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Property and Environmental Protection in the Jurisprudence of the Court of Justice of the European Union

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Content

A. Introduction[1]

For European environmental lawyers the provisions in the treaty on environmental protection (Articles 191-193 TFEU) are quite familiar. The literature on the role and meaning of the environmental objectives and principles and their legal status is abundant.[2] However, with respect to the role of property, property rights and their influence on European environmental law and policy matters are quite different. In the current treaty the following provision (Article 345 TFEU) on 'property' can be found: 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.' The origin of this provision goes back to the founding EEC Treaty, which contained a similar provision. Regulating property ownership is therefore primarily a matter for the Member States.[3] In view of this provision it must be acknowledged that the Member States are, in principle, free to regulate property ownership for reasons of environmental protection.

However, it is also clear that the EU institutions, in view of the explicit competences attributed to them in the Articles 191-193 TFEU, are entitled to take necessary measures in order to protect the environment. Accordingly, the measures taken may very well restrict the use of property in the Member States.

It goes without saying that measures taken with the objective to protect the environment may restrict persons in the use of their property. Occurring both when the measures are taken by the EU itself or by the Members

[1] This paper builds on previous publications of the first author, in particular J.H. Jans & H.H.B. Vedder, *European Environmental Law*, Groningen: European Law Publishing 2012.

[2] J.H. Jans & H.H.B. Vedder, *European Environmental law*, Groningen: European Law Publishing 2012, at 32 et seq.

[3] Cf. the 'old' law, e.g., Case C-483/99 *Commission v. France* [2002] ECR I-4781, ECLI:EU:C:2002:327, para. 44, making it clear that although property ownership is a matter for the Member States, this provision does not provide a carte blanche to the Member State to disregard their obligations under the E(E)C Treaty.

States, when implementing EU policies or taking measures on their own accord. The main objective of this paper is to discuss some of the tensions between property rights and environmental protection.

B. The Legal Status of the Right to Property in EU Law

Well before the entry into force of the Charter, the Court of Justice of the European Union (hereinafter: CJEU) had already acknowledged that 'the right to property' is to be regarded as a 'general principle' of EU law. The origin of this right to property can be traced back to the *Hauer* case.[4]

Ms Hauer was refused permission to use her plot of land for wine-growing purposes on account of the unsuitability of the soil. In this landmark case the Court affirmed that fundamental rights, including the right to property, form an integral part of the Community legal order. With respect to the right to property the CJEU explicitly referred to Article 1 of Protocol 1 to the ECHR. However, while the right to property forms part of the general principles of Community law, the Court argued that it is not an absolute right and must be viewed in relation to its social function.[5] As a consequence the EU itself and the Member States have the possibility to regulate the use of property in accordance with the general interest; and CJEU case law shows that they both have a large amount of discretion in doing so. With respect to the right to property the CJEU only rarely comes to the conclusion that reasons of general interest do not justify a restriction to the right to property.[6] In the words of the CJEU:

> 'that the right to property is not absolute but must be considered in relation to its function in society. Consequently, its exercise may be restricted, provided that the restrictions in fact correspond to objectives of public interest pursued by the Community and do not constitute, in relation to the objective pursued, a disproportionate and intolerable interference, impairing the very substance of the right guaranteed.'[7]

Of course, and as we are all aware, this case law has evolved and is now been codified in Article 6(3) TEU:

> 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

The entry into force of the *Charter of fundamental rights of the European Union* has strengthened the protection of fundamental rights in the EU. The provisions of the Charter are binding upon to the Union institutions, bodies, offices and agencies, and upon the Member States 'when they are implementing Union law' (Article 51(1) Charter). With respect to the concept of 'property' the Charter contains the following provision in Article 17:

> 'Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. 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. The use of property may be regulated by law in so far as is necessary for the general interest.'

With respect to possible limitations to the rights mentioned in the Charter Article 52(1) provides:

> 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

This provision makes it perfectly clear that environmental concerns are legitimate reasons to restrict the right

[4] Case C-44/79 *Hauer* [1979] ECR 3727, ECLI:EU:C:1979:290.

