Fair Compensation for Telecom Rights in Land in Sweden and the UK*

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Abstract: This article explores how the ever increasing demand for and rapid development of high-speed broadband have influenced the policy for compensation for compulsory grants of telecom rights in land in Sweden and the UK. The article assesses whether the compensation in Sweden and the UK is fair in relation to compensation for other necessary social infrastructures such as water and electricity, consideration for equivalent voluntary rights in land, general principles of expropriation law and the right to peaceful enjoyment of property according to Article 1 in the first Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

I. Introduction[1]

Digital connectivity and high-speed broadband are vital questions for economic growth and prosperity and have recently become high profile issues within the European Union (EU).[2] The EU has adopted a series of directives aimed at creating a functional, effective and globally competitive Digital

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2 See for example the European Parliament resolution of 19 January 2016 on Towards a Digital Single Market Act (2015/2147)(INI); the European Council's conclusions, 28 June 2016, (EUCO 26/ 16); the European Commission Connectivity for a Competitive Digital Single Market – Towards a European Gigabit Society, 14 September 2016, (COM 2016) 587 final.

Market.[3] These directives cover a wide range of issues arising within this Digital Market, such as the authorization of electronic communication network services, personal data protection and infrastructure sharing.

Access to land is a necessity for achieving the aims of improving broadband speed and coverage, and to ensure free competition in the telecom-market. In most European countries, telecom-rights are granted in one of two forms, voluntarily through negotiations with landowners or compulsory by court order, expropriation or the like. When access to land is compulsory, according to most constitutions, landowners are to be financially compensated.[4] A fundamental principle regarding compensation for compulsory rights is that such compensation should be fair. How fairness is measured can differ with regards to the specific circumstances in a particular situation. A number of factors should be considered with regards to fair compensation for compulsory rights, for example, which calculation model provides the most accurate result or whether compensation should be based on a liberal or socialist view.[5]

[3] See for example Directive 2014/61/EU of The European Parliament and of the Council, 15 May 2014, on measures to reduce the costs of deploying high-speed electronic communications networks; Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services, directive 2002/20/EC of 7 March 2002 on the authorization of electronic communications networks and services, Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services and Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

[4] The requirement of compensation follows from fundamental principles of expropriation law as are recognized by the European Court of Human Rights (ECtHR) with regards to the application of Art 1 Prot 1 ECHR, See for example, *James v the United Kingdom* (1986) Series A No 98 para 54; *Lithgow v the United Kingdom* (App No 8793/79) (1986) Series A No 102 para 120 and *Hentrich v France* (App no 13616/88) (1994) Series A No 296-A para 48; The requirement of compensation has also recently been identified and determined as a core principle of European Expropriation law through a comparative research project between 15 European countries, JAMA Sluysmans and ECL Waring, 'Core Principles of European Expropriation Law' (2016) 5 EPLJ 3.

[5] See for example T Allen, 'Liberalism, social democracy and the value of property under the European Convention on Human Rights' (2010) 59 ICLQ 4; For further theoretical examinations of fair compensation see for example FI Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation"' (1967) 80 Harv L Rev 6; J Rawls, *Rettferdighet som rimelighet: En reformulering* (Pax 2003).

The issue of fair compensation is discussed here primarily from the basis of a specific situation and a particular form of compulsory grant, examining what may be seen as fair compensation for compulsory telecom-rights granted in place of earlier rights, used for the same purpose and entered into on a voluntary basis. Fair compensation for telecom-rights is examined from a comparative law approach, Sweden and the UK, primarily chosen due to their different approaches to regulating compensation for telecom-rights. A secondary reason for comparing Sweden and the UK is that the effects of the regulation in both countries, from the outset fundamentally different, over time are becoming more similar.

