PLANNING, PUBLIC CONTRACTS AND EUROPEAN LAND LAW

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Organizing a Single European Market affects property. Although the European Treaties does not provide grounds for a prejudgment of the national rules that govern the system of property ownership, national systems of property may not form an infringement to the rules of the single market. Rules for public contracts and public works concessions constrain the role of public property in planning policies, and may have considerable theoretical and practical implications. This paper discusses these implications. The theoretical implications will be focused on the relationship between European law and planning law. The practical implications will be focused on planning practice.

Introduction

Public authorities sell land for planning purposes. Recently, it has been debated whether such a sale of land entails a public works concession and should follow European public procurement proceedings. This debate is going on in several cases in different countries, such as in York (UK) for the sale of land for a new housing area (CEC, 2009b), in Wildeshausen (Germany) for the sale of land of a former military area (OLGD, 2008b; ECJ, 2010), and in Eindhoven (The Netherlands) for the sale of land to promote urban regeneration (CEC, 2009a). The idea is that the transfer of land is part of a wider contract, which for a part is about the realisation of public works. The development value of the property on this land is seen as the pecuniary interest of the contract. The European Directive on public contracts defines a public works concession as a public contract in which the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.

As the Treaty of the Functioning of the European Union (Part of Lisbon Treaty) states in article 345 (former article 295 of the Treaty of Rome) “The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.” This does not involve that Brussels has no impact on property, “…because the workings of the internal market are immune from the article 295 proscription” (Sparkes,

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2007). In his book of 547 pages Sparkes analyses the diverse ways the internal market has created a substantive European Land Law. In our paper we will elaborate on the contribution of the public works directive towards European Land Law. In what ways is the sale of land for planning purposes affected by this element of European Law?

European integration involves both negative integration, that is to dismantle the barriers to trade and other market exchange over national borders within Europe, and positive integration, which is about the substitution of national disparate regulatory regimes for a harmonized EU regulatory framework (Fligstein and Stone Sweet, 2002, 1216). The legal integration in Europe has been moved forward through the legal doctrines of supremacy and direct effect of European law. "The doctrine of direct effect enabled private actors to bring actions against their own governments in national courts, and the doctrine of supremacy meant that national judges had to resolve these conflicts with reference to EC law." (Fligstein and Stone Sweet, 2002, 1223) Due to these doctrines European law has a 'constitutional' position in relation to national law (Eleftheriadis, 1998). Parties may litigate before national courts if they consider that national law does not entitle them to rights they have according to European law, and national courts must consider whether the direct effect of European law might result in putting national law aside (Alter and Vargas, 2000).

The relationship between public works concessions and the right of ownership has according the advocate general of the European Court of Justice (ECJ) Mengozzi 'significant theoretical and practical implications' (AGECJ, 2009, nr. 86). This paper discusses these implications.

Property vs Land law

Property is a complex concept, which can be defined in different ways. The most common metaphor for property, especially in the context of common law, is as a 'bundle of rights', or a bundle of sticks in which each stick represents a different right. This conception is used by Healey (Healey, 1992) in her institutional model of the development process, and many other authors who discuss the relationships between planning and property use this metaphor explicitly or implicitly (Buitelaar, 2003; Needham, 2006; Janssen-Jansen, 2008; Penker, 2009).

The state has a distinct role in relation to property. "Property rights actions are state activities that define and enforce property rights, i.e., the rules that determine the conditions of ownership and control of the means of production." (Campbell and Leon, 1990, 635) These 'actions' are not always intended. They can be the result of activities. Not all means of production are related to land, or intellectual property law, and even law regulating labour may fit within this definition. The idea is that "…the state transforms and permanently shapes the organization of the economy through property rights actions." (Campbell and Leon, 1990, 642) Governance transformations may "…stem directly from shifts in property rights and from variations in

property rights across the institutional terrain of the state." (Campbell and Leon, 1990, 642) Changes of property rights may have nothing to do with explanations relating to economic inefficiencies. In Europe states have been active in realizing a Single European Market, this is an action that may reshape property.

Property is a complex concept. It may be conceptualised as having the following five dimensions (Carruthers and Ariovich, 2004):

1. The object of property: what can be owned?
2. The subjects of property: who may own?
3. The articulation of use: what can be done with it?
4. The enforcements of rights: how are property rules maintained?
5. The transfer of rights: how property moves between different owners.

