

## THE QUESTIONNAIRE / A NATIONAL REPORT

**Topic: The Environmental Law and Property Guarantee  
Avosetta Annual Meeting on 30/31 May, 2014  
Venue: Faculty of Law University of Maribor,  
Mladinska 9, 2000 Maribor**

Dear Avosetta members!

It is now about five months before our annual meeting, and so we contact you, for the first time, and with the main purpose, to send you the questionnaire for our main topic "*The environmental law and property guarantee*". The topic aims to discuss how the private property in land/industry/buildings etc can serve as a protective shield against environmental regulatory restrictions of land-use, operations of industry, uses of buildings, etc.

For instance, if an authority closes down a polluting factory its owner may claim undue intervention into his property. He may conceive the restriction as an expropriation or as an indirect expropriation and argue that the action was unlawful or at least triggering compensation. Other examples include the restriction of agriculture in Natura 2000-sites, or the introduction of energy efficiency requirements (isolation etc.) concerning existing buildings. Questionnaire also touches some connected questions and issues.

It is important for you to note that by property we understand in our context not the civil law notion (which tends to be somewhat narrow) but the notion used in constitutional law (i.e. in the context of protection against intervention by state action). Please provide leading cases if available.

As always, we are not expecting you to spend an excessive time on the questionnaire, and ideally to produce something reasonably succinct (max 8 pages?) so that everyone will have time to read and compare for discussion. We appreciate that some questions may make more sense in some jurisdictions than others.

The questions are the following:

- 1) *What are, according to your country's legal system, potential objects of "property" (real things, private law rights, public law rights, a business, a market share etc)? To what extent is it possible to obtain property / ownership on natural resources? Has private property been used in defence of environmental protection?*
- 2) *How does your legal system construe expropriation (definition, preconditions, and legal effects) in particular in matters relating to the environment or of environmental friendly investments (like renewable energy infrastructure)?*
- 3) *Concerning regulatory restrictions to use property: does your legal system distinguish between allowable restrictions and allowable restrictions with compensation?<sup>1</sup> What are the criteria of distinction between the two kinds (weight of public interest, proportionality, etc)? Are these criteria sector-specific enriched, such as in nature protection from intensive agriculture, prevention of pollution from*

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<sup>1</sup> Sometimes called indirect or regulatory expropriation, or - such as in Germany - determination of property content requiring compensation.

*industrial installations, removal of water extraction rights, prevention of climate gas emissions etc?*<sup>2</sup>

- 4) *What public interests are considered legitimate to impose obligations (active & passive; to do or not to do something) regarding the use of property in cases:*
- to prevent environmental damage;*
  - to prevent traditional damage;*
  - to improve the appearance of the property (i.e. to remove own waste; or to renovate the building façade in the towns, or to isolate buildings for energy efficiency, etc.);*
  - to limit activities/property due to the special protected area, like Natura 2000*
  - of public health/safety reasons.*

*To what extent can private individual invoke these sorts of powers – eg actio popularis)?*

*In which above cases compensation is foreseen by law?*

- 5) *Is there a category of (possibly: gradual) dissolution of vested rights without requirement of compensation (example of stepping out of nuclear power)? Can for instance the economic (financial) difficulties of public finances be a reason for dissolution of compensation or vested rights (for instance, lowering or even abandoning wasted financial rights) like subsidizing green electricity)?*
- 6) *How can a property holder defend his interests (through the ordinary courts/constitutional court)? What principles will the courts use when checking the compatibility with the property guarantee?*
- 7) *Is secondary legal protection (i.e. the right to compensation) dependent on the exhaustion of primary legal protection (i.e. a motion to annul the action)?*
- 8) *Can one be responsible for the environmental damage only (solely) due to the fact of ownership of the property (i.e. for instance, the owner of the land where the waste is illegally deposited by the third (unknown) person)?*
- 9) *Does the state permit (like IPPC permit, operation permit etc) exclude the holder from the liability towards third persons (in case of damage cause by undertakings)?*
- 10) *Are there cases (courts or administrative) that take into account Art. 8 of the ECHR (Right to private life) or Art. 1 of the first protocol of the ECHR? (For instance, where state intervention to limit the property without the compensation would be objected based on above article)?*
- 11) *How does your national legal system deal with situations where indirect or direct expropriation may be caused by EU legal acts or their implementation?*
- 12) *Are there cases where national courts have referred questions to the ECJ concerning property issues in environmental law?*
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*Two cases:*

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<sup>2</sup> *Could you indicate case(s) that can be later on, at the meeting, compared.*

1) *A factory, situated near a town, has been operating for decades. People are slowly realizing that statistically the inhabitants in the city and in the vicinity do not live average age and the cancer is more frequently present among them, also the frequent cause of the deaths. They have no direct proofs that the factory could be responsible, although it is rather clear that the soil around the factory is poisoned and that the heavy metals found in the vegetable could be linked to the factory. However, credible proofs are missing.*

*What could be the obligation of the state?*

*Could the inhabitants rely on the public remedies procedure?*

*If the state wants to revoke the operation permit, could the factory claim any sort of property guarantee?*

2) *How this case would be solved in your legal system: a waste disposal site is located not far away from a place with app. 150 individual houses. Inhabitants assert that they smell bad odour and they would like to sell their property, but, of course, there are no potential buyers. Their property is worth less. The waste disposal site is equipped with the necessary permits.*

*Are the inhabitants in the surrounding entitled to compensation (perhaps to annual revenue)? Do they have to annul the operation permit first?*

Please, could you prepare the answers by May 10, 2014. There are no special directions on styling, citations etc. Please, take into account ordinary and general rules, especially for citation purposes. Try also to include leading cases where available.

We would also need somebody who will present the property/environment issue at the EU level, and ideally also someone who would be prepared to summarize the related ECtHR jurisprudence.

Also, please, try to answer straight forward in order to enable us to make comparison. We suggest a maximum length of paper of 8 pages.

For all inquiries/questions you might have, please do not hesitate to ask (rajko.knez@um.si).

Information on logistic will follow in January 2014.

With my best regards,

Rajko