Telecom-operators can acquire rights according to the provisions laid down in the Utility Rights Act in Sweden,[6] or the Electronic Communications Code (the Code) in the UK,[7] by either negotiating with landowners directly or by a compulsory grant from the respective designated authority.[8] The Utility Rights Act and the Code respectively encompass provisions regulating the calculation of compensation for compulsory rights. Even though the calculation model for compulsory rights does not formally apply to an equivalent voluntary right in land, consideration and compensation levels for both forms of rights under normal circumstances are more or less the same. In Sweden, the close relation between the two forms makes the provisions regarding compensation for compulsory rights also indirectly applicable to voluntary rights. The reason for this is that the calculation basis for compensation for compulsory rights is also used as a basis for rent negotiations by telecom-operators. In the UK, according to the 2003 Code, consideration levels for both forms have been the same because fair consideration for compulsory grants was decided on the basis of the current market rent.

The issues raised by the national differences in compensation levels between voluntary rights and compulsory telecom-rights in Sweden and in the UK are examined here. These differences in compensation levels in recent years have been extensively discussed and debated in Sweden. This debate has focused on fairness with regards to a general sense of justice and the fundamental issue of whether compensation for compulsory rights should be compensated according to no-scheme based principles for loss or according

6 *Ledningsrättslag* (1973:1144)

7 The Code is in Schedule 2 to the Telecommunications Act 1984 as amended by Schedule 3 to the Communications Act 2003.

8 The designated authority in Sweden is *Lantmäteriet*, Utility Rights Act section 5, and in the UK the County court. The Code (2017) Sch 3a part 16 para 94 (the original print).

to other economic principles, for example, profit-sharing. Fair compensation for telecom-rights has also been recently discussed and debated in the UK due to the 2017 reform of the Code. In contrast to the Swedish debate, however, the UK discussion has focused on lowering the levels of compensation for telecom-rights to create a compensation level that is equivalent to the compensation granted for other necessary infrastructure systems, such as gas and water.

The different approaches to compensation for telecom-rights in the chosen countries are compared and evaluated from a fairness-based perspective. Fairness is discussed in relation to the calculation basis for compensation as to compulsory rights in the chosen countries, the definition and nature of the property right, compensation levels for other necessary social infrastructures such as water and electricity, consideration levels for equivalent voluntary rights in land, general principles of expropriation law and the right to peaceful enjoyment of property according to Article 1 in the first Protocol of the ECHR.

The issues discussed in this article primarily focus on the application of Swedish and UK telecommunication legislation. Even though the focus is on Swedish and UK law, the discussion can be of interest for similar problems arising in other jurisdictions. Despite the individual characteristics of the national legal systems, the main issues explored are also of a more general interest.

II. Compensation for Telecom Rights – Sweden

1. Compensation According to Expropriation-based Principles

The concept of fair compensation for compulsory telecom-rights in Sweden is based on general principles of expropriation law.[9] The compulsory grant of telecom-rights is however not per se to be perceived as a case of expropriation. The right for telecom-companies to receive compulsory access to land is primarily regulated by the Utility Rights Act and not by the Expropriation Act.

The rights of telecom-operators to get access to land for telecom-purposes is regulated in the same way as other necessary infrastructure systems. The

[9] See The Utility Rights Act section 13, which prescribes that compensation for a compulsory grant of certain rights for cables, conduits etc, *ledningsrätt*, is to be decided according to Chapter 4 of the Expropriation Act, *expropriationslag* (1972:719).

Utility Rights Act is a general act applicable to the installation, for example, of water and gas pipes, electrical conduits and cables. As with the Expropriation Act, the provisions of the Utility Rights Act ensure compulsory access to land for the purpose of the common good. However, in relation to the Expropriation Act, the Utility Rights Act is a form of lex specialis, an act especially created for the purpose of ensuring that necessary infrastructure structures can be placed and serviced on land. A further distinction is that the requirements for the grant of such a right, for example for a cable, is less formal, less complicated and quicker than the procedures necessary for the expropriation of property.

