"The Right Of Ownership In The European Law"

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Abstract

The paper is about the case of the right of ownership, the social function that the constitutions of some western countries recognize to this rights and the balance of this right with other public interests. The right of ownership has a great importance even in the European judicial order. The right of ownership has undergone many changes with the creation of a single European market, so that nowadays we could not talk about only one ownership category. Special attention will be dedicated to the article 17 of the EU Charter of Fundamental Rights according to which everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. The limitation of this right will be legislated toward the public interest and toward a fair compensation being paid in a good time. In its decisions, the European Court of Justice has stated that the property as a fundamental right is described not as an absolute right, for the European judge the social function has to do with the general interest that is the basis of each treaty, that is the free and full competition. The private property for the jurisprudence of the community is a fundamental right, but it could be limited due to the general economic interest that aim to be realised.

Keywords: The right of ownership, Article 17 of the EU Charter of Fundamental Rights, European public interest, Decisions of the European Court of Justice

Introduction

The right of property has been object to many initiatives of European legislation, in fact the competencies of European law-making regarding the right of property should be excluded peremptory, because a provision exists from the creation of the European mutual space and it hasn't changed yet. It is the article. 295 EC according to which: *"The*

Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."[5]

This provision originates in the Robert Schuman declaration held on May 9, 1950 and reinforce further even the article 83 ECSC, which provides: *"Community institutions shall in no way prejudice the right of property of enterprises/companies that undergo the provisions of this Treaty"*.

This provision aims to enable the Countries, who see the need to proceed with the nationalization of the companies[6], also enable the creation of the national monopolies but does not exclude the monopoly companies from the competition rules and approved regulations[7].

Another reason has to do with the importance of the property institute, as one of the main institutes that are not regulated by ex novo or in a uniform way in European level starting for the specific aspects that represent this institute in each of the Member States[8].

These are the reasons why the original text of ECHR of 1950 did not include the property in its content, which was presented after an intensive debate through an additional protocol.

The objective of this choice was to give the States the competence to determine the legal regime of the items and the property and general interest report.

However, the above reasons do not halt and could not do it because of the importance that this institution represents, further interventions of the community institutions regarding this topic: "European property values have already won an organic importance that is presented as the main elements of any research that want to understand what does the property mean nowadays"[9].

Further interventions of the European Community are based on the subsidiarity principle, in fact the institutions can intervene in any case and make laws in cases when the objectives exist which can be realised better in the European level than in the national one[10]. These objectives based even in the article 3 TFEU are: the prosperity of its people, the stability of

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[5] Tizzano A., (2004), *Trattati dell'Unione Europea e della Comunità Europea*, Milano, Giuffrè Editore, pg. 1312.
[6] Megret J., (1987), *Le Droit de la Communauté économique européenne: commentaire du traité et des textes pris pour son application*, vol. 15, *Dispositions générales et finales*, Bruxelles, pg. 424.
[7] Cit., Tizzano A., *Trattati dell'Unione Europea e della Comunità Europea*, pg. 1312.
[8] Bessone M., (2000), *Trattato di diritto privato*, Torino, Giappichelli, pg. 175.
[9] Trimarchi M., *Proprietà e indennità di espropriazione*, in Rivista trimestrale "Europa e diritto privato", Giuffre Editore, 4/2009, pg. 1056.
[10] Rizzo V., (1997), *Diritto privato comunitario. Fonti, principi, obbligazioni e contratti*, Napoli, ESI, pg. 266.

the prices, creation of a market economy, full employment, the war against social exclusion, economic, social and territorial promotion, creation of a free and honest trade zone and also the protection of human rights[11].

All this seems to conflict with another principle, that of neutrality, however the European Court of Justice is the first institution that has declared in the beginning of 70s that part of European fundamental rights is also the right of ownership. For more, it is exactly the right of ownership the starting point when the ECJ counts the community fundamental rights (Nold 1974 and Hauer 1979 cases).

The proposals of ECJ are applied later by the Treaty of Lisbon which in article 6 defines: "*The Union respects the fundamental rights determined by the European Charter of Fundamental Rights and that derive from the constitutional tradition and that are mutual to Member States as general principles of the Union rights*".

The document that recognized for the first time the right of ownership is the Treaty of Nice, obviously a formal text without legal value but anyway with interpretative value.

To sum up, the principles in the field of private property rights and the jurisdiction that interprets are included in three levels:

- First, based on the article 1 of Additional Protocol, Convention of Human Rights and Fundamental Freedoms interpreted by ECtHR
- Second, based on the article 6 of Treaty of Lisbon and in article 17 Treaty of Nice interpreted by ECJ;
- Third, is the local Constitution interpreted by Constitutional Court.