Property has consequences in relation to aspects as inequality and economic performance (Carruthers and Ariovich, 2004). Property depends on the state, that is, "States provide rules and courts so that market actors can engage in exchange and be able to try and construct stable markets." (Fligstein and Merand, 2002, 10). According to Fligstein (Fligstein, 1996) the social institutions necessary to make markets are (1) property rights, (2) governance structures, (3) conceptions of control, and (4) rules of exchange.

"Theoretically, a single market implies rules that (1) produce a well-defined system of property rights, (2) sanction certain forms of competition and cooperation, and, (3) minimize the cost of transaction between economic units." (Fligstein and Mara-Drita, 1996, 17) In the EU, however, the member states have long traditions in having their own rules relating property rights, rules of exchange and governance structures. The solution was that the EU policies relating to the Single market focused on opening the market by changing the rules of exchange (Fligstein and Mara-Drita, 1996). In the process of European integration the rules of exchange have for example been developed regarding the mutual recognition of rules relating to goods (Fligstein and Merand, 2002), a good that may be sold according to the rules of one of the member states, may be sold in all other member states, which has provoked the emergence of European regulations regarding these goods, such as toys, and food (Fligstein and Stone Sweet, 2002).

According to economic theory on transactions, however a 'transaction is not essentially an exchange of commodities but of property rights over commodities' (Webster, 2009, 478), and so changing rules of exchange may affect property rights, and its organization within the member states.

Fligstein considers the survival of the firm as the goal of action, and in his analysis actors are therefore geared towards the creation of stable worlds, i.e., 'shelters from price competition' (Fligstein, 1996, 659), and states " ...provide stable and reliable conditions under which firms organize, compete, cooperate, and exchange. The enforcement of these laws affects what conceptions of control can produce stable markets."

(Fligstein, 1996, 660) Law on public contracts break through this shelter as competition on price is the most important criterion in the award of contracts. Consequently it may be expected that actors show reluctance towards organising the market differently.

There have also been some critics on the conception of property as a bundle of rights (Arnold, 2002; Rodgers, 2009; Passinhas, 2010). Arnold (2002) indicates that this metaphor struggles with incoherency, its marginality in relation to categorization of property, inadequate contextualism, its estrangement to the physical object, its orientation on rights, and empirical problems in relation to what according to the law property entails. Even in the USA judges may deviate from this metaphor or may find not much guidance in it for their judgments (Arnold, 2002; Passinhas, 2010).

Arnold (2002) proposes an alternative metaphor of property as a 'web of interests'. Although this metaphor, just like, any other metaphor, steers perception in an uneven way, it hat potential in relation to bridging the gap between professionals and scientists in relation to property and planning (Meinzen-Dick and Mwangi, 2009). After all, coordinating the web of interests around places and spaces may be also be a metaphor of planning activity. This web of interest "…is a set of interconnections among persons, groups, and entities each with some stake in an identifiable (…) object, which is at the center of the web. All of the interest-holders are connected both to the object and to one another." (Arnold, 2002, 333) In this definition there is also (1) an object, there are (2) persons, groups and entities, (3) relationships between these persons et al, and the object and (4) the relationships amongst these persons. This concept has merit for analyzing the relationship between property and European law (Passinhas, 2010). Creating a Single European Market may alter the web of interests around an object, such as, that economic operators that may be active in realizing works are differently chosen.

European Land Law

As the Treaty of the Functioning of the European Union (Part of Lisbon Treaty) states in article 345 (former article 295 of the Treaty of Rome) "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership". As a result of this pure domestic property law such as the systems of conveyancing, the rules on succession, and family law stay outside the scope of the EU. Although therefore the basics of national systems of land law remain free from European interference, this does not mean that Brussels has no impact on the property rights on land. On the contrary, as Sparkes concludes in his recent analysis of the influence of Europe in this area "it has not been a serious impediment to the development of an autonomous European land law." (Sparkes, 2007, 109).

The crucial moment in this development was the introduction of the free movement of capital in the Maastricht Treaty in 1994. Residents of the EU are free to move capital across the internal market. Such a

movement of capital is involved in a sale and purchase of land, and when a cross-border element is involved in this the freedoms of the EU treaty comes in play. An example is the purchase of land in Tirol by a German. According to Austrian law this purchase required an authorisation by the Austrian administration. The European Court of Justice considered this requirement to be a control on land ownership that affected the free movement of capital without sufficient justification (ECJ, 1999a).

Not only the payments made to buy land, but also loans for the purchase of land or the construction of a building on the land, and the creation of a mortgage to secure the loan are examples of capital movements (ECJ, 1999b).

In the words of Sparkes "the dawn of 1994 represented the birth of European Land Law" (2007, 22).