Even though there are differences between expropriation under the Expropriation Act and a compulsory grant for example of cable rights under the Utility Rights Act, with respect to compensation for these compulsory rights there is no difference as between the landowners whose land is taken or controlled according to Expropriation Act or to the Utility Rights Act. In terms of the actual calculation of compensation, compensation is to be granted for the loss of the underlying value of the land and any other losses, regardless of whether that loss is caused by loss of land, the disturbance of having work done or the loss in value of the land at the end of such operations.[10]

The fundamental underlying principle of the provisions regarding compensation in the Expropriation Act is that landowners are not supposed to gain economically from compulsory acquisitions or grants of rights, but be fully compensated for their losses. The aim in Sweden, as in many other countries, is to keep costs for compulsory acquisitions low but fair. The aim to keep cost for compulsory acquisitions low follows from the time and the circumstances when the compensation provisions of the Expropriation Act were formulated. At the time when the Expropriation Act was enacted, land development for the common good was primarily executed by public entities and funded by public means.[11] The motivation for keeping costs for expropriation low was consequently that the expropriation project was normally state-funded.

[10] The Expropriation Act Chapter 4 sections 1–2.

[11] For a historical overview of the Swedish fundamental principles for compensation as applied and formulated in the Expropriation Act, see T Kalbro and J Paulsson, 'Development of Swedish Legislation regulating Compensation for Compulsory Acquisition – A Law and economics Perspective' (2014) 3 EPLJ, 222–223; Prop 1971:122, 165–168; and R Hager, *Värderingsrätt – särskilt om ersättning och värdering vid expropriation* (Jure 1988), 103–107.

2. Fair Compensation? The Connection Between Consideration for Voluntary Rights and compensation for Compulsory Utility Rights

The fundamental principles for calculating compensation for telecom utility rights in Sweden are in essence similar to how compensation for compulsory acquisitions in land is calculated in most other European countries. The principles are thus internationally adopted and can generally be said to be reasonably fair.[12] The Swedish principles for compensation can even comparatively, from a certain perspective, be perceived as particularly generous since landowners are compensated above the full market value of the property, to the equivalence of 125 per cent of the market value. Even so, for a certain type of utility rights used for telecom-towers and smaller structures, the telecom-tower land space, the compensation levels have been soundly debated and questioned with regards to fairness.[13]

The issue of fair compensation for tower-land arose in 2008 as a result of a Supreme Court ruling on three similar cases, the Tower cases.[14] The issue tried in these cases was whether the compensation level for utility rights granted in place of an earlier right should be compensated according to the value of the underlying land according to its previous use as forest, pasture or arable land, or if compensation should be based on the value of the use of the land for telecom-purposes. In all three cases, the utility rights had been granted in place of earlier rights and the Swedish Land Surveyors' Office, Lantmäteriet, had decided on compensation levels based on the value of the underlying land and its previous use, the use of the land before it was developed and used for telecom-purposes. The landowners appealed the decisions and claimed that compensation should be given for the use of the land for telecom-purposes on the basis of the capitalization of rent. The relevant rent level for capitalization was claimed to be an estimated future rent based on the earlier agreements and the current general market level for equivalent lease rights.

[12] See generally Sluysmans and Waring (n 3), 142–169.

[13] See SOU 2008:99, 194–196; Prop 2009/10:162, 70; SOU 2012:61, 174; F Bonde, 'Professorskritik mot den nya reformen om förhöjd ersättning vid expropriation skjuter över målet' [2011] SvJT, 208–210; See further general critique before the reform proposal of 2004 was enacted JO Sundell, 'Duger ledningsrättslagen för 3G-mobiltelefoni?' (2004–05) JT 3, 668–673.

[14] NJA 2008 p 510 I–III.

The Court decided that Lantmäteriet's decision should prevail, compensation should be given according to the market value of the underlying land according to its previous use. Where the grant of a utility right terminated an existing agreement prematurely, the landowners were also to be compensated for the loss of rent income for any remaining period of the pre-existing lease term. That the landowners were compensated for the loss of income from the remaining term of the leases is consistent with the characterization of the rights, that utility rights are different rights in land than the previous voluntary right, this follows from the expropriative character of the grant that terminates the landowner's right to use the land in question. Since the previous agreement with the landowner was terminated by the expropriation, there was a loss that the landowner was to be compensated for according to the provisions of the Expropriation Act.

