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### **Expropriation**

*A comparison of the legal basis, legislation, valuation methodology and compensation payable in selected European countries*

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### **Abstract**

The paper examines the comparative legislation and valuation methodology for the expropriation of land within a number of European countries. The legal basis for the expropriation of land for the common good, in the selected countries, is established, contrasted and analysed. A similar analysis is made of the valuation techniques and methodology used by valuers in their respective countries in this area of statutory valuation.

The paper uses data collected from legal sources in the respective countries together with comparative law texts. The prime research has been through the development of a network of interested surveyors from the subject countries. The data has been collected from a scenario based questionnaire, there has however been some variation in the development of the responses received as some participants became more interested in the comparable valuation techniques.

### **Introduction**

Expropriation exists as a legal concept in public law as the right to take private property for public use. Specifically it is the statutory right of the legislature to delegate power to government departments and public utility companies, to appropriate, by due process of law, the ownership and possession of private property, and to recompense the owner of the property by the payment of just compensation.

## **1. Aims, Objectives and Methodology**

The aim of this paper is to examine and compare the legislation and valuation methodology for the expropriation of land within a number of European countries.

The objectives of the paper are to:

- Identify the legal basis for the expropriation of land for the common good in the selected countries.
- Establish, contrast and analyse specific elements within the legislation
- Establish the valuation techniques and methodology used by valuers in their respective countries in this area of statutory valuation.
- Compare the differences and similarities

The research methodology is based on a legal literature search and review, description of country specific appropriate valuation methodology and questioning of professional valuers from the countries on a number of given scenarios

The countries to be considered are; France, Germany, Portugal and the United Kingdom.

## **2. The Legal Basis of Expropriation**

The legal basis for public law is derived and analysed by consideration of

- Constitutional law.
- Statute law

### **2.1 Constitutional Law**

France, Germany and Portugal all have written constitutions whereas the United Kingdom does not have a promulgated written constitution. The constitutions of Germany and Portugal define property rights, the concept of expropriation and the right to compensation.

#### **2.1.1 Germany :**

Article 14 Property, right of inheritance, taking of property

- (1) Property and the right of inheritance are guaranteed. Their content and limits are determined by statute
- (2) Property imposes duties. Its use should also serve the public will
- (3) The taking of property is only permissible in the public weal. It may be imposed only by or pursuant to a statute regulating the nature and extent of compensation. Such compensation has to be determined by establishing an equitable balance between the public interest and the interests of those affected. Regarding disputes about the amount of compensation, recourse to the courts of ordinary jurisdiction is available. (International Constitutional Law 1992)<sup>1</sup>

### **2.1.2 Portugal**

#### Article 62 Right to Private Property

- (1) Everyone is guaranteed, under this Constitution, the right to private property and to transfer it during his or her lifetime and on death.
- (2) Requisitioning or compulsory acquisition of property for public purposes shall be carried out only under the authority of law and on payment of fair compensation (Constitution of the Portuguese Republic 1997)

### **2.1.3 France**

The right to hold property and to receive compensation for its expropriation is not addressed in the constitution of France.

(Adopted 1958 - Fifth Republic plus amendments 1999)

### **2.1.4 United Kingdom**

The Constitution of the United Kingdom is described as unwritten, but this does not mean that constitutional rules are not written down. It means that they are not all written down in an authoritative form within a single document. The United Kingdom does, however, have a non promulgated Constitution prepared by the Foreign Office for the purposes of scholarly activity and in which the right to compensation for expropriation is identified.

#### Section 9 Property

Everyone has the right to own property alone as well as in association with others, no one shall be arbitrarily deprived of his property

Compensation is paid for any losses suffered through expropriation (compulsory purchase) or the deterioration of property as a result of activities by public authorities. (International Constitutional Law 1992)<sup>2</sup>

In the United Kingdom constitutional rules are based on Common Law (case law), developed by the courts, together with fundamental principles that are so important that only clear words of primary legislation can override them.

The commonality of approach from a constitutional basis is

- All of the countries studied, except the United Kingdom, have a written constitution.
- All the countries with an adopted constitution, except France, identify the right of the individual to hold property and to receive compensation if the property is 'taken for the common good'

## **2.2 Statute Law**

The identified constitutional right to compensation for expropriation is supported by specific legislation in Germany, and Portugal, in France too there is a named code for expropriation whilst the United Kingdom has a number of inter dependent pieces of legislation.