The connection between those is made by the article 6 of Treaty of Lisbon, protection of fundamental rights are guaranteed by ECHR and from the States Member Constitution.

The case is that often in the field of private rights, the Constitution of the State Member does not coincide with the jurisprudence predictions of the Court of Justice, without mentioning the Treaty of Nice that will complicate the situation further.

The Court of Justice refers to the social function of the property. For the European judge, the social functions has to do with the general interest that is the base of each treaty, namely with the free and full competition. The private property for the jurisprudence of the community is a fundamental right, but it could be limited due to a general economic interest that aim to be realised.

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[11] Frigo M., (1998), *Le limitazioni al diritto di proprietà e all'esercizio delle attività economiche nella giurisprudenza della Corte di Giustizia*, in "Rivista di diritto internazionale privato e processuale", 1998, pg. 70

Further, the Treaty of Nice treats the right of ownership in article 17 Chapter II titled Freedom. The social function of the property is one aspects that it does not take into account. Specifically, article 17 defines that "*Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions*." Formulated this way, it shows the changes it has with the Italian Constitution and its approaches with the French Civil Code.

Article 17 of European Charter of Fundamental Rights

The European Convention of Human Rights and Fundamental Freedom is not yet, at least formally part of the legal system in the EU, so "official" source of field of fundamental rights remains the European Charter of Fundamental Rights. Article 6, point 1 TFEU predicts: European Union knows the rights, freedom and the principles defined in the European Charter of Fundamental Rights, dated December 7, 2000, as it was adapted in Strasburg in December 12, 2007, which has the same legal values as the Treaties".

For this aspect, we can mention the decision of Liselotte Hauer vs. Land Rheinland-Pfalz of ECJ, which says that "*the case on the limitation of fundamental rights from an official act of the Community could only be valued only regarding European Rights. The introduction of specific elements of the assessment arising from legislation or constitutional system in a State Member, in a way that threaten the material union, and the effectiveness of the European Right, will bring in an inevitable way the crack of the mutual market and will put on dangerous the unity of the Community"*[12].

Specially the article 17 of the European Charter of Fundamental Rights predicts that: "*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. Intellectual property shall be protected*."

The above provisions highlight in a comprehensive manner the individualist vision of the property that characterized the European Charter of Fundamental Rights in contrast to the "social" role of this right; in this way it is enough to say that the article mentioned is placed in the chapter dedicated to the freedom that's why the right of ownership is not considered as an economic-social right, but as a fundamental right

[12] ECJ. CE, 13 December 1979, C-44/79.

protected by State intervention and from the obligation of the solidarity toward other citizens.

From this point of view, the ownership is considered as one of the ways of expressing freedom[13].

Exactly, the article 17 of the European Charter of Fundamental Rights is focused on:

- To be in favour of the owner and not of the restrictions that could be placed on his right;
- "restrictions of the right are done for "public interest causes";
- Legality of the expropriation is connected with the "fair compensation";
- Special prediction of the intellectual property protection;

The social function of the property is not mentioned even in the article 52 ("The aim and the interpretation of the rights and principles") and even in article 53 of the Charter ("Protection"); especially, article 52, point 1 predicts that: "*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"*.

Article 53 predicts that: *"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."* Article 52 (1) of the Charter provides that for as many rights that this Charter content, correspond with the rights that are guaranteed by ECHR, the meaning and the field of action of these rights are the same with those of the rights provided by the ECHR.

Restrictions of property due to the fundamental values of European public interest

The concept of the typical right of ownership of the European Charter of Fundamental Rights is similar to those defined by the Court of Luxemburg in Nold decision[14]. The Nold decision made the Court of

[13] Rodota' S., (1960) *Note critiche in tema di proprietà*, in "Rivista trimestrale di diritto e procedura civile", II, Giuffré Editore pg. 1303.
[14] ECJ. CE, 14 May 1974, no. 4.

Luxemburg, judge in the field of property. The court, in this context, reminds the mutual constitutional traditions of the state members and the international treaties for the human rights protection.

Thus, Nold decision makes a summary of the judges opinions: “the rights thereby granted, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property. For this reason, rights of this nature are protected by law subject always to restrictions laid down in accordance with the public interest”[15].