[5] *Inter alia* Case C-44/79 *Hauer* [1979] ECR 3727, ECLI:EU:C:1979:290; Case C-280/93 *Germany v Council* [1994] ECR I-4973, ECLI:EU:C:1994:367; Case C-5/88 *Wachauf* [1989] ECR 2609, ECLI:EU:C:1989:321.

[6] Case C-5/88 *Wachauf* [1989] ECR 2609, ECLI:EU:C:1989:321.

[7] Case T-138/07 *Schindler Holding Ltd v. Commission* [2011] ECR II-04819, ECLI:EU:T:2011:362, para. 189.

to property. Since the ruling of the CJEU in the *ADBHU* case,[8] from the early 1980's, 'environmental protection' must be regarded as such an official objective of the EU.

Another relevant provision of the Charter to be taken into account in this respect is Article 52(3). It states:

'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.'

The explanatory notes for ex Article 52(7) of the Charter[9] explicitly state that Article 17 of the Charter is based on Article 1 of the Protocol to the ECHR. The relevance of this is that with respect to the interpretation of Article 17 of the Charter, the ECHR is leading. Article 17 Charter guarantees at least the same level of protection for the right to property as Article 1 Protocol 1 ECHR.[10] The explanatory notes state in this respect: 'the meaning and scope of the right [the right to property of Article 17, authors] are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there.' In other words: Article 17 Charter has imported Article 1 Protocol 1 ECHR and the case law of the ECtHR relating to that provision into the EU legal order.

However, to have a more comprehensive picture of the legal status of the right to property vis-à-vis environmental protection, we also have to address the question on whether there is a similar guarantee in the Charter for 'environmental protection'. Regrettably, this is not the case. With respect to 'environmental protection' Article 37 of the Charter contains a text similar, but not identical, to Article 11 TFEU:

'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'

Most importantly this provision, known as the 'integration-principle' is not formulated as 'a right'. In view of Article 51(1) of the Charter 'rights' must be 'protected' whilst 'principles' must be observed and their application thereof promoted. Also in view of the fact that the ECHR does not contain a dedicated[11] explicit fundamental right to environmental protection, one has to come to the conclusion that in the EU the right to property has the status of a fundamental right, whilst this is not the case with respect to environmental protection.

Taking into account the above points, we come to the following conclusions. In EU law the 'right to property' has the legal status of a 'fundamental right'. Yet for 'environmental protection', despite being an official objective of the EU, there seems to be no 'right to environmental protection' that has fundamental legal status. Having said that, even the fundamental rights, the right to property included, do not have an absolute character.[12] The right to property can be restricted if it is necessary for reasons of general interests. Environmental protection is such an interest. However, it seems that in the balancing of the right to property and the need for environmental protection, the right to property is in the driver's seat and environmental protection is more *defensive* than *offensive*. In this respect we mean the following: Restricting the right to property for reasons of environmental protection is, as such, not a problem, but its status as a fundamental right requires that the very essence of that right must be protected. The lack of 'fundamental status' of environmental protection means that in balancing the right to property and the need for environmental protection, the latter seems to be weaker.

[8] Case 240/83 *ADBHU* [1985] ECR 531, ECLI:EU:C:1985:59.

[9] See Explanations relating to the Charter of fundamental rights, OJ 2007 C 303/17.

[10] We refer in particular to the observations of B. Wegener in chapter II.1. of this book.

[11] Of course the authors are aware of the case law of the European Court of Human Rights on the importance of in particular Article 2 (protection of life), Articles 6 and 13 (access to justice), Article 8 (privacy), Article 10 (freedom of expression) for environmental protection.

[12] F.M.J. den Houdijker, *Afweging van grondrechten in een veellagig rechtssysteem*, Nijmegen: Wolf Legal Publishers 2012, at 472.