The home government ministries for the legislation is varied

- Germany - Transport, Construction and Housing
- Portugal - Planning and Management of the Territory
- France - Council of State
- United Kingdom -Environment Transport and the Regions

### **2.2.1 Germany**

The German legislation is contained in The Federal Building Code (Baugestzbuch.1997) (BauGB 97). The extensive nature of the Code identifies the scope of the planning and development process from planning principles to completion of a development. The document is specific in each section and addresses both the national and federal systems of the country.

Chapter One, Part five of the Code defines the Legal Requirements, Compensation and the Procedure for expropriation. Whilst Chapter Three Other Provisions, Part One establishes Valuation duty and expertise including specific reference to Valuation for expropriation.

### **2.2.2 Portugal**

The Portuguese constitution is supported by The Code of Expropriation 1991.(Decree of Law 438/91) The code states that expropriation must be completed by private negotiation. The code also makes specific reference to the calculation of compensation based upon the planning constraints or policies of the subject land for expropriation. Some of the mathematics of the valuation are enumerated within the code. The planning implications too, are clearly very evident.

### **2.2.3 France**

The absence of expropriation in the Constitution of France is filled by the more historic right of the French Declaration of Human and Civil Rights 1789, together with the 1804 Napoleonic "Code Civil" that state respectively:-

- "Property being an inviolable and sacred right, no one can be deprived of it, except when the public necessity, legally established, requires this, and on condition of a fair and previous indemnity" (1789)
- "No one can be required to surrender his property except in the case of public purpose, and on condition of a fair and previous indemnity"(1804)

The Code Civil (1804) is a Parliamentary Act but takes legal precedence over the Declaration.

The operational legal basis for expropriation today is the Code Expropriation due to public utility and is in two parts; the legislative and the regulative. The laws and regulations establish the right to expropriation from, the declaration of a decree that states the expropriation of land for a public utility (use) to the payment of compensation. In addition the administration process is monitored fully.

#### **2.2.4 United Kingdom**

In the absence of a written Constitution in the United Kingdom Private and Public Acts of Parliament are the sources of legislation.

The Private Act was at one time the only way of obtaining expropriation powers, its use today is only where no other power exists. A recent example of a modern Private Act is The Channel Tunnel Act 1987

The more commonly used statutes today are Public Acts that are generic and do not identify specific locations eg. The Highways Act 1980.

There are also a large number of Public Acts that identify procedures applicable to all expropriations and as such may be incorporated into a Private Act. The main statutes in this category are The Compulsory Purchase Act 1965 and The Land Compensation Act 1961. The former act provides the power to acquire title, take possession and pay compensation whilst the latter identifies the Rules for the Assessment of Compensation.

Thus each country can be seen to have the both constitutional and statute to address the legal concept of expropriation

### **3 Establish, contrast and analyse specific elements within the legislation**

The objective of this section is to establish the existence of the following in the various Codes and legislation:-

- Right to expropriate
- Planning
- Public benefit
- Right to compensation
- Valuation Methodology

#### **3.1 Germany**

Expropriation can only take place under the BauGB for use of the land designated in the Bebauungsplan (Binding Use Plan).

Expropriation is only possible for the "general good" and when the purpose cannot be achieved in an alternative way. The development of the land to be expropriated is only possible if such development will benefit the municipality or public agency. Throughout there is a presupposition that private negotiations have been unsuccessful.

The principles of compensation are that it is provided as a monetary payment for the loss of legal rights, together with property loss and any other loss that arise out

of the expropriation. The concept of 'set off' of any benefits accrued is taken into account in the assessment of compensation. The basis for the payment of compensation is "current market value at the which the expropriation authority adjudicates on an application for expropriation which is decisive." The concept of other property loss, disturbance is then addressed

An alternative concept of compensation is the provision of alternative land to replace the expropriated land. Usually this is provided by the expropriation of the substitute plots of land from the area not in the Bebauungsplan. The process in this case has a different procedure.

#### Valuation Methodology

Section 95 defines that Compensation for the Loss of Right is based on current Standard Market Value (as defined in Section 194). The section then continues with the items that are not to be considered, including changes in value linked to:- change of use, anticipation of the expropriation, increases in value since an open market transaction was possible, Section 96 considers Compensation for other property loss.

Thus the legislation aims to identify a valuation methodology, however the legislation goes further and establishes the concept of valuation experts, their duties, powers and capabilities. Definitions of values and the recording of price data is also addressed

### **3.2 Portugal**

The Code of Expropriation 1991.(Decree of Law 438/91) flows from the rights within the constitution and identifies the right of the community to acquire the property of an individual for the shared benefit of all for a public utility.