The result of the decision is that a landowner who willingly enters into a lease agreement with a telecom-operator for a certain period can by court decision regarding a compulsory grant to use the same land, be compelled to accept a one-off compensation payment commensurate to a fraction of the market value of the lease agreement. In the Tower cases, the difference between the claimed compensation, based on the capitalization of accrued lease payments, and the compensation granted by the Court, based on a no-scheme calculation, was the difference between the value of the lease, SEK 300,000 to the compensation paid of SEK 3,000, one one-hundredth of the lease value.[15]

The Supreme Court decisions in the Tower cases have been criticized. The outcome was made a priority in 2012 in the governmental law reform proposal, SOU 2012:61. The main concern about the Tower cases was that the low compensation levels for utility rights was perceived as contrary to a general sense of justice, even though why it was perceived of as contrary

[15] Claimed and granted compensation in case I–III: Case I: Total amount claimed was SEK 160,168 (SEK 92,455 SEK compensation for the value of the land and SEK 67,713 for other damages) the total granted compensation was SEK 10,975 compensation for the value of the land. Case II: Total amount claimed was SEK 308,122 (SEK 300,000 compensation for the value of the land and SEK 8,122 for other damages) the total granted compensation was SEK 3,000 compensation for the value of the land and SEK 8,122 for other damages) Case III: Total amount claimed was SEK 425,000 (SEK 250,000 compensation for the value of the land and SEK 175,000 for other damages) the total granted compensation was SEK 26,922 compensation for the value of the land.

to a general sense of justice is not stated.[16] With regards to the factual circumstances of the Tower cases and the general argumentation and reasoning in the reform proposal, one reason presumably is that it did not seem fair that privately-owned profit-run telecom-companies are able to circumvent landowners and apply for a compulsory right in place of an earlier right for considerably less compensation.

The primary explanation for why the compensation levels for this particular kind of utility right was perceived as unfair was that the proprietors in the tried cases were privately-owned profit-driven companies. From a landowner perspective, it is not considered fair that a privately owned company can be granted a compulsory right to use the land for profits without sharing any of the profit that the company can derive from the use of the land with the property owner.[17] This explanation is plausible. Property owners had for some time been voicing complaints about the compensation levels for utility rights, with the underlying argument that privately-owned profit-driven companies should not be able to be granted rights in exchange for compensation calculated only to cover losses.[18] The argument is compelling, built on the fact that the fundamental justification in Sweden for a no-scheme basis for compensation for expropriation is that the taking is for the common good, and that the costs for the expropriating party, which historically is assumed to be the state, should be kept low.[19]

However, the lack of possibility for profit-sharing cannot be perceived as the primary reason for why the compensation for any telecom-tower land space in the reform proposal was considered to be against a general sense of justice. If the legal nature of the telecom-company was the primary reason for why the compensation levels for this certain kind of utility rights was perceived as unfair in SOU 2012:61, then the same unfairness should reasonably also apply to other cases of compulsory acquisition or grants of rights, for

[16] What the government is referring to with the compensation levels being contrary to the general sense of justice is not obvious. The legal concept of a general sense of justice does not have a clear definition. Normally it is used as a factual description of the general view of the public, that a sufficiently large number of individuals actually have similar attitudes in 'legal issues'. See D Victor, 'Rättsmedvetande och straffvärde' (Det 29:e nordiska juristmötet, Stockholm 19–21 August 1981), 151–168.

[17] See SOU 2012:61, 174.

[18] See A Victorin, 'Electronic plumbing – Building the telecom-infrastructure' (2002) SOU 2002:112 Law and information Technology: Swedish views, an anthology produced by the IT Law observatory of the Swedish ICT Commission (ed) P Seipel, 169.

