

THE INTERACTION BETWEEN PROPERTY RIGHT AND NATURA 2000 IN SPANISH LAW

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SUMMARY: 1. The Spanish constitutional Law and the protection granted to property right.- 2. The steps to achieve the implementation of the Natura 2000 network. a) The statutory and administrative steps. b) The contractual steps.- 3. The compatibility of the Natura 2000 network and the property right. a) The participation. b) The compensation.-

1. The Spanish constitutional Law and the protection granted to property right.

In accordance with the Spanish Civil Law, real property is the ownership of land, structures, firmly attached and integrated equipment (such as light fixtures or a well pump), anything growing on the land or the improvements on it, and all interests in the property, which may include the right to future ownership (remainder), the right to occupy for a period of time (tenancy, leasehold or life estate), the right to drill for oil or minerals, the right to get the property back if it is no longer used for the purpose for which it was expropriated by any Public Administration (reversion), the use of airspace above the land within some limits or an easement across another's property.

With regard to land property, the common content of property right is bound to the classification of the land made by any Local Council under the urban Planning Law's provisions. Therefore, land may fall into three distinct categories namely *urban land* (built areas), *development land* (designated as building land by the Urban General Plan) and *rustic land* (where building activities are generally excluded). Land placed in natural areas is always deemed rustic land. Thus, the content (and value) of the property right of rustic land is determined by the natural and objective exploitability of it (farming, hunting, mining), that shall be ascertained using a case-by-case analysis.

The protection granted to property right in the Spanish Law is based on art. 33 of the Constitution, that recognizes "the right to private property" but also the possibility that "the social function of (the property) implies limitations of (its) content, in accordance with the law". The third paragraph of the said article states that "no one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the law".

The main guarantee of this regime is the "reservation of the law" for any public intervention on the property right. The art. 53.1 of the Constitution asserts that "Only by a Law which in any case must respect its essential content, could the exercise of the property right be regulated". Therefore any administrative regulation encroaching upon property rights must be based on and consistent with a Law. Nevertheless, the Legislator has wide discretion to shape the content and limitations of property right, with regard to certain requirements: the proportionality principle, the respect to the "vested rights" (rights earned by the proprietor lawfully), the protection of legitimate expectations and the equality before the Law. Thus, the regulation of the use of property is not considered as an expropriation, even if the restriction leads to the complete loss of profitability of the land. The restrictions of the use of property are deemed to be a determination of property content which may however involve the duty to

provide compensation. This duty arises, i.e., if the significant burdens imposed on an individual private property by any Administration sacrifice the single proprietor's interest for the better of the public interest; if the investments made lawfully by the proprietor to improve the land's conditions are rendered unprofitable as expected, or if a previous and lawful use of the land corresponding to its natural situation and/or character is excluded or significantly restricted by a regulation.

The right to private property is not a fundamental right but merely a "right and duty of the citizens", that does not grant the right to "assert a claim to protect the fundamental rights by means of a preferential and summary procedure before the ordinary courts and, when appropriate, by lodging an individual appeal for protection to the Constitutional Court", under art. 53.2 of the Constitution. Also, other constitutional rights might be indirectly restricted by an administrative action aiming at protecting natural values: i.e., freedom of trade and industry finds its basis on art. 38 of the Constitution, that recognizes "the right to free enterprise within the framework of a market economy" but also in accordance to the demands of the general economy and, if need be, of economic planning. Free enterprise does not imply the absolute freedom to choose a localisation for the enterprise, neither the exercise of unreasonable uses of the natural resources, and it does neither deserve the protection granted by the art. 53.2 of the Constitution.

As well as the arts. 33 and 53.1 of the Constitution, the constitutional clause concerning the Public Administrations' liability needs to be mentioned: art. 106.2 of the Constitution states that the "private individuals shall, under the terms laid down by law, be entitled to compensation for any harm they may suffer in any of their property and rights, except in cases of *force majeure*, whenever such harm is the result of the operation of public services". This clause completes the panorama of the constitutional protection of property rights, broadening the range of the protection to the extent that any action issuing from a public body, whether statutory, regulatory or administrative, tortious or not, grants the right to a fair compensation.

Said constitutional provisions comply with the EU Treaties' principle of "protection of legitimate expectations", and they are developed at the legal level by arts. 139 and 141 of the Administrative Common Procedures Act 30/1992, of 26 November (Administrative Procedures Act hereinafter), and the Expropriation Act of 16th December 1954 on the whole. This protection regime also applies to the damages caused directly by laws: art. 139.3 of the Administrative Procedures Act specifies that the Administration shall make good any damage caused by the enforcement of non-expropriatory Laws provided that those Laws admit the right to a compensation, with the limitations thereby established; and provided that the interested party is not subject to suffer those damages by Law.