The code states that expropriation must be completed by private negotiation. The code also makes specific reference to the calculation of just compensation based upon the planning constraints or policies of the subject land for expropriation. The two categories identified are Construction land (Art.25) and Land for other purposes (Art.26)

The valuation techniques are established within the Code of Expropriation and are specific to the identified land categories

Construction land is valued by considering the market value of the construction that would be allowed if the expropriation did not take place, by reference to the planning zoning. It is considered that land value, usually, amounts to 10% of the construction value and as such provides a basis for compensation. There are however the following add on factors depending on specific property:

- i) 1% property served by a tarmac road
- ii) 1% property served by a public water supply
- iii) 1.5% property served by a public sewer
- iv) 1% property served by electricity supply
- v) 0.5% property served by rainwater sewers

- vi) 2% property served by a public treatment station
- vii) 2% property served by a public gas supply
- viii) 15% on the basis of the ambience of the property

Land, for other purpose (Art.26)

The calculation of the value of land, other than that identified as construction land, is based upon the statement regarding the land in the land registry. The value is based upon the income, on an existing use basis, from the subject land. The use of comparable evidence from nearby properties is also important

The Code continues with criteria for:

Partial Expropriation (Art.28)

Calculation of the value of partial expropriation

- Calculate separately the total value and the income of the building and then the values of the separate parts and their respective incomes
- Then take into account any depreciation of the residue parts that occurs as a result of the expropriation of part of the property
- Similarly any increases in the value of the residue
- Finally, if the residue property is financially not viable, purchase of the whole can be effected

### 3.3 France

The Code Expropriation due to Public Utility has in its title the essence that there is right to expropriate and that right for the benefit of the public in general. The planning issues of either agreement or potential dispute are addressed in Article 11-4. The influence of the plan-led system is demonstrated in the expropriation process where land is valued to the use set out in the latest revision of POS (*plan de sols*) and that value is full market value. (Dowdy, Jackson, McCafferty 97) The procedure in the Code clearly identifies the planning and the valuation issues. Valuation methodology is based upon the ideal situation of open market negotiations if at all possible and the concept that expropriation is a procedure of last resort.

### 3.4 United Kingdom

Victorian and subsequent Case Law together with the Compulsory Purchase Act 1965 give the right to expropriate land for the common good upon the payment of compensation. These powers are only to be exercised when open market negotiation fails. The basis of the compensation is to satisfy the "Principle of Equivalence".

i.e. "compensation is the amount required, so far as money can do so, to put the owner in the same position as if his property had not been acquired." *Ricket v Metropolitan Rail Co.* (1867)

The planning system in the United Kingdom in some areas addresses and complements the expropriation process, particularly where Unitary Development Plans are in existence. The system is however not totally "plan-led"

The Land Compensation Act 1961 Section 5 (LCA 61) states the Six Rules of Valuation but they are silent on mathematics.

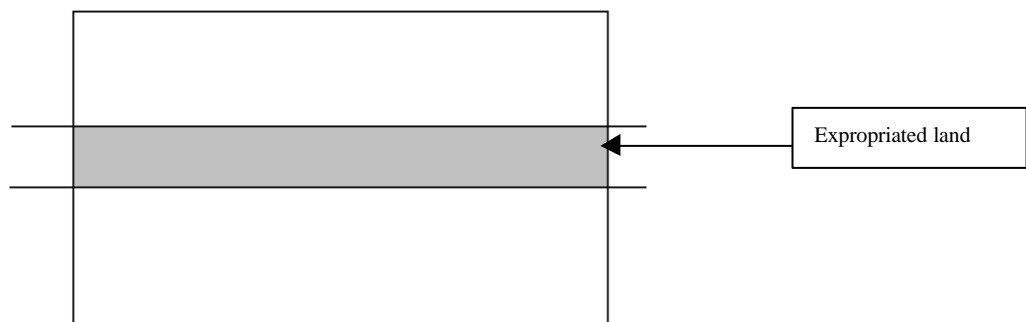
- (i) No allowance shall be made on account of the acquisition being compulsory
- (ii) The value of land shall as hereinafter provided, be taken to be the value which the land if sold on the open market by a willing seller might be expected to realise
- (iii) The Special suitability or adaptability of the land for any purpose shall not be taken into account if that particular purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any authority possessing compulsory purchase powers.
- (iv) Where the value of the land is increased by reason of the use thereof or any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the premises or to the public health, the amount of that increase shall not be taken into account
- (v) Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the Lands Tribunal is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement.
- (vi) The provisions of rule 2 shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land.

#### 4. Prime Research

Research into the most frequently occurring types of land expropriation showed that the purchase of strips of land for infra-structure develop; roads, railways and other transport systems was very prevalent. Thus the scenario used is the purchase of strip of land the valuation methodology used and the resultant claim for compensation in each of the countries. The issue is how does the valuation claim change if the proportion of land taken again and land remaining is altered.