[19] Kalbro and Paulsson (n 10), 222–223.

example, regarding the compensation that privately-owned profit-run electrical companies applying for utility rights are required to pay to landowners. This however does not appear to be the case, according to the conclusions in SOU 2012:61 and the therein referred material, profit-sharing was only perceived to be needed to be considered for telecom-tower land space.[20]

This approach of a differentiation as to compensation levels depending on the nature of the legal entity of the expropriator is also consistent in the Tower cases with previous discussions and decisions regarding compensation for utility rights. When the basis for compensation for utility rights was discussed in the early 1970's, it was regarded as functional, efficient and fair to adopt the same compensation principles for utility rights as for other compulsory takings or grants of rights for the common good. The main reasons for not making a distinction with regards to whether the expropriating party is profit-driven was equal treatment of different compulsory takings of land, systemic coherence and keeping costs for necessary infrastructure investments at restrained levels.[21]

The main reason why the particular compensation levels for telecom-tower land space were perceived as unfair in SOU 2012:61 is rather that the voluntary form of this particular right, leases for a certain period of time, had an established market value rent, which differed considerably from the compensation levels of Chapter 4 of the Expropriation Act.

The following outlines ampler reasons behind why in SOU 2012:61 it is considered unfair to apply the compensation provisions of Chapter 4 of the Expropriation Act on telecom-tower land space. The perceived unfairness will be explained by a contextual description of the telecom-market and how the companies negotiate and gain rights for telecom-purposes.

As mentioned, the grant of utility rights according to the Utility Rights Act is not the only possible option for telecom-operators to get access to land for the roll out and maintenance of telecom-equipment. The grant of utility rights is not even the preferred way for telecom-operators to get rights. Even though the telecom-operators according to the Utility Rights Act have the possibility and right to get a compulsory grant of a particular kind of right in land the majority of telecom-rights are freely negotiated leases and easements

[20] See SOU 2012:61 para 10.2.4.
[21] See SOU 2004:7, 167–169.

entered into willingly with landowners.[22] The main reason for this is that the voluntary negotiation usually is faster and cheaper than applying for utility rights with *Lantmäteriet*.[23]

Voluntary rights in land differ from utility rights in several ways. For example, utility rights can only be granted by *Lantmäteriet*, they are granted without limitation in time and are always binding against third parties. In comparison, voluntary rights in land, leased rights, must be limited in time, are granted by the landowners and can be, but are not always, binding against third parties. From the differences between the two forms, it follows that they are considered and characterized as two different forms of right in land. The two rights also differ with regards to underlying governing principles for compensation. Utility rights are, as mentioned above, governed by expropriation principles, whereas voluntary lease rights can be granted for any consideration.[24] Hence, fairness with regards to rent levels for voluntary lease agreements is, at least theoretically, entirely up to the parties to decide. In reality though, there is not much room for negotiation or deviation from the compensation level given for the compulsory grant of utility rights.

Even though the voluntary negotiation and grant of lease rights by the landowner formally differ substantially from the compulsory grant of utility rights by *Lantmäteriet*, the identical purpose of the two forms make them closely interlinked, even interchangeable. One effect of the close relation between the two forms is, as mentioned above, that the provisions on compensation of the Expropriation Act are used as a benchmark and indirect control of rent levels in negotiations for the equivalent voluntary lease agreements. For example, even though there are no formal restrictions regarding

[22] See Lantmäteriet, Governmental Report on Bredband Markåtkomst i samband med bredbandsutbyggnad, Delrapport Hinder vid utbyggnad av bredband ur ett markåtkomstperspektiv (11 October 2013) para 3.2.1; See also Prop. 2003/04:136 Ledningsrätt för elektroniska kommunikationsnät, 14.

[23] See Lantmäteriet (n 21) para 3.5.4.; See also A Bove and V Dalbert, 'Ledningsrätt – används det för lite?' (2010) Student essay, Fastighetsvetenskap, Institutionen för teknik och samhälle Lunds Tekniska Högskola, available at Lantmäteriets website www.lantmateriet.se.