C. Who is Responsible For What?

According to the Charter, in particular Article 51, the provisions of the Charter are addressed to the EU institutions and 'to the Member States only when they are implementing Union law'. In interpreting this provision the CJEU has build upon its older pre-Charter fundamental rights case law. In *Åkerberg*[13] the Court ruled:

> '19 The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights, the observance of which the Court ensures (see inter alia, to this effect, Case C-260/89 ERT [1991] I-2925, paragraph 42; Case C-299/95 Kremzow [1997] ECR I-2629, paragraph 15; Case C-309/96 Annibaldi [2007] ECR I-7493, paragraph 13; Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25; Case C-349/07 Sopropé [2008] ECR I-10369, paragraph 34; Case C-256/11 Dereci and Others [2011] ECR I-11315, paragraph 72; and Case C-27/11 Vinkov [2012] ECR, paragraph 58).
> 20 That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C-279/09 DEB [2010] ECR I-13849, paragraph 32). According to those explanations, 'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'.
> 21 Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.
> 22 Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to this effect, the order in Case C-466/11 Currà and Others [2012] ECR, paragraph 26).'

Whether someone can rely on Article 17 of the Charter, the right to property, as a shield against environmental regulation depends on the question if the legal situation falls within or outside the scope of European law.

An example in the case law of the CJEU of a national measure falling outside the scope of European Union law is the *Annibaldi* case. If there is no link at all with European environmental law one cannot rely on the Charter or any other EU fundamental rights as was made clear in the *Annibaldi* case.[14] In this case the Court ruled that as the law stands at present, regional legislation, which establishes a nature and archaeological park in order to protect and enhance the value of the environment and the cultural heritage of the area concerned, applies to a situation which does not fall within the scope of Community law. The case concerned the authorities' refusal to grant Annibaldi permission to plant an orchard of 3 hectares within the perimeter of a regional park. Annibaldi argued that such a refusal without financial compensation violated his right to property. Although this case was ruled upon prior to the entry into force of the Charter, the line of argument can be held applicable to the Charter as well.

Another recent judgment of the CJEU with an environmental context concerning the Charter is the *Siragusa* case of 6 March 2014.[15] Mr Siragusa owned property in a landscape conservation area. He made alterations to that property without first obtaining landscape compatibility clearance as required by Italian law and then applied

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[13] Case C-617/10 *Åkerberg* [2013] ECR I-0000, ECLI:EU:C:2013:280.

[14] Case C-309/96 *Annibaldi* [1997] ECR I-7493, ECLI:EU:C:1997:631.

[15] Case C-206/13 *Siragusa* [2014] ECR I-0000, ECLI:EU:C:2014:126. See also the blog from Xavier Lewis: http://eulitigationblog.com/2014/03/13/case-c-20613-siragusa-the-scope-of-the-charter-of-fundamental-rights-preliminary-references-and-national-law/comment-page-1/.

to the Comune di Trabia (Municipality of Trabia) for retrospective planning permission for those alterations. According to Italian law, the owner of a property in protected landscape conservation area may not destroy it or alter it in such a way as to impair the features of the landscape, and must apply for 'landscape compatibility clearance' before carrying out any alterations. If he carries out alterations without applying for clearance, the authority may, however, authorise those alterations retrospectively if the work carried out is compatible with the features which are under protection. However, the Italian public authority, the *Soprintendenza* adopted an order requiring Mr Siragusa to restore the site to its former state by dismantling, within 120 days, all work which had been carried out illegally. The order was made on the grounds that the work in question was not eligible for certification as compatible with the landscape conservation rules. Mr Siragusa brought an action contesting that order before the local administrative court, the Tribunale amministrativo regionale per la Sicilia. This court wondered whether Article 17 of the Charter, the right to property, precluded legislation like the contested Italian legislation. The CJEU decided that it had no jurisdiction to answer the question referred by the Tribunale amministrativo regionale per la Sicilia as the Italian court failed to establish, by demonstrating a sufficient connection, that the disputed Italian legislation falls within the scope of EU law or implements that law.

The judgments in *Annibaldi* and *Siragusa* are clear examples of cases where the connection of national environmental law with European law were absent or too remote to trigger the application of Article 17 of the Charter.