The fundamental rights is described as an absolute right, a position that is held continuously by the jurisprudence of the ECJ. For example, ECJ has said that: “same as the right of ownership even the freedom exercise a professional activity, as part of the general principles of the community right. It is not an absolute right but need to be valued based on their social function. As a result, it could be placed restrictions on the enjoy of these rights, especially in the context of a single market that aims to secure the defined objectives in article 39 of the Treaty, in accordance with the obligation taken from the Community as a result of the Lomè Convention with the condition that these restrictions could answer the objectives of general interest aimed by the community and the intervention to be proportional to the aimed goal, without damaging the real core of the guaranteed rights”[16].

Nold decision has defined the general principles on which is based the jurisprudence of the ECJ and based on these, during the 90s has treated three different aspects of the property:

- Possible restrictions of the private property in general;
- The report between the property and the free exercise of the economic activity
- Intellectual property;

Regarding the restrictions on the private property, these are justified by the ECJ with the protection of four fundamental interests: that of security, environment, health and competition.

a. Regarding security, the decisions of ECJ are concentrated in the majority in the restrictive measures regarding the strategy against terrorism.

In this direction, the ECJ in the decision Faraj Hassan says: “restrictive measure laid down by act of the Community, such as the EU Regulation of Council of May 27, 2002, no. 881 (imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the

[15] ECJ. CE, 11 July 1989, no. 265/87.
[16] ECJ. CE, 5 October 1994, no. 280.

Taliban), are restrictions to the right of ownership, which are in principle justified”[17].

Even before, ECJ with the Bosphorus decision[18], justified the restrictions of the right of ownership and the freedom to pursue a commercial activity of “Bosphorus Airways” through distrain of a rented plane by a company located in the territory of the Federal Republic of Yugoslavia (former Yugoslavia now) because according to the Court, the rights pretended by Bosphorus Airways are not absolute and their exercise could be subject to justified restrictions from the general interest objective followed by the Community.

b. According to the restrictions set to protect the environment, we need to recall the decision of 2010 regarding the request of the Administrative Court of Sicily District (ex article 234 TEU, today article 267 TFEU), to interpret the principle “polluter-pays” and the Directive 2004/35 EU on environmental responsibility regarding the prevention and remediation of the environmental damage[19] based on the substaible development principle.

ECJ in accordance with Directive 2004/35 EU, has recognized the right of the local competent authorities to take or to order the “preventive or remedial” measures from the companies which through their activities has caused environmental damage or are an inevitable threat to the environment and for such damage will be considered financially responsible. These measures will serve in a way to urge the companies to approve and to do practices to minimize the risk of the environment damage. Article 2(11) of the Directive 2004/35 EU titled "Remedial measures" defines as such "the action or the activity, whether temporary in order to restore, rehabilitate or replace the natural resources/services damaged or offer an alternative similar to those resources or services as foreseen in Annex II of the Directive.

The measures taken that are realized “with the restriction of some rights that belongs to the right of ownership” are considered legal as the caused violation of this right, is temporary.

c. Regarding the restrictions on public health protection it is worth to mention the Agrarproduction Statebelow decision[20] on the elimination of all the animals of the herd where was a infected calf with BSE virus (Bovine spongiform encephalopathy), article 13 Regulation no 99/2001 EU.

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[17] ECJ CE, 3 December 2009, cases C-402/05 P and C-415/05 P.

[18] ECJ CE, 30 July 1996, no. 84.

[19] ECJ CE, 9 March 2010, cases C-379/08 and C-380/08.

[20] ECJ CE, 12 January 2006, no. 504.

Regulation no 99/2001 EU sums up in a single text the approved measures from 1990 of European Union regarding the protection of animal health and the direct measures to protect the health of humans for the risk of infection as it could be in the case of BSE; Scientific Committee on Animal Health and Animal Welfare (SCAHAW) in its statement, released in 15 September 2000 on the animal elimination with BSE virus, said that "the massacre of all the herd, now has brought effects in the prevention aspect of other cases. SCAHAW recommended the elimination of the herd since the birth as many times as there is a BSE case, regarding the general epidemiological situation".

Based on these decisions, the Chairman of Rural district of Bad Doberan because of a case with BSE has ordered the elimination of the herd.

