental rights are part of the general principles of law whose observance they ensure.

Later on, the protection of fundamental rights initially acknowledged by jurisprudence was granted by treaties. The first reference to fundamental rights was made by the Maastricht Treaty under article F, paragraph (2)[4]. Then, along with the Nice Treaty the Charter of Fundamental Rights of European Union was adopted (herein named the "Charter"), without any legal force, though. Since the Treaty of Lisbon has come into force, the European Union acknowledges all rights, freedoms and principles listed in the Charter whose legal value is the same as that of the founding treaties.

The right to property as fundamental right is acknowledged and guaranteed in the European Union Law by article 17 of the Charter of Fundamental Rights of the European Union. The drafting of this article was inspired by the content of article 1 from Protocol 1 of the European Convention on Human Rights (herein called "ECHR"). As a result, given the similarity between the text of the Charter to the ECHR one, there should not be any difficulties with respect to the interpretation of the right to property regulated by the Charter in the light of the right to property regulated by Protocol 1 of ECHR. In this sense, article 52 paragraph 3 of the Charter stipulates that: "(3) In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

Moreover, the same principle applies to the relations between the right to property regulated by the Charter and the fundamental rights provisioned by the constitutions of member states. In this sense, paragraph (4) of the same article 52 stipulates that: "In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."

[3] M. Jaeger, «La protection du droit de propriété dans l'ordre juridique de l'Union européenne à la lumière de l'article 17 de la Charte des droits fondamentaux», p. 160-161, *De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins, Mélanges en l'honneur de Paolo Mengozzi*, coordinators Vincent Kronenberger, Maria Teresa D'Alesio, Valerio Placco, Bruylant, 2013.

[4] *L'Union respecte les droits fondamentaux, tels qu'ils sont garantis par la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, signée à Rome le 4 novembre 1950, et tels qu'ils résultent des traditions constitutionnelles communes aux États membres, en tant que principes généraux du droit communautaire*. –Treaty on European Union, signed at Maastricht on February 7, 1992, JO C 191, 29.7.1992.

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Despite all these, given the general interests of the Union and especially the aim of integration, one of the most difficult aspects of approaching the right to property in the Union's law refers to the ways in which the protection of this right is granted. In this sense, it is important to mention that, as a compromise, CJEU found solutions meant to balance individual rights, on the one hand and the aim of integration, on the other hand, which made necessary and legitimate certain limitations of these individual rights. Furthermore, the evaluation of these limitations was made by the Court in the light of the provisions of article 1 of the first additional Protocol to the European Convention on Human Rights and the jurisprudence of the Court from Strasbourg, jurisdiction with which CJEU had a dialog from the beginning, despite some initial divergent opinions.[5]

According to a formula familiar to internal rights, ECHR provides two categories of limitations of property rights: the deprivation of property (art. 1, § 1 of Protocol 1 to ECHR) and the regulation of the use of goods (art. 1, § 2 of Protocol 1 to ECHR). These two types of restrictions to the exercise of the right to property are also stipulated by Union law.

Regarding the deprivation of property, the conformity with public utility is the essential element that legitimizes the interference in the right to property. In this sense, article 17 of the Charter of Fundamental Rights of European Union stipulates that "No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss."

To our knowledge, CJEU has never qualified a measure that might be deprivation of property as expropriation. This owes to the fact that this jurisdiction cannot resort to such as qualification except for the actions of European institutions. Thus, the Court adopted an extremely cautious position with respect to the existence of a case of expropriation, mainly as far as expropriation without any damages is concerned.[6]

The actions of national authorities on expropriation are usually controlled by national jurisdictions. Therefore, in the *Annibaldi* case CJEU decided that a national law on expropriation applies to a situation which does not fall within the scope of Community law..[7]

Despite all these, in the *Fearon* Case, CJEU decided that it may control the conformity of the procedure in case of expropriation with the observance of the right to property as stipulated by community law. In this sense, CJEU ruled that, according to article 54, paragraph (3) letter (e) of the treaty, the restrictions on the acquisition and use of some land property by a national of a member state located in a different member state is among the restrictions that needs eliminating in view of achieving the freedom of settlement. Similarly, *Programme général pour la suppression des restrictions à la liberté d'établissement* of the Council from 18 December 1961 (JO 1962, p. 36) includes, among the restrictions on the freedom of settlement that need eliminating, the dispositions or practices which confer the nationals of another member state a less favourable regime in the case of expropriations. It results that, despite

[5] M. Jaeger, «La protection du droit de propriété ….», in De Rome à Lisbonne: lesjuridictions de l'Unioneuropéenne à la croisée…, op. cit.,p. 166.
[6]Case C-5/88, *Wachauf*, Judgment of 13 July 1989, point 19, www.curia.europa.eu.
[7]Case C-309/96, *Annibaldi*, Judgment of 18 December 1997, www.curia.europa.eu.

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article 222 of the treaty which does not contest the right of member states to institute a regime of public expropriation, such a regime is yet subjected to the fundamental norm of non-discrimination which lies at the basis of the chapter in the treaty that deals with the right of settlement.[8]

The analysis of several pertinent causes in the case of the deprivation of property leads to the conclusion that, traditionally, the Court of Justice analyses the fulfilment of two conditions: the condition of dispossession and of indemnity.

a) The condition of dispossession

In the *Hauer* Case, CJEU considered that the contentious legislative measure in question (the prohibition of new planting vines) could not be considered an act which attracts the deprivation of property as the owner is free to dispose of his asset and use it for any other purposes that are not prohibited.[9] After an interpretation *per a contrario*, to assess the deprivation of property, CJEU seems to consider necessary that the intervention in question leads to the situation in which the owner cannot dispose of its asset or use it for another purpose.