At the other side of the spectrum we can find cases where the Member States have implemented EU environmental measures and that individuals have opposed these national measures by relying on the right to property. One of the oldest cases in this respect is the *Standley* case, which is also interesting due the ruling of the CJEU.[16] In the *Standley* case, the Court considered the Nitrates Directive. It was argued that this directive gave rise to disproportionate obligations on the part of farmers, so that it offended against the principle of proportionality and their fundamental rights to property. They argued in particular that the right to property was infringed by imposing on farmers the entire responsibility for, and economic burden of, reducing nitrate concentrations in the waters concerned when others are the major or substantial causes of those concentrations. The Court was not impressed. After a careful study of the Nitrates Directive, it came to the conclusion:

> 'As regards infringement of the right to property, the Court has consistently held that, while the right to property forms part of the general principles of Community law, it is not an absolute right and must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (Case 44/79 Hauer v Land Rheinland-Pfalz [1979] ECR 3727, paragraph 23, Case 265/87 Schräder v Hauptzollamt Gronau [1989] ECR 2237, paragraph 15, and Case C-280/93 Germany v Council [1994]ECR I-4973, paragraph 78).'

It is true that the action programmes which are provided for in Article 5 of the Directive and are to contain the mandatory measures referred to in Annex III impose certain conditions on the spreading of fertiliser and livestock manure, so that those programmes are liable to restrict the exercise by the farmers concerned of the right to property.

However, the system laid down in Article 5 reflects requirements relating to the protection of public health, and thus pursues an objective of general interest without the substance of the right to property being impaired.'

Finally, the Court came to the conclusion that the directive contains 'flexible provisions' enabling the Member States to avoid any disproportionate restrictions on the right to property. This case shows that where an EU environmental measure leaves Member States a certain degree of discretion when implementing it, it is the responsibility of the Member States that the right to property is observed and for the national courts to review the legality of the measures taken.[17] Also, one cannot challenge the validity of the EU measure in such a case by relying on the fundamental right to property.

[16] Case C-293/97 *Standley* [1999] ECR I-2603, ECLI:EU:C:1999:215.

[17] Building upon previous case law like the *Wachauf* case: C-5/88.

This same approach can be found in the *Ferdinand Stefan* case. In this case Mr Stefan, having problems with the implementing Austrian legislation, challenged the validity of Directive 2003/4/EC on environmental information. According to Mr Stefan the directive violated Article 47(2) of the Charter (right to an effective remedy). The CJEU reiterated that under Article 51(1) of the Charter, the fundamental rights guaranteed therein must be respected where national legislation comes within the scope of EU law and that Member States are required to respect Article 47(2) of the Charter when they implement Directive 2003/4. Subsequently, it argued that a provision of secondary EU law must, so far as possible, be given an interpretation which renders that provision consistent with the Treaties and the general principles of EU law, including the right to an effective remedy. In other words: EU directives must be assumed to be in line with the Charter and its fundamental rights. Therefore it is the Member States who must use their margin of appreciation, conferred on them by the directive, 'in a manner which is consistent with the requirements flowing from that article of the Charter'.

The final case to discuss which illustrates the important role the Member States and their court's play in ensuring the right to property, within the EU legal order, is the *Sahlstedt* case.[18] Private landowners challenged the decision of the Commission, taken under the Habitats Directive, adopting the list of sites of Community importance for the Boreal biogeographical region as their property was included in the list. The landowners argued that this decision had a significant effect, both legally and factually, on their property rights. The Court of First Instance ruled however that they were not directly concerned, as required by Article 263 TFEU:

> 'it cannot be held that the contested decision – which designates, as sites of Community importance, areas of Finland in which the applicants own land – produces, by itself, effects on the applicants' legal situation. The contested decision contains no provision as regards the system of protection of sites of Community importance, such as conservation measures or authorisation procedures to be followed. Thus, it affects neither the rights or obligations of the landowners nor the exercise of those rights. Contrary to the applicants' argument, the inclusion of those sites in the list of sites of Community importance imposes no obligation whatsoever on economic operators or private persons. Article 4(4) of the habitats directive states that once a site of Community importance has been adopted by the Commission, the Member State concerned is to designate that site as a 'special area of conservation' within six years at most.
>
> In that regard, Article 6(1) of the habitats directive states that the Member States are to establish the necessary conservation measures for special areas of conservation, the aim being to meet the ecological requirements of the natural habitat types and species present on the sites.'