ECJ referred the case even based on the article 234 TEU (today article 267 TFEU), stating that the imposted measures has been justified and tolerated, taking into account the seriosity of the situation for more the article 13 (1) (c), regulation 99/2001 provides an immediate compensation in favour of the eliminated animal owners.

d. Last, regarding the necessary for the protection and the promotion of the competition quoted in Van den Bergh Foods' decision[21] according article 3 (1) (g) EU provides that: to achieve the objectives of the European Union, it is necessary a system that guarantee a honest competition in the internal market and as the application of article 85 and 86 of the Treaty, after article 81 and 82 TEU (now article 101 and 102 TFEU) represent one of the aspects of public interest for the EU, the right of ownership could be defined with the condition that the elected restrictions should not be in disproportion with the aim that want to achieve and not to threat the core of the right.

The decision is important since it highlights the change from the general interest to the European public interest, the latest is considered a fundamental principle in the protection of the competition and especially to eliminate the anti-competitive practices in present of which it is legal to deny the right of ownership, a fundamental right of the European right.

Another decision in the competition field is the case of Alessandrini [22] that has treated "the position in the market" of the economic operators regarding the right of ownership; in this case, the restrictions of the right of ownership are not a cause of a contrast of superior rank values, but as a consequence of an "technical" impossibility as the "position in the market" of a operator by nature could not be the

[21] ECJ CE, 23 October 2003, no. 65.
[22] ECJ CE, 30 June 2005, no. 295.

object of the right of ownership. Even in this case, the ECJ stated that "no economic operator could not re-established the right of ownership on the position he had before the creation of a mutual market, as his position is a temporary economic one, due to the changes of the circumstances".
In this direction, the Court of Justice accepts a broader concept of the "wealthy", typical of the Common Law system, where it is included in the ownership protection all the rights of the personal nature that derive from the exercise of economic activity[23].

This is due to the fact that the more comprehensive is the concept of property, the bigger is the protection of the competition values.

The protection of the right of ownership and its restriction of the liberal nature, as it is seen from above, collide with the social function of the property treated in the national constitution; this assessment become more visible if we recall another decision, the case of FIAMM in 2008, in which the ECJ has stated that: "being that the article 288 (2) (now article 340 TFEU on non-contractual liability of EU) aim to protect the important principle of the rule of law in protection of the individual and in particularity of their rights of ownership and the free economic initiative, starting from the liberal orientation of the legal order of the Community, interpreting in such a way that favour the most liberal principles that characterize the legal system of the States Member"[24].

In other words, the principle of the rule of the law exists to protect the property and the economic activity and taking into account that the principle of the law dominance defines the political and legal content of the judicial system in the States Member. The interpretation of the Treaties and of the law that derive should be done aiming their liberal evaluation and content in a way that they can achieve the adaptation with any State Member.

The decision FIAMM is the crown of the jurisprudence orientated by the liberal doctrine principles; we can mention here the case of Schrader[25], where the right of ownership is set as a boundary opposite a very high taxation or Viking, Laval and Rùffert decision which declare as a priority the economic freedom in the social and work rights, that are part of the national legal system.

Specially, in Viking case[26] the conflict between Finnish Seamen's Union[27] (FSU) and Viking Line ABP[28] (hereinafter "Viking") had as an

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[23] Moscarini A., (2006) "*Proprietà privata e tradizioni costituzionali comuni*" , Giufree' Editore pg. 264 ss.
[24] ECJ CE, Grand Chamber, 9 October 2008, cases C-120/06 P and C-121/06 P.
[25] ECJ CE, 11 July 1989, no. 265.
[26] ECJ CE, 11 December 2007, no. 438.

object a collective initiative of the trade unions FSU to urge the sign of a collective contract with the private company "Viking" located in the same state with the trade union and the implementation of the provisions of this contract the employees of a company established in another State Member that is controlled by "Viking".

The request directed to ECJ has to do with the interpretation of the article 43 TEU (now article 49 TFEU) and with the Council Regulation (EEC) of December 22, 1986, no 4055 that applies the principle of the freedom to offer the transportation services between the State Members and those that are not members.

The court has stated that article 43 TEU should be interpreted in a way that the collective initiative forced a private company located in a State member to sign a contract with a trade union located in the same state and to implement the provisions of this contract to the employees of the company established in another State Member but that is controlled by "Viking" put restrictions on the freedom to stay.

These restrictions could be justified in principle because of a public interest such as the protection of the employees with the condition that verified these are the necessary means to achieve the objective and does not go beyond what's necessary.

In Laval case, the ECJ has declared that a host State Member could determine the realization of a service in its country territory respecting the working conditions and employment that overlap the obligated rules of the minimum protection of the article 3, directive 1996/71[29].