[24] A voluntary lease right to use land is governed in Sweden by Chapters 8–11 in the Land Code (*Jordabalk* 1970:770). There are no restrictions or regulations regarding consideration apart from the requirement that some consideration has to be given for the right to be a form of *arrende*, lease right, that is regulated in chapters 8–11 LC. If there is no consideration, then the right is merely considered an undefined right in land which is only regulated through the provisions of chapter 7 LC, and such a right can for instance be terminated at any time.

the level of consideration for a lease right in land for telecom-purposes, the basis for calculation of compensation in the Expropriation Act are generally held to be the "market level" rent. The obvious reason for this is that the telecom-company can use the possibility of applying for a compulsory utility right as part of the "negotiations".

The close connection between the voluntary lease rights and utility rights, and the fact that both rights are used by telecom-companies for the same purpose, not only makes it possible for telecom companies to negotiate the terms with the provisions of the Utility Rights Act as a form of indirect rent control. It also makes them comparable in relation to the perceived fairness of compensation levels. A result of the fact that there are two forms of rights that can be used for the same purpose is that fairness in compensation, from a landowner perspective, is not only measured in comparison with other compulsory acquisitions of land, but also in comparison with the consideration that is given for the equivalent voluntary right. Normally though, according to the above, there is no difference in consideration and compensation between the two rights. Hence, normally the compensation level for utility rights is comparable to that of voluntary lease rights, or at least, not perceived of as fundamentally unfair.

However, as mentioned above, with respect to telecom-tower land space, there has been a difference between the consideration for voluntary lease rights and the compensation paid for the equivalent utility rights. The reason for this difference in compensation between the two forms is that in the early 2000's, telecom-companies were unable to be granted utility rights for this type of right in land. The reason for this was that telecom-tower land space at that time did not fall within the application of the act, which only applied to the use of land to install and maintain conduits, pipes, cables, etc. Without the possibility to be granted a utility right for telecom-tower land space, the telecom-companies were left only with the option to negotiate leases at an arm's length. The results of the negotiations were that a free market level rent for telecom-tower land space was established.

That utility rights could not be granted for telecom-tower land space in the early 2000's can be explained by the reality that legislative reform is a relatively slow process. The Utility Rights Act was enacted in 1973, and by the early 2000's was not entirely up-to-date with the swift developing, expanding and constantly changing telecom-market. By the end of the 1990's and the beginning of the 2000's, the development of new technology had not only changed the way people used telecom-networks, but also telecom-compa-

nies' needs regarding different kinds of access to land. In the early 1970's, the grant of utility telecom-rights was mainly used for the roll out of cables to be able to connect residential landlines. When the development of broadband networks was initialized some twenty years later, telecom-companies were to a greater extent in need of access to land for the instalment of different kinds of equipment for telecom-purposes, such as poles, towers and the erection of smaller buildings.

The fact that during this time, telecom-companies were not able to get compulsory right for telecom-tower land space in the event negotiations failed was perceived as a problem. This problem was recognized by the Government in 2002 and resulted in two reports.[25] The reports resulted in a broadening of the application of the Utility Rights Act by reform of some of its provisions as enacted in 2004.[26] As an effect of the reform, lease rights that previously were only granted by way of voluntary agreement and at market level rents, could now also be granted as utility rights for compensation according to the provisions of Chapter 4 of the Expropriation Act.

The adjustment of the Utility Rights Act in 2004 created a difference in costs for the telecom-companies depending on whether they acquired rights to use land by voluntary negotiations or by compulsory utility rights. The comparatively lower compensation that now was required for the grant of utility rights could be used as a negotiation tactic by the telecom-companies, in the same way as it is used for other negotiations of lease rights that can also result in compulsory utility rights according to the Utility Rights Act. Even though the reform took place already in 2004, it was not until 2008 in the light of the Tower cases that the difference between the compensation given for utility rights and the consideration negotiated for the voluntary lease of telecom-tower land space was acknowledged as a problem.