Although the conclusion must be that a coherent system of EU Land Law as such does not exist, Sparkes identified an important number of areas where European Law has "a significant and substantive effect" on property law (2007, 153). Examples are the introduction of an Energy Performance Certificate (EP and CEU, 2003), the regulation of the timeshare marketing in order to protect consumers buying time-shares (EP and CEU, 1994), and the setting of a framework for e-transactions regarding land (EP and CEU, 2000). However for our subject is important the impact of the Directive 'on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts' (EP and CEU, 2004), i.e. the public procurement directive on contracts involving land.

Public Contracts, European Land Law and Planning Law

In relation to the promotion of a Single European Markets, the European Parliament (EP) and the Council of the European Union (CEU) have issued a directive for public contracts, which are defined as 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services' (EP and CEU, 2004, article 2a). The idea is that authorities advertise contracts for works, supplies and services European wide in a way that there is a level playing field for economic operators throughout the European Economic Area (Korthals Altes, 2006). This directive breaks through regional networks of public-private relationships (Korthals Altes and Taşan-Kok, 2010). The directive also defines 'public works concessions', which are the same as public work contracts, 'except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment' (EP and CEU, 2004, article 3). In several occasion debates has been raised whether land transactions in relation to planning activities may follow European proceedings for public contracts.

The directive on public contract may have an impact on a diversity of activities in planning, such as development obligations in kind (ECJ, 2001), and contracts in which the sale of land is part of deals in relation to works to be realized (ECJ, 2007).

The relation between ownership and European Law has been discussed several times by the European Court of Justice of the advocate general to this court.

In relationship to planning obligations, the ECJ has ruled that it is possible that the authority may oblige the landowner to follow the proceedings (ECJ, 2001).

> "Since the municipality had no power to choose who was to be made responsible for executing the infrastructure works, since, by operation of law, that person is the owner of the land to be developed and the holder of the building permit, it was possible to find that the award procedures could be applied, in place of the municipality, by the holder of the permit, the only appropriate person, according to the law, to execute the works, as an alternative to the payment to the municipality of a contribution to the infrastructure costs." (ECJ, 2005, paragraph 57)

Here European Law respects the current situation of ownership, which makes it possible that the owner of the land is entrusted with following the public contract proceedings. In a situation where the development company does not own the land this is not possible. To put it in other words, European Law does not oblige contracting authorities to purchase the right to contract works on someone's land compulsory.

This has resulted in further questions about a contracting authority selling land for which a public work contract must be issued. As authorities expect that such a contract will take place, are they free to dispose the land to someone else? This has impact on the working of the Single European Market. Moreover it is not uncommon that contracts about the disposal of land by authorities regulate elements relating to works to be developed on the site. The most radical position on these aspects was ruled by the *Oberlandesgericht* in Düsseldorf (OLGD) in Germany. The OLGD ruled that European public procurement rules must be followed in those cases where the land sold forms part of an urban development plan (OLGD, 2007a; 2007b; 2008a; Korthals Altes, 2010). This involved that contracts that defined land transfers by authorities to private actors were nullified, and left German lawyers to discuss the options it had for the ownership the land (Jenn and Peiffer, 2008). Here it must be noted that the OLGD has made also a decision in a compensation case, which was based on a general principle in German procurement law that in mixed contracts, only compensation must be paid for that part of the contract that is at stake. According to the OLGD the contract about the disposal of land was not at stake, but only the 'building order' (*Bauauftrag*) that was linked (*verknüpft*) with the contract for the sale of land. Although the OLGD decided that according to public contract law the sale of land and the building order must be considered as one, in relation to the pecuniary interest of the parties the contracts must be considered separate (OLGD, 2007c, paragraph 6).

Although, originally the OLGD was of opinion that the matter was so clear cut a consequence of earlier guidance by the OLGD (OLGD, 2007a), they finally gave way to preliminary proceedings to the ECJ. The ECJ (2010) did not follow the radical position of the OLGD. However, even the consequences of the interpretations of the ECJ go further than many practices in Europe as Europeanization is a slow process (Korthals Altes, 2010)

A first indication of the position of the ECJ was given in the conclusion of the advocate general Mengozzi. He indicates on the matter of the relationship between ownership and public works concessions that the 'compatibility between public works concessions and the right of ownership has significant theoretical and practical implications' (AGECJ, 2009, paragraph 86). First of all the rights of concession has been considered to be a limited right. "By its very definition, a concession is a way of allowing a person to exploit property to which that person could not otherwise claim any right." (paragraph 88) "..the problem arises not so much from the objective characteristics of the right of ownership in connection with the possibility of exploiting the property, as from the potentially unlimited duration of that right. Consequently, the exploitation entrusted to the concessionaire can never be granted for an unlimited period of time, regardless of the legal title by virtue of which it may be exercised." (paragraph 93)

The European Court of Justice indicates that a contracting authority must be in the position to exploit a work before it can transfer this right to another party. The contracting authority will normally not have this position when "…the only basis for the right of exploitation is the right of ownership of the economic operator concerned." (ECJ, 2010, paragraph 73). The ECJ justifies this as follows.