Finally, in Rùffert case it is predicted that the public work tenders of a State Member will be offered to the companies located in other State Member with the condition that they accept the obligation to give the employees minimum salary in accordance with the collective agreement in force in the state were the working will be performed. Through a legislative prediction the public authorities will evaluate as a winner of the public work tenders, the company will accept in a written form the obligation of the minimum salary for the employees that will be employed to perform these works.

[27] Finnish Seamen's Union (FSU) is a Finnish maritime union, which has about 10,000 members. The crew of the ship Rosella are members of the FSU. FSU is a member of the ITF, an international federation of trade unions in the transport sector, the centre of which is in London (UK).

[28] Viking, a company incorporated under Finnish law, is a large ferry operator. It manages seven vessels, including the Rosella ship under Finnish flag, guaranteeing connection between Tallinn (Estonia) and Helsinki (Finland).

[29] ECJ CE, 18 November 2007, no. 341.

In Rùffert case, Land Niedersadchsen predicted that the public work tenders that are in its competency will be given to the companies (located in another State member) which will agree to pay their employees at least the rate set by a collective agreement and against the payment of the penal condition, the contractor will ask the same obligation even from other subcontractors[30].

About the case ECJ has considered the standards of the minimum salary defined by the collective contract of the state where the work will be performed in contrary to the Regulation 96/71 which limits the means used by the national legislature to adjust the work conditions of the employees transferred by foreign companies.

For this reason, the article 49 TEU has been violated because the obligations placed by Land Niedersadchsen brings a heavy economic burden for the foreign companies that apply low payment bringing a limitation of the freedom to offer services, which are unnecessary to protect the rights of the transferred employees (now protected by the Regulation 96/71) and the trade unions freedom.

Conclusion

From the analysis of some of the European Court of Justice decisions, it results that the immunity of the right of ownership overpasses conclusively the concept regarding which this right could be limited from an internal norm. This marks at the same time the end of the social function of the property, typical of the constitutional documents of the States Member[31].

The principles which are the basis of the community judicial order and also the jurisprudences of the different courts are those of the rule of law, the maximum protection of the right to private property and economic freedom. These principles should be followed even from judicial systems of any States Member, which according to the European legislature should be freed by the conclusions of constitutional acts on the social function of the right to property.

Even the objective with the general interest through which are evaluated if a limited measure of property is legal or not, are referred to the limitation outside the right to property, such as: environment, health, free competition, security.

References:

Bessone M., (2000), *Trattato di diritto privato*, Torino, Giappichelli.

[30] ECJ CE, 3 April 2008, no. 346.

[31] Cited, Rodota S, *Note critiche in tema di proprietà*, pg. 1297.

Frigo M., (1998), *Le limitazioni al diritto di proprietà e all'esercizio delle attività economiche nella giurisprudenza della Corte di Giustizia*, në "Rivista di diritto internazionale privato e processuale".
Megret J., (1987), *Le Droit de la Communauté économique européenne: commentaire du traité et des textes pris pour son application*, vol. 15, *Dispositions générales et finales*, Bruxelles.
Moscarini A., (2006) "*Proprietà privata e tradizioni costituzionali comuni*" , Giuffre Editore.
Tizzano A., (2004), *Trattati dell'Unione Europea e della Comunità Europea*, Milano, Giuffrè Editore
Trimarchi M., *Proprietà e indennità di espropriazione*, në Rivista trimestrale "Europae diritto privato", Giuffre Editore, 4/2009.
Rizzo V., (1997), *Diritto privato comunitario. Fonti, principi, obbligazioni e contratti*, Napoli, ESI.
Rodota' S., (1960) *Note critiche in tema di proprietà*, në "Rivista trimestrale di diritto e procedura civile", II, Giuffré Editore.
ECJ. CE, 14 May 1974, no. 4.
ECJ. CE, 13 December 1979, C-44/79.
ECJ. CE, 11 July 1989, no. 265/87.
ECJ. CE, 5 October 1994, no. 280.
ECJ CE, 30 July 1996, no. 84.
ECJ CE, 23 October 2003, no. 65.
ECJ CE, 30 June 2005, no. 295.
ECJ CE, 12 January 2006, no. 504.
ECJ CE, 11 December 2007, no. 438.
ECJ CE, 18 November 2007, no. 341.
ECJ CE, 3 April 2008, no. 346.
ECJ CE, Grand Chamber, 9 October 2008, cases C-120/06 P and C-121/06 P.
ECJ CE, 3 Dicember 2009, cases C-402/05 P and C-415/05 P.
ECJ CE, 9 March 2010, cases C-379/08 and C-380/08