In sum, the CFI ruled that the Finnish landowners are not directly affected by the decision of the Commission, but by the national measures implementing that decision. It is remarkable, that in appeal, the CJEU did not mention 'direct concern' at all, but declared the landowners inadmissible because they were not individually concerned by the Commission decision. The CJEU ruled that since the contested decision was not adopted in light of the specific situation of the landowners, it could not be regarded as a group of individual decisions addressed to each landowner and that the appellants are not individually concerned by the decision. Therefore they had no standing in an action for annulment ex Article 263 TFEU. The landowners were advised to bring their case before their national court. If necessary that national court could ask the CJEU, in the context of a preliminary ruling, to rule on the validity of the decision of the Commission.

Both the *Standley* and the *Sahlstedt* case show the important role Member States have to play to ensure that the right to property is protected. *Standley* shows that the Member States must ensure substantive protection; while *Sahlstedt* shows the role Member States play in offering legal protection.

D. Balancing the Right to Property and Environmental Protection Requirements in the Case Law of the CJEU

The right to property can be used either to 'shield' against environmental regulation or as a 'sword' to trigger environmental protection. If we look at the case law of the CJEU of the EU it is quite clear that most of the cases concern using property rights as a shield. This might not surprise us in view of the legal status of the right to property as a fundamental right. Wegener made it quite clear in his contribution to this book that Article 1

[18] Case C-362/06 *Sahlstedt* [2009] ECR I-2903, ECLI:EU:C:2009:243.

Protocol 1 ECHR does not guarantee the right to enjoy ones possessions in a pleasant environment.[19] In the European Union the legal situation is similar.

Wegener's contribution also shows us that the right to property of Article 1 Protocol 1 ECHR can be triggered to combat environmental degradation when this degradation creates a situation of *de facto* expropriation.[20] Although there is no case of the CJEU to support this, our argument is that in EU law a similar legal situation exists. Measures falling within the scope of EU law causing environmental degradation to such an extent that it amounts to a *de facto* expropriation, must be deemed to be unlawful in EU law as well.

1. The Right to Property as 'Shield' to Environmental Regulation

Above we already mentioned that, in EU law, the right to property is not an absolute right and must be viewed in relation to its social function. The right to property may be restricted for environmental reasons, provided that those restrictions are not disproportionate and intolerable, and do not impair the very substance of the right to property.

There are a couple of cases that illustrate the above point. In the *ERG* case the CJEU made it clear that it may be justified to make the right of the operators to use their land subject to the condition that they implement the necessary environmental remedial measures, in order to oblige them actually to take those measures.[21] The measure has to be 'justified by the objective of preventing a deterioration of the environmental situation' or, 'pursuant to the precautionary principle, by the objective of preventing the occurrence or resurgence of further environmental damage to that land'.[22] However, the measures may not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question.[23]

Križan concerned the construction of a landfill by Ekologická Skládka on the grounds of former brickworks in the Slovak city Pezinok. The environmental inspection granted an integrated permit for the construction and operation of the landfill.[24] Some residents of Pezinok, including Joseph Križan, objected and appealed the decision, requesting annulment of the permit. Ekologická Skládka invoked its property rights from Article 17 Charter. In appeal, the Supreme Court suspended the operation of the integrated permit and annulled the permit because the competent authorities did not observe the rules for public participation and with regard to the environmental assessment did not carry out enough research on the environmental impact of the construction of the landfill. After the Constitutional Court set aside the decision and referred the case back, the Supreme Court asked the CJEU for a preliminary ruling concerning whether Article 17 Charter was violated by the annulment of the permit on the grounds of breach of Article 15a of Directive 96/61 and Article 9(2) and (4) of the Aarhus Convention. After stating the general rule that a property right is not an absolute right, the Court held that the protection of the environment is one of the objectives of general interest and is therefore capable of justifying a restriction on the use of the right to property. In addition, the Court examined whether the restriction was proportionate and the Court ruled that 'it is sufficient to state that Directive 96/61 operates a balance between the requirements of that right [the right to property of Article 17 Charter, authors] and the requirements linked to protection of the environment'. The Court held that a decision of a national court, taken in the context of national proceedings implementing the obligations resulting from Article 15a of Directive 96/61 and from Article 9(2) and (4) of the Aarhus Convention, which annuls a permit granted in infringement of the provisions of that directive is not capable, in itself, of constituting an unjustified interference with the developer's right to property enshrined in Article 17 of the Charter. This case shows that it is possible to rely on the right to property for the annulment of a permit and that the ownership interests and community interests are weighed on an abstract level.