Therefore, the constitutional protection of property rights (with its suite, the Public Administrations' liability) is the firmest way to prevent any administrative interference caused by the implementation of the NATURA 2000 network, on the grounds of Administrative tort Law. The right to request a compensation for any burden imposed by the Administration is not granted on the grounds of the content of the restricted right itself, but on the grounds of the economic amount of the restriction of an asset's profitability whatsoever (the regulation of the use of land, a single administrative act excluding the normal profitable use of property, etc.).

2. The steps to achieve the implementation of the NATURA 2000 network.

The regime of protection of the NATURA 2000 sites issues mainly from art. 6 of the “Habitats Directive”, that establishes the need to take *appropriate steps* to avoid the deterioration of natural habitats and the habitats of species as well as significant disturbance of the species for which the SACs must be designated. The notion of *appropriate steps* includes, among others, the “statutory, administrative or contractual measures” which correspond to the ecological requirements of the natural habitat types and the species present on the sites. The protection regime issuing from art. 6 of the “Habitats Directive” is transposed literally and directly by the provisions of the Royal Decree 1997/1995, of 7th December, that fails to detail the content and the extent of these “statutory, administrative or contractual measures”. Also, the Autonomous Governments are free to choose, on their discretion, the optimal step for implementing the NATURA 2000 network, along with the designation of the NATURA 2000 sites (designation that falls under their competences). Therefore, either the option for one of the steps and the content of the step chosen are rather undetermined.

Nevertheless, the regime of protection of the sites does not only issue from the “Habitats Directive” and the Royal Decree 1997/1995, because approximately 25% of the Spanish SPAs and SACs have been designated as natural protected areas in accordance to the Wildlife Conservation and Natural Protected Areas Act 4/1989, of 27th March (Natural Protected Areas Act hereinafter) or the Autonomous Communities’ environmental Laws. This cross designation arises legislative overlapping and requires a distinctive analysis of the substantial regime of the NATURA 2000 sites that fall under the application of the Natural Protected Areas Act.

a) The statutory and administrative steps.

The delimitation of a natural protected area in accordance to the Natural Protected Areas Act entails the declaration of “public need” for the purposes of the Expropriation Act of 16th December 1954. Thus, the owner of land placed inside a natural protected area can be expropriated by the State Administration (if a National Park is concerned) or by the Autonomous Government (if other protection modalities are concerned) in the interest of nature conservation, on the grounds of art. 10.3 of the Natural Protected Areas Act and the Expropriation Act 1954 on the whole). The appraisal of the land is made in accordance to the fair market value of similar land in the area (art. 26 of the Land Appraisal Act 6/1998, of 13th April). The Autonomous Governments may purchase land subject to the Civil Law, as private persons; and also within the expropriation procedure, where a previous settlement is foreseen although not widely used (because the vendor usually obtains a higher price for his land and also a special bonus -5 % of the compulsory purchase price, for ‘moral compensation’- if the expropriation proceeds).

Alternatively, the delimitation of a natural protected area entails the establishment of administrative redemption and pre-emption rights on *inter vivos* conveyances of land placed inside the protected areas under art. 10 of the Natural Protected Areas Act. The owner of land placed inside a natural protected area must communicate the intended *inter vivos* conveyances of its land and the price of the purchase, to enable the State Administration (if a National Park is concerned) or the Autonomous Community (if other features are concerned) to exercise the pre-emption rights and redemption for the purposes of the Natural Protected Areas Act.

The rules hereinabove are not foreseen for the NATURA 2000 sites. SPAs and SACs may be implemented through mandatory steps aimed to control the use of property of land

falling into them. Though, mandatory steps are considered as limitations of the right to property rather than expropriations. Therefore, any limitation issuing from the delimitation of natural protected areas grants a compensation on the grounds of the provisions that regulate the non-contractual liability of the Public Administration. These general or basic provisions apply to any Public Administration (State, Autonomous, Local) and to any administrative action, in accordance to the principle of the protection of legitimate expectations: arts. 139 and 141 of the Administrative Procedures Act state that the Administration shall make good any damage, tortious or not, caused in the performance of its duties; thus every individual shall claim a fair compensation provided that he is not subject to suffer those damages by Law¹. The damages alleged must be effective and shall be granted after a due appraisal, based on the criteria established in the Expropriation Act and others (the above mentioned Land Appraisal Act and the tax Law on the whole). The compensation shall refer to the moment in which the damages occur, and shall comprise the interest rates fixed by the yearly Budgeting Act. The compensation does include lost profit. Therefore, any loss of profitability of the land suffered by an owner (or a simple tenant), due to the designation of his land as SPAs or SACs, shall, under said conditions, be refunded upon his request and after the due administrative claims procedure.

b) The contractual steps.