The plans (1) and (2) below show the various layouts.

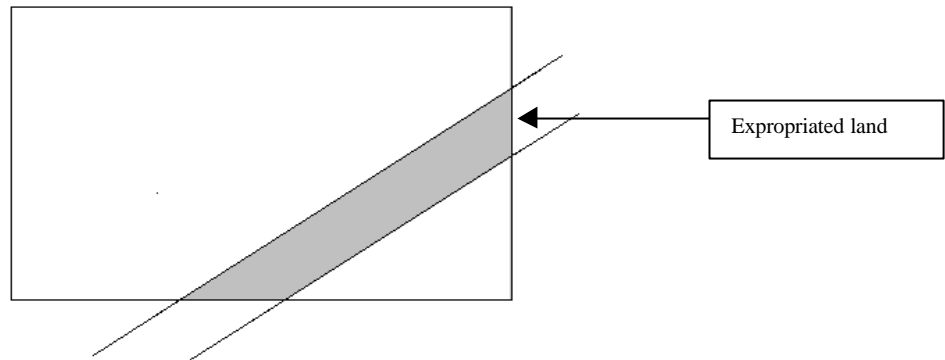
#### Plan 1





Plan 1 shows an area of land that is severed by the expropriation of the strip of land across the middle of the owned land, thus 33% of the land is expropriated and 33% remains on either side of the expropriation

## Plan 2



Plan 2 shows the expropriation of the same area of land in  $m^2$ , but the expropriation is from the margin of the owned land thus leaving a large piece of land and a very small area.

Comparable existing use land values for large areas of land are proven to be 10,000 Euros/hectare for agricultural use.

### 4.1 Germany

The value of the land is dependent upon its location within or outside the Bebauungsplan. If within, the Valuation method is from the BauGB legislation in the example shown in Plan 1 and take the form of the 33% to account for land lost 3,300 Euros plus any impact on the surrounding area or benefit in value accrued. Outside of the Bebauungsplan the value would be much less.

Plan 2 would in the Bebauungsplan area would give a comparable valuation of 3,300 Euros for the land taken but the loss would be perceived to be greater to take account of the diminution in the value to the small remaining piece of land. The amount of the increase would be on a proportional basis and dependent upon the Standard Ground Values for small areas of land.

The valuation would need to comply with definition of Standardised Market Value BauGB Section 194" the price that the property would achieve in an ordinary transaction, at the time of assessment, taking into account the existing characteristics, general conditions of the property and the location of the site..."

Compliance to Principles Governing the Assessment of Fair market Values of Property (Valuation Ordinance) 1988 and its rules for the derivation of required

data. The Committees of Assessors are working towards sufficient data so that their offices can get Standard Ground Values for all land within their area.

The ranking of the use of data is:

- Comparable
- Capitalised Income Appraisal - usually only the personal use of properties by the owner
- Cost Procedure - used when comparative data is limited

(Tychsen 1997)

#### **4.2 Portugal**

The Code of Expropriation Article 28 establishes a methodology for Partial expropriation, the key to the methodology is the location of the subject property. If the property is within an area of 'Land for Other Purposes'

The Code requires, effectively, a before valuation of the income flow from the whole of the owned property and then a set of valuations of the income flows from each of the component parts. This calculation can take account of any increase or decrease in the income flows and thus the expropriation value is established.

Plan 1 could establish any one of three valuations :-

- The income flows for the remaining areas of land are unchanged and thus the compensation is for the portion of land expropriated
- The income flows for either or both of the remaining areas of land increase and thus the compensation is for the portion of land adjusted for the enhancement in values of the remainder
- The income flows for either or both of the remaining areas of land diminish and thus the compensation is for the portion of land plus an amount for the diminution of the income flows of the remainder.

Plan 2 would give a similar valuation calculation but as the smaller piece of land, in particular, becomes less viable the expropriatee can claim for the purchase of the shaded land plus the redundant land based upon the income flow of these two parcels of land held together on an Existing Use Income basis.

If the expropriation is of Construction Land, as defined under Planning criteria, the valuation methodology changes and is based upon the concept that land accounts for 10% of the constructional value. The statutory enhancements, due to the physical services and amenity of the land are then added. (Article 25). A combination of these could enhance the compensation from between 1%-24%.

#### **4.3 France**

The valuation methodology in France depends upon the actual land use and the designated use in the Plan de sols. If the land in the scenario is agricultural land,

the calculation of compensation is based upon the land use on a specific date prior to the expropriation and by reference to the Planning classification. The assessment of compensation is based upon the impact of the severance of the land and its economic viability. If, as in either of the given plans the farm buildings are severed from the main agricultural land the impact on value will be greater.