> "The owner of land has the right to exploit that land in compliance with the applicable statutory rules. As long as an economic operator enjoys the right to exploit the land which he owns, it is in principle impossible for a public authority to grant a concession relating to that exploitation." (ECJ, 2010, paragraph 74)

According to the ECJ an 'essential characteristic' (ECJ, 2010, paragraph 75) of a concession is that the concessionaire bears a substantial operating risk. The ECJ did not follow a suggestion of the EC "that that risk may lie in the concessionaire's uncertainty as to whether the urban-planning service of the local authority concerned will, or will not, approve its plans" (paragraph 76) as in this type of scenario

> "…the risk would be linked to the contracting authority's regulatory powers in respect of urban planning and not to the contractual relationship arising from the concession. Consequently, the risk is not linked to exploitation." (ECJ, 2010, paragraph 78)

Granting planning permission over private land is therefore no concession, which must be procured following the proceedings set by European law. Also a contract for the sale of land in which is stated that both parties have the intention that urban development takes place, and in which the contracting authority

reserves a right to examine the building plans or will take a decision in relation to regulatory planning powers does not have to follow these proceedings. It is different, though, if there is not only an intention that urban development will take place, but there is also an obligation to realise works. Such an obligation involves that the authority has given legal means, based on law of the member states, to demand performance. This obligation must go beyond a provision that gives the authority the right to demand the retransfer of the land to them.

The ECJ did not revise an earlier judgment in the Scala case that the European procurement directive "…precludes national urban development legislation under which, without the procedures laid down in the Directive being applied, the holder of a building permit or approved development plan may execute infrastructure works directly, by way of total or partial set-off against the contribution payable in respect of the grant of the permit.." (ECJ, 2001, paragraph 103) There seems to be so a difference between the 'regulatory powers in respect of urban planning' (ECJ, 2010, paragraph 78, see also above), and the drafting of a development agreement, which is, according to the ECJ a public contract when this agreement is about works, services or supplies with a value above the threshold fixed by the directive.

The recent German case is not directed towards a local authority in the process of making a development agreement, but is geared towards a national authority that sells property for development, where later development obligations must be set by the local authorities, and the question is whether this sale itself must be considered to be public contract, i.e. it must follow European tender proceedings. The idea that development must be according to planning regulations is not enough ground for the sale being a public contract itself.

The transfer of ownership itself, though, appears not to be the concession, as the ECJ gives some comments in relation to the remarks of the advocate general. "[W]ith regard to the duration of concessions, there are serious grounds, including the need to guarantee competition, for holding the grant of concessions of unlimited duration to be contrary to the European Union legal order" (ECJ, 2010, paragraph 79). In principle this limits the freedom to contract over complex land sales in which there are obligations to realise work attached to the transfer of the land. This contracts must not only follow the proceedings of publishing the contract, but also they must put an end date to the concessions. In practice these end dates are often included, for example, a concession to build housing for sale, ends if the houses are sold. Obligations to operate dwellings to rent them to specific target groups may have a duration for which this is obligatory.

Discussion

If we go back to the five dimensions of property rights (Carruthers and Ariovich, 2004), introduced above, we can discuss the impact this piece of European law has on property rights.

The object of property.

European Law on public contracts has no direct impact on fundamental differences in property rights as the variety in definitions of ownership between civil and common law jurisdictions, and the way land use rights as emphyteusis, superficies, usufruct and leasehold are defined by national law. It does however define the concept of public work concession, which is a property right granted by an authority to an economic operator. The debate about the relationship between property rights in land and this concession indicates that in many cases a relationship may exist between the ownership and this right, which is partly guided by European law, and for which national states may develop their own systems, as makes a good fit with this system.