Moreover, with respect to the deprivation of property, CJEU is interested in the analysis of the limitations to the main prerogatives over the use of an asset, i.e. *abusus* and *usus.* As a result, CJEU does not only have in view the cases of final and complete deprivation – in the sense of the *in toto* end of the relation between an asset – object of the right to property and the holder of this right (such as an expropriation or animal slaughter). In addition, the Court has in view the situations in which the owner cannot use the asset concretely without being deprived of its possession.[10]

Thus, we are able to note the concern of the Court of Justice to analyse the limitations on the right to property not only from a theoretical viewpoint, controlling just the object of the contentious measure, but also from a concrete one, also considering the practical effects of its respective limitation in the case of the claimant. Put differently, in the category of deprivations of property, CJEU does not only include the measures of legal dispossession, but also the measures whose effects lead to the same result. Consequently, for a violation of an individual's right to property to be qualified as deprivation, the owner needs not be able to use its asset in any way.

If we connect CJEU jurisprudence, as previously quoted, and article 17, paragraph (1) of the Charter of Fundamental Rights of the European Union, the essential prerogatives (set as criteria to assess whether the content of property in cause is exhausted or emptied of content) are the following: the right to hold property, to use, dispose of and bequeath one's assets. This specification is important since it helps us understand how a contentious measure can be qualified as deprivation of property according to the nature of the asset in cause, its

[8]Case C-182/83, *R. Fearon*, Judgment of 6 November 1984, points 6,7, www.curia.europa.eu.
[9]Case C-44/79, *Hauer*, Judgment of 13 December 1979, point 19, www.curia.europa.eu.

[10]Case T-390/94, *Schröder*, Judgment of 15.04.1997, www.curia.europa.eu.

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prerogatives and the consideration of the concrete interest that the property has for its owner.[11]

For instance, there are assets such as lands for which the aforementioned prerogatives are acknowledged to the owner. In this case, the case-law of the Court of Justice considered that a contentious measure cannot be qualified as restrictive with respect to property unless it bans these prerogatives of the owner in fact or in law.[12]However, for assets such as bonds or legitimate claims, it is enough to suppress the right to benefit from the respective goods.[13]

b) The condition of indemnity

This requirement has been acknowledged by CJEU ever since 1975. Thus, in the *CNTA*[14] decision that compelled the Commission to fix the prejudice caused further to the cease of several compensatory payments, CJEU ruled that (43) The Community is therefore liable if, in the absence of an overriding matter of public interest, the Commission abolished with immediate effect and without warning the application of compensatory amounts in a specific sector without adopting transitional measures which would at least permit traders either to avoid the loss which would have been suffered in the performance of export contracts, the existence and irrevocability of which are established by the advance fixing of the refunds, or to be compensated for such loss. As a result, the Court acknowledged that any deprivation of personal assets should be accompanied by compensation. Furthermore, as mentioned above, in the *Wachauf* case, CJEU ruled that a community regulation which would actually have the effect of deprivation, without any compensation, of the grantee by the *fructus* of his or her work would be incompatible to the protection of fundamental rights in Union law. Incorporating this criterion of indemnity in the system of community protection of property, the Court of Justice sought from the beginning to ensure an efficient, not illusory protection of the right to property. This conception is formally acknowledged in Union law by article 17 paragraph (1) of the Charter which stipulates that any deprivation of property implies a right compensatory amount granted in due time for the loss incurred.

But on the other hand, even if the issue of the amount of indemnity has not been raised yet in the causes ruled at the Court of Luxembourg, following the model of the Court of Strasbourg, the payment of a reasonable amount according to the value of the asset in question is implied[15]. At present, the demand for "fair compensation" in article 17, paragraph 1 of the Charter of Fundamental Rights confirms the theory that this indemnity should be a reasonable amount corresponding to the value of the asset paid in good time for the loss incurred.

In addition, the Court of Justice defined the cases in which the institutions of the European Union were compelled to provision the existence of an indemnity. In fact, up to the

[11]See C. Pelissier*, La protection des droits économiques et sociaux fondamentaux dans la Communauté européenne*, Diffusion ANRT- Atelier national de reproduction des thèses, Cedex, Lille, 2001, p. 318-319.
[12]Case T-390/94, *Schröder*, Judgment of 15.04.1997, www.curia.europa.eu.
[13]Case C-74/74, *CNTA*, Judgment of 14 May 1975, www.curia.europa.eu.
[14]Case C-74/74, already quoted, point 43.
[15]Cedh, Judgment of*James and others*, of 21 February 1986.

present, the questions that the Court had to answer in this field inquired about the deprivation of property and whether it could be effectively attributed to an EU institution. The analysis of the jurisprudence of the Court reached the conclusion that for this issue to receive a positive answer, two requirements need to be met.

Firstly, the cause should deal with an act of secondary law. This first requirement results from the case of *Dubois et fils* where CJEU ruled that only a deprivation resulting from an act of secondary law leads to a "community" indemnisation (in the sense of an indemnity paid from the community's budget).[16] Secondly, as showed in the aforementioned decision, among other things, the act of secondary law needs to be the direct or determinant cause of the deprivation of property.[17]

Conclusions

To conclude, as in the case of the other fundamental rights, the right to property was gradually acknowledged in Union law. However, such an acknowledgement did not automatically imply absolute protection of this right. Thus, considering the general interests of the Union, the exercise of the right to property may be limited by various types of restrictions, leading to the deprivation of this right. In the latter case, the conformity to the public utility is the essential element that legitimizes the interference in the right to property. At the same time, CJEU checks the fulfilment of two conditions if the deprivation of property occurs: the condition of dispossession and of indemnity.

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[16]Case T-113/96, *Dubois et fils*, Judgment of 29.01.1998, www.curia.europa.eu.
[17] Idem.

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