In Plan 2 the small piece of land might become redundant and as such the owner could force the expropriator to purchase that element with the defined land.

#### 4.4 United Kingdom

The valuation methodology for expropriation is to carry out a before and after valuation of the land held by the claimant and the difference is the amount of compensation.

The scenario shown in Plan 1 would establish that the value of the original holding would be valued at existing use value of 10,000 Euros per hectare. After the expropriation the land would be severed into three parts; The land that has been expropriated, extending to 33% of the total, and thus worth 3,300 Euros.

The impact on the two residual pieces of land could be that their combined values, together with the value of the land expropriated, may or may not summate to the value of the whole, prior to the expropriation.

The compensation payable is the depreciation in value between the before value and the summation of the three divided parts. For purposes of comparability, the element of compensation attached to the area of land purchased and the intrinsic loss of value are itemised.

If there were any enhancement of value, due to development potential this would be taken into account.

Plan 2 would be treated in the same manner although the diminution in value to the small piece severed piece of land could be anticipated to be substantial as the land would become economically not viable. In certain circumstances the owner could enforce the expropriator to purchase that piece of land.

	Germany	Portugal	France	United Kingdom
Written Constitution	X	X	X	
Historic Right			X	X
Single specific Legislation	X	X	X	
Valuation Criteria in law	X	X	X	X

## **5. Conclusions**

**5.1** The right to expropriation of property is well established in each of the four countries, although the legal basis varies in as much as in Germany and Portugal it is a right defined in their written Constitution. Whilst in France its origins are in two Historic Codes, both of which are two hundred years old. In the United Kingdom the right stems from the mid-nineteenth century and the original consolidating legislation dates from 1845(Land Clauses Consolidation Act).

Thus there is a clear acceptance that expropriation is a necessity in all of the countries, although its historic legal development is different.

**5.2** The current statutory legislation in Portugal and France is entitled "The Code of Expropriation" a clear and explicit acknowledgement of purpose of the legislation. The remit of both of these codes is predominantly procedural and the ethos is for Open Market negotiations rather than the use of enforced expropriation. The execution of the procedures of the administrative system is subject to greater examination than the legal basis of expropriation. The appropriate legislation in Germany, the BauBG 1997, is an all embracing piece of development and construction statute. It is not subject specific to expropriation, yet it is exact in its sections on the subject. The procedural, valuation and valuers expertise are well defined. The United Kingdom exhibits the rights that come from a Common Law background of case law that has lead to the development of statute. Within expropriation the law provides different statutes for the role of the lawyer and the valuer. The Compulsory Purchase Act 1965 which predominantly considers procedure and the purchasing process whilst the Land Compensation Act 1961 addresses the amount and payment of compensation.

The legislation in all four countries is revisited frequently and direct comparisons show that the same aspects are covered.

**5.3** The valuation methodology of each of the countries demonstrates similarities of aim but variation in calculation. The aim of just indemnification of the owner of property for loss of legal rights due to expropriation is identified in all of the countries. The calculations reveal the historic development of the countries and the valuation profession. Germany has had the opportunity, as a result of recent history, to need to establish a formal land use registry together with a detailed database of property values. The quality and use of the information is through the Expert Valuers, whose role is also defined. The development of the valuation profession has come from engineering end of development and thus has the exacting mathematical approach.

Similarly in Portugal the basis of valuation identifies a 'traditionally' accepted constant that land value is a specific percentage of a construction project. Any changes from that basic percentage are as a result of specific criteria that are awarded identified additional percentages. In Portugal too, the valuation profession has developed from an Architectural and Engineering background and it is only recently that the differences between cost and value have emerged.

In France the role of valuers has developed from being arbitrators and expert witnesses (Bardouil & Malaquin 1996) mostly from the banking sector. The expansion of the profession from banking into other sectors, including expropriation, came in 1971. The most commonly used valuation basis is that of Open Market Value usually proven by

comparable evidence. Many of the roles of the valuer are from an administrative legal approach and this reflected in the value concept.

The valuation profession in the United Kingdom developed from 'Estate Management' of the landed estates, both rural and urban. Negotiation has been the ethos and until fifty years ago the methodology was silent. Today the calculations are evident and the methodology flows from the legislation.

**5.4** Thus in an emerging Europe, where the valuation profession is working across country borders, it is necessary for valuers to learn and understand the basis of valuation in the specific country and be adaptable to change. Or is there an alternative?

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