The Spanish Administrative Law does foresee the contractual relationships between the authorities and the citizenship exceptionally: in general, the settlement of administrative procedures with the affected parties is foreseen within some strict conditions²; in particular, the agreements on urban planning and management are successful instruments of the last decade's Urban Planning Law.

With regard to the implementation of the NATURA 2000 network, the "contractual measures" are foreseen by the RD 1997/1995, consistent with the Habitats Directive. Nevertheless, the steps laid down by contract between authorities and land owners or land users for the management of the NATURA 2000 areas are hardly conceivable, even if admitted by Law. The specific regime of the NATURA 2000 sites lacks for a provision similar to art. 22 *quater* of the Natural Protected Areas Act, according to which both the State Administration and the Autonomous Governments concerned can discretionarily grant technical, economic

¹ In its decisions of 9th February and 25th September 1999, the Supreme Court recalls the regime of the administrative liability to protect the proprietors from the limitations on the right to build imposed in the nature protection's interest. The Government of the Balear Islands designated the Natural Protected Area of *Sa Canova de Artá (Mallorca)* and adopted a Special Protection Plan by virtue of the Balear Law 9/1988, of 21st September. The designation entailed a re-classification of several areas as rustic land, thus the development of a projected urbanization in the area was rendered partially unfeasible. The individuals claimed damages before the Autonomous Government of the Balear Islands, due to the re-classification of their land. The amount claimed raised up to the expenses made for the preparation of the planning instruments needed for the development of the area before the development was prohibited. In both cases, the Court granted the damages claimed, on the grounds of the principle of the protection of legitimate expectations.

² Art. 88 of the Administrative Procedures Act establishes the legal requirements for the settlements to end an administrative procedure, and renders these instruments unlikely to be used. They may be signed provided that: a) they aim to satisfy a public interest and are consistent with the Law, b) the matters concerned are tradeable, c) a single provision regulates their extent, effects and their specific regime, d) the parties involved, the functions and the term of validity are identified, e) they are published depending on their nature and the parties involved, f) they do not alterate the competences neither the responsibilities of the administrative authorities and public employees.

and financial aid for the owners of land placed in the socio-economic influenced areas around National Parks, to promote the sustainable development of the neighbour populations. This aid aims to guarantee the feasibility of the traditional and environmental activities, especially those related to the protection of the architectural heritage, the creation of employment and the improvement of the quality of life in the area.

3. The compatibility of the NATURA 2000 network and the property right.

The Spanish Law does not foresee a subsidiarity principle to regulate the option among the steps to be taken for implementing NATURA 2000, although common sense –and a short budget- leads to choose any step before taking the property. Nevertheless, the “proportionality principle” applies to any administrative action, with regard to the “sustainable development principle”: when imposing burdens on private property the goal must be important enough to justify the measure, and only the least burdensome measure among the several others can be adopted.

The expropriation of the land concerned, the establishment of administrative redemption and pre-emption rights on said land and the contractual sales pursue the transfer of private-owned land to the public authorities (Autonomous Communities). The public land in Spain, although overprotected by the Law, is in practice usually abandoned because of the high costs and the bureaucratic rigidity that its management entails. Instead, the regulation of the private property by means of mandatory steps to control the uses of land is a lower-cost solution, it is better accepted by the society and preserves the integrity of the land subjecting it to severe public controls. Any management contractual solutions between authorities and land owners or land users and the technical, economic and financial aid for them should be regarded as the best way to promote the sustainable development of the local populations. This latter means of protection guarantee the feasibility of the traditional and environmental activities, and make the protection of the natural heritage compatible with the creation of employment and the improvement of the quality of life in the area, thus rendering the protection of the environment a socially attractive activity.

None of the steps aiming at implementing the NATURA 2000 network is fully compatible with the property right, inasmuch they all entail wide-range limitations to the objective uses of the land, especially farming and building. Also, some of them cause a higher degree of interference in the property right, because they affect the right itself, further than the mere exercise of it.

The expropriation and the contractual sales of the land concerned simply entail the elimination of the private property rights on the land. The establishment of administrative redemption and pre-emption rights on the land entail interferes with the right to property, because the economic value of the land decreases when those public rights are imposed on it; but it is also an interference with the exercise of the right itself; inasmuch the right to sale the property is limited: the intention to convey land subject to an administrative pre-emption right must be communicated to enable the Public Administration to purchase the land for the price declared; and the conveyance of land subject to an administrative redemption right must be communicated to enable the Public Administration to purchase back the land for the price declared. The regulation of the private property by means of mandatory steps to control the uses of land only interferes with the exercise of the right to property, inasmuch the content of the right remains formally unaltered, although there is a substantial restriction of the uses and profits that compose the property right. The management contractual solutions between authorities and land owners or users is a bilaterally agreed interference with the exercise of the property rights.