The ECJ, as we have seen above, defines the difference between regulatory activities of the state, and property rights that can be transferred to others. Changing planning regulations cannot be considered to be a concession, and a contracting authority must be in the position to exploit a work before it can transfer this right to another party. In relation to defining what a contract is, the ECJ has in the past clearly indicated that an agreement under national public law can be a contract according to European law (ECJ, 2001; 2007). This indicates that European law has a separate position in defining what is in the area of private property rights, and what is in the domain of regulatory government activity. For planners it may be convenient to know that town planning regulations are, indeed, regulatory activities.

The object is also limited by the rule that the scope of the contract cannot develop beyond the contract announcement published in Tender Electronic Daily.

Another element of property that is not acknowledged is the relational capital of actors acquired based on previous contacts with the authorities (Korthals Altes and Taşan-Kok, 2010).

The subjects of property.

European law uses the principle of mutual recognition in many fields. The general principle is so that a legal entity that is eligible in one of the member states to own certain property, is allowed to do so in all other member states. Limiting public contracts to local enterprise does not follow this principle, and the rules go even further to create a level playing field between enterprises. In relation to public contracting the rules are mostly about the transfer of these rights (see below).

The articulation of use.

European contract law does not put many limits on this aspect. It does however indicates that granting building permissions based on regulatory activities of the state is an activity of another type than the transfer of private property rights.

The enforcements of rights.

Due to the doctrine of direct effect, and the duty to transpose European directive in national law, enforcement is not limited to European institutions. Parties may use national law to enforce the rules. They however may call-in the European Commission. At the end the ECJ may judge whether national enforcement has met European Law.

The transfer of rights

This aspect comes most eminently. The rules are about public contracts and public works concessions. This case shows that changing the rules about the transfer of rights has impact on other dimensions of property. This may reinforce the meaphor of property as a web of interests. This case sows that this web changes, in relation to the way authorities may attach obligations to the transfer of property rights to economic operators. So property is affected.

Implications for practice

Authorities may use property rights for planning purposes. The strategy in the formation of the single market to concentrate on the rules of exchange, involves that the impact on property rights starts just there. If the local authority is only disposing land to enable development, the impact of the Single European Market is limited. This is different as this transaction also entails duties, especially as these duties can be related to performing works, services of delivering supplies, such as, realising infrastructure or affordable housing.

This involves that ‘in house’ direct development is not much affected by the legislation, and only where exchange occurs with market parties, there is an impact. Authorities that are willing to evade making public contracts may be tempted to do everything themselves.

The contracting model of the European Directive is based on certainty. Contracts may not be beyond the original contract notice. The impact of this limitation of the property rights regarding to exchange, may

involve that authorities will only make contracts in a late stage in the process, as specifications are clear cut. Strategic partnering, the joint operation of public and private actors in a process, involves that at the start the products to be delivered are not specified, and may well be out of the range anticipated at the start.

The potential impact of this on property development, is also be underlined by a organisation as the British Property Foundation, which puts this theme first on a five point Regeneration Manifesto, and is requesting more guidance to combat ‘ misinterpretation’ , that is , ‘the use of tendering processes in circumstances where this is both unnecessary and unrealistic’, and action to reduce inefficiency and costs of the procurement process (BPF, 2009, 4). According to this manifesto following this procurement proceeding deters developers form participation in regeneration schemes. Together with the Local Government Association they perceive that their way of working is affected by this procurement scheme (BPF and LGA, 2009). Guidance was provided by the Office of Government Commerce (OGC, 2009). The idea, however is, that public bodies will obtain their own legal advice before proceeding.

This appears also the case in Germany. Although the interpretation of the OLGD no longer holds, the theme is clearly on the agenda of local authorities, development companies and their law firms (Hertwig and Lamm, 2010), and their relationships, and hence property as a web of interests, will be structured by these regulations.

The European Parliament, who has together with the Council of the European Union issued the directive on public contracts has recently adopted a resolution on new developments in public procurement, in which it welcomes the judgment of the ECJ about public contracts in relation to town planning regulations, as, although the directive has ‘ broad and ambitious aims’, its scope cannot “ be extended indefinitely by appealing to the purpose of the measure, since otherwise there would be a danger that all town planning activities would be subject to the directive, given that, by definition, provisions on the possible execution of building works substantially alter the value of the land in question(..)” (EP, 2010, paragraph 17). In this resolution the European Parliament calls on the Commission to simplify and streamline proceedings, which has not happened yet, although this was one of the aims of the 2004, and presently ‘public procurers often have to prioritise legal certainty above policy needs’ (EP, 2010, paragraph 3). Planning authorities do not always follow this route, just as procurement errors are the major irregularities in spending European regional funds (Court of Auditors, 2009), but this difference between local practice and European roles may add to uncertainty in the property development processes.

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