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[19] B. Wegener, Chapter II.1., referring to the judgment of the ECtHR in *Kyrtatos v. Greece*, Judgment of 22 May 2003, Application 41666/98.

[20] Referring to case ECtHR, *Taşkin and Others v. Turkey*, Judgement of 10 November 2004, Application 46117/99.

[21] Case C‑379/08 en C‑380/08 *ERG* [2010] ECR I-2007, ECLI:EU:C:2010:127, para. 80.

[22] *ERG*, para. 85.

[23] *ERG*, para. 86.

[24] Case C-416/10 *Križan* [2013] ECR I-0000, ECLI:EU:C:2013:8.

2. *The Right to Property as a 'Sword'*

Above we argued that in EU law only occasionally the right to property is invoked as a sword to trigger environmental protection. Most of these cases deal with state liability for failing to implement EU directives by the Member States. A recent case in this respect is the *Juta Leth* case.[25] In this case Ms Leth argued that the Member State (Austria) is liable to pay damages for the decrease in value of her property. This decrease was the result of an extension of an airport runway in violation with EIA Directive 85/337/EEC. The CJEU accepted that exposure to noise resulting from a project covered by the EIA Directive has significant effects on individuals, in the sense that a home affected by that noise is rendered less capable of fulfilling its function and the individuals' environment, quality of life and, potentially, health are affected, a decrease in the pecuniary value of that house may indeed be a direct economic consequence of such effects on the environment. However, this does not necessarily mean that Ms Leth had to be compensated as the failure to carry out the assessment prescribed by the directive, does not, in principle, by itself constitute the reason for the decrease in the value of a property. In other words, even with an environmental assessment carried out the runway extension could have been approved. The fundamental question: does EU law contain a rule to enjoy one's possession in an environmentally sound manner, and if so, does the violation of such a rule trigger financial compensation, was not addressed at all.

E. Restricting the Right to Property With or Without Compensation?

The previous section showed that the right to property can be regulated and restricted for reasons of environmental protection. A separate question, at least to a certain extent, is whether there is, or can be, a legal duty in EU law to compensate the financial loss for those individuals who are confronted with restrictions to their property.

Let us start by saying that if the damage is the direct result of an intervention by the European legislator, the European legislator might provide for financial compensation. Outside environmental law we can find some examples in particular in the area of agricultural policy and law.[26] There is also case law of the CJEU, e.g. the *Wachauf* case, where restrictions to the right to property were deemed to be illegal, particular in view of the fact that no compensation was offered.[27]

Another question is whether EU law provides for a remedy to compensate for lawful actions. Many Member States know of a rule saying that the state, under very specific circumstances, has a duty to compensate financial loss even if the measures taken to restrict the right to property for the general interest are lawful.[28] These remedies are mainly based on concepts like 'excessive burden', *égalité devant les charges public*, etc. Of course, the EU treaties do not contain a remedy for lawful measures. Article 340 TFEU and the duty to compensate only deals with unlawful measures by the EU institutions. So with respect to any duties for the Member States, it suffices to say that state liability according to the *Francovich*-doctrine also only refers to infringements of EU law by the Member States.