In any case, the administrative interferences in the property right must be the suite of two main legal guarantees: the participation of land owners or users and the due compensation of the damages caused. Both issues are examined hereinafter.

a) The participation.

Any of the steps adopted for implementing NATURA 2000 must regard some formalities, aimed at granting participation of the land owners and/or land users during the administrative procedure of designation of the site.

In case of expropriation, the Administration must hear the proprietor to fix the “fair price” of the land, and other interested parties (i.e. lessees) to fix the compensation for breach of the contracts, if need be. Failure to reach a settlement within the procedure, a specific administrative body (the Expropriation Jury) shall fix the price. If the interested parties disagree with the price fixed by the Expropriation Jury, a judicial claim may be lodged.

In case of restrictive regulation (i.e., if the Administration enacts a general regulation of the uses of land in certain areas), the proprietor may intervene in the administrative procedure for drafting the regulation. The Administration holds discretionary powers to considerate the observations made by the interested party, but must always answer reasonably. The administrative answer may be helpful in a judicial claim against the regulation.

In case of single restriction (i.e., if the Administration designates a site restricting the uses of land in the site and affecting a small number of proprietors), the proprietor may intervene in the administrative procedure for designating the site. The Administration holds discretionary powers to considerate the observations made by the interested party, but must always answer reasonably. The administrative answer may be helpful in a judicial claim against the designation of the site.

b) The compensation.

Any interested party suffering a limitation in the use of his property, without prejudice of his legal status (owner, lessee, tenant, mortgagee...), can claim a fair compensation (proportioned to his right's asset) if the effective damage suffered in his estate can be economically appraised. Inasmuch the Autonomous Governments are competent to designate and manage the NATURA 2000 sites, they are responsible for the compensation of the damages alleged.

In case of expropriation, the Administration must pay the “fair price” of the land, with regard to the fair market value of similar estates. The comparison must regard the localisation of the similar estates, their size and nature and the uses and profits of these estates. If the comparison is impossible the price of the land shall be appraised by the capitalization of its real or potential yields in the moment of the appraisal. The price includes a bonus -5 % - for ‘moral compensation’. If the vendor disagrees with the price determined by the Administration, he may lodge a judicial claim. The Courts usually rise the price granting compensation for loss profit or for mere expectations on urban development of the land.

In case of regulation and/or restriction, the proprietor may lodge an administrative claim for damages in order to obtain a compensation for the depreciation of the land from the liable Administration. The Administration holds discretionary powers to appraise the compensation and the loss of profitability must be proved by the interested party. The

compensation shall refer to the moment in which the damages occur (the regulation is enacted), must regard the price of the similar estates and shall comprise the interest rates fixed by the yearly Budgeting Act until it is fully paid. The compensation does include lost profit.

The compensation for the loss of profitability of the land due to the designation of NATURA 2000 sites must be fair and claimed by the interested party. The damages alleged must be effective and proved by the interested party; shall be granted after a due appraisal on the grounds of the criteria established in the Expropriation Act and others (the above mentioned Land Appraisal Act and the tax Law on the whole). It shall refer to the moment in which the delimitation occur, and shall comprise the interest rates fixed by the yearly Budgeting Act, including lost profit. Moral damages are foreseen in certain cases, on judicial discretion. The only way to obtain a compensation for damages is the due payment of a sum, made effective by means of a simple bank credit. The compensation is taxable, though not fully: art. 35.1 g) of the Personal Income Tax Law 40/1998, of 9th December, sets the taxable profit in the difference between the compensation perceived for the loss of profitability and the share of the acquisition price corresponding to the loss.

In parallel with the possibility of obtaining compensation under the conditions and by the means hereinabove, most of the *Common Agricultural Policy* agri-environmental aid is being concentrated in the land placed in the NATURA 2000 sites, in accordance with the Council Regulation (EC) No 1257/1999 of 17th May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (as amended by the Commission Regulation No 963/2003 of 4th June 2003 and developed by the Commission Regulation 445/2002, of 26th February 2002)³. Though, funding granted by the Agricultural Guarantee Fund is not the only European source of aid aimed to meet the obligations pursuant to art. 6.1 of the “Habitats Directive”, in so far art. 8 of the “Habitats Directive” (transposed into art. 9 of the RD 1997/1995) foresees the co-financing of the NATURA 2000 network implementation by the Commission. The Spanish regulation, as well as effecting a literal and direct transposition of art. 8 of the “Habitats Directive”, enables the Ministry of Environment to budget specific items to co-finance the NATURA 2000 network implementation (a redundant provision, in the light of the broad State’s budgeting powers).

³ The Autonomous Communities’ Governments are the competent authorities to distribute this aid, according to the State regulations that establish the financial regime for the Rural Development and the environmental farming methods: Royal Decrees 4/2001, of 12th January, and 708/2002, of 19th July.