The reason why the Tower cases raised an extensive debate on fairness, and subsequently also was perceived as motive to propose a change as to the basis for compensation only for this particular type of utility right, was that the cases so clearly illustrated difference between the consideration that telecom-companies were willing to pay for the rights to use land for telecom-purposes and the compensation granted according to the Utility Rights and Expropriation Acts. The result of the decision was that it was clear that the compulsory grant of utility rights enables not only a right for

[25] SOU 2002:83 *Ledningsrätt för elektroniska kommunikationsnät*; Proposition 2003/04:136 *Ledningsrätt för elektroniska kommunikationsnät*; SOU 2004:7 *Ledningsrätt*.

[26] See *Lag* (2004:643*) om ändring i ledningsrättslagen* (1973:1144).

telecom-companies to be granted rights even if a landowner is not willing. It also provides a bargain-solution for telecom-companies.

It became evident that the Utility Rights Act can be used as a tool to avoid paying a rent that has been mutually-agreed between the telecom-companies and landowners.

The conclusion that can be drawn from this discussion with regards to fair compensation for telecom-tower land space in Sweden is that market level rents generally are not considered to be the bench mark for fair compensation as to utility rights. Market level rents are only considered to be the equivalent of fair compensation where they exist. Even though the main motivation for the proposal of adjusting the calculation basis for telecom-tower land space to a profit sharing method was argued to be the fact that the proprietors of telecom-tower land space are privately owned profit-driven companies. The primary reason for perceiving, or considering, the compensation levels of the Expropriation Act as unfair is where there is a difference between the compensation for compulsory utility rights and the consideration for equivalent voluntary rights. It is the difference itself, and not the basis for calculation that is perceived as unfair.

The reform proposal as mentioned above was primarily focused on the perceived unfairness of the underlying calculation method used in the Expropriation Act when applied to compulsory telecom-tower land space rights to privately owned profit-driven entities. The fact that the reform proposal recognizes the compensation levels as unfair, and that it was actually even recommended that profit-sharing be inserted as the basis for calculation for telecom-tower land space, is however not to be interpreted as a general critique of the no-scheme basis for calculation. The concerns in SOU 2012:61 regarding unfair compensation for telecom-tower land space are not based on a conviction of systematic unfairness due to the lack of possibility of compensation based on profit sharing. Quite the contrary, the application of the no-scheme calculation basis of Expropriation Act on other forms of compulsory rights for necessary infrastructures was explicitly held to be generally well functioning, producing balanced "game rules" for negotiations.[27]

Even though it is not explicitly stated in SOU 2012:61 the general conclusion in the proposal is that the compensation system of the Expropriation Act by and large is functional and fair in the sense that it treats all compulsory takings of land in the same way. The compensation principles of the

[27] SOU 2012:61, 179.

Expropriation Act are considered to create a balanced and functional "set of rules" for the negotiation of rent for the voluntary form, a functional set of rules that maintains the costs for necessary infrastructures low. It is only when a market level rent has arisen outside the intended control of negotiations that the market level rent is seen as a benchmark to consider. The perceived unfairness arises as a result of the difference between voluntary consideration and compensation for compulsory grants.

III. Compensation for Telecom Rights – The Uk 2003 Code

1. Free Market-Based Compensation – The Legal Nature of and Connection Between Voluntary and Compulsory Grants of 2003 Code Rights

According to the Code, electronic communication network apparatuses can be installed and maintained by a Code operator on private land against a landowner's will for adequate consideration and compensation. The Code requires that the operators initially contact the landowner to negotiate a right to use the land for telecom-purposes, but if a contract cannot be entered into on a voluntary basis, then a compulsory grant of a Code right can be ordered by the County Court.[28]