In light of this a specific EU-based remedy to compensate for financial loss due to lawful restrictions to the right to property, seems to be far-fetched. Although earlier case law[29] of the CJEU seemed not to exclude this possibility completely, in its landmark case *FIAMM*, the CJEU denied the existence in EU law of such a specific remedy.[30] However, the Court did open a backdoor to such a remedy by stating that an EU 'legislative measure

[25] Case C-420/11 *Leth* [2013] ECR I-0000, ECLI:EU:C:2013:166.

[26] See for example Commission Regulation (EC) No 349/2005 of 28 February 2005 laying down rules on the Community financing of emergency measures and of the campaign to combat certain animal diseases under Council Decision 90/424/EEC, OJ 2005, L 55/12. See also Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community, OJ 2000, L 169/1. Cf. M.K.G. Tjepkema, *Nadeelcompensatie op basis van het égalitébeginsel*, Deventer: Kluwer 2010, at 852.

[27] Case C-5/88 *Wachauf* [1989] ECR 2609, ECLI:EU:C:1989:321; Den Houdijker 2012, at 478-479.

[28] Cf. the comparative legal research undertaken by the CJEU in the *FIAMM* case, discussed below.

[29] Case T-184/95 *Dorsch Consult* [1998] ECR II-667, ECLI:EU:T:1998:74; Case T-196/99 *Area Cova* [2001] ECR II-3597, ECLI:EU:T:2001:281.

[30] Case C-120/06 P and C-121/06 P *FIAMM* [2008] ECR I-6513, ECLI:EU:C:2008:476.

whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession that impair the very substance of those rights in a disproportionate and intolerable manner, perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment, could give rise to non-contractual liability' on the part of the EU. In other words, a lawful measure can become unlawful if no compensation is offered.

If the EU measure itself offers no compensation, the question arises whether the Member States are required to offer compensation. The case law of the CJEU shows that the Member States enjoy a large amount of discretion in this respect.[31] The case *Booker Aquaculture* concerned the outbreak of a fish disease and the fish that had to be destroyed as a result of a European directive to combat fish disease.[32] The fish owners relied on their property right. The Court was faced with the question whether the State was obliged to compensate the loss of the fish owner as a result of the Directive. First, the Court ruled that the directive contained no provisions on compensation. The Court stated that although the Member States were empowered to adopt rules for compensation, they were not required to do so on the basis of European law. The destruction of the fish could not in any event be regarded as a 'disproportionate and intolerable interference impairing the very substance of the right to property.[33] The Court emphasized that the act served the public interest and that the fish owners could expect that a fish disease may break out at any moment and cause them loss. According to the Court such risk is inherent to the business of raising and selling livestock and is the consequence of a natural occurrence. Finally, apart from the fact that it was not a disproportionate and intolerable infringement of the right to property, the Court held that the Member States can nevertheless compensate if they want to.

F. Conclusion

All of the above leads us to the following final observations. Firstly, we have demonstrated that the legal status in EU law of the 'right to property' and the 'right to environmental protection' are quite different. The right to property enjoys the legal status of being a 'fundamental right'. This is reflected in the case law of the CJEU when balancing property and environmental rights. Property rights are mainly used to shield against environmental regulation, rather than as a sword to demand environmental protection.

Secondly, it is argued that with respect to the interpretation of the 'right to property', the ECHR is leading. Article 17 of the Charter mirrors Article 1 Protocol 1 ECHR and follows its interpretation.

Thirdly, it is argued that in order to comply with Article 17 of the Charter Member States have an important role to play. The case law of the CJEU seems to suggest that Member States, when implementing EU environmental measures, must use their discretion in such a manner that the property right guarantee of Article 17 Charter is ensured; either by offering substantive protection or providing financial compensation in the case of *de facto* expropriation.

[31] Cf. also the *Wachauf* case.

[32] Case C-20/00 and C-64/00 *Booker Aquaculture* [2003] ECR I-7411, ECLI:EU:C:2003:397; Den Houdijker 2012, at 485-488.

[33] *Booker Aquaculture,* paras. 79-85, 91 and 92.