The grant of a Code right in place of an earlier right does not change the legal character of the right, as does the grant of a utility right in place of a voluntary right in Sweden. A compulsory Code right (2003 and 2017) is not to be considered a particular kind of property interest in land. In fact, a Code right does not even necessarily have to be an interest in land at all. The Code regulates certain kind of rights that are granted by way of a voluntary written agreement or compulsory grant ordered by the Court, to a Code operator for the stated Code purposes.[29] Legally, the rights can be interests in land such as leases or personal interests such as licenses or wayleaves. As such, the legal form of Code rights in principal is not different from the interests created by general law.[30] Code rights in essence are also governed by general law

[28] Sch 2 part 5 para 5(1–2) The Code (2003) and Sch 3a part 4 para 20(3) a–b The Code (2017).

[29] The Code (2003) para 2(1); See also The Law Commission (n 28) paras 2.12–14.

[30] Code rights can only be conferred in accordance with the general law, either by grant of a property right or contract (license or wayleave), see The Law Commission (n 28) para 2.68.

and for example, can only be entered into in the same way that they can be entered into under general law. Even though the Code rights are the "same" as the rights created by general law, the Code does give particular personal rights a better position than they would have been given under general law. For example, under limited circumstances, personal Code rights can bind superior interests.[31] The better priority given to personal Code rights, such as licenses or wayleaves, over an equivalent right that is governed by general law, can be said to be a difference of material interest for the definition and comparison of different forms of telecom-rights. However, there is no difference between the legal nature of a compulsory form of a Code right and the voluntary form of the same Code right.

According to the Code "rights imposed by the court shall have the same effect and incidents as rights conferred by agreement and shall be able to be released or varied by agreement".[32] In fact, both compulsory and voluntary Code rights are rather to be seen as regulated relationships than a special form of property interest in land.[33] The Code simply holds that rights to use land for the purposes laid down in the Code are regulated by the Code regardless of what the parties have intended or thought as to the agreement when they entered into it. What the Code does generally is insert certain rights to the benefit of Code operators. Most importantly, it enables Code operators to get a compulsory right to use land for telecom-purposes from an unwilling landowner. The same kind of rights can be granted to other parties,[34] but they will not be regulated by the Code if the other party is not a Code operator. Code rights also cannot be conferred to other parties than Code operators by a court if a landowner is unwilling to enter into such an agreement.[35]

The legal characterization of Code rights, as regulated relationships rather than particular rights in land, was by the 2003 Code reflected in the calculation basis for compensation. Whether a Code right was granted voluntarily or by the Court did not change the calculation basis. Compensation to landowners according to the 2003 Code, in contrast to the Swedish compen-

31 The Code (2003) para 2(3); See further The Law Commission (n 28) paras 2.88–2.90.

32 The Code (2003) para 5(7); The law commission recommendation in report no 336 is that corresponding provisions 5(4), 5(5) and 5(7) be inserted in the revised code, see The Law Commission (n 28) para 4.53.

33 Ibid paras 2.15–16.

34 Ibid para 2.25.

35 Ibid para 2.23.

sation only approach, required that both compensation and consideration was payable to the landowner when the Court granted a Code right. The compensation payable was based on a calculation of loss for any damages that might occur as a result of the Code operator's exercise of rights under the Code. One example is the reduction of land value that occurs as a result of the installation of electronic equipment. The payment of consideration was decided on the basis of what an open market value of the right could be estimated to be.[36] Hence, consideration for Code rights were the same regardless whether they were entered into on a voluntary basis or by compulsory grant ordered by the County court.

As a result of the free market approach to consideration and compensation for compulsory Code rights, the calculation basis for consideration and compensation for compulsory Code rights according to the 2003 Code, neither deviated nor interfered with the consideration that was negotiated for voluntary Code rights. In the UK, in contrast to the Swedish approach which treat telecom utility rights in the same way as other compulsory acquisitions or grants, landowners were compensated for the full value of the property right in land that was granted. Thus, the problem in Sweden with unfair pricing of telecom-rights that are granted in place of earlier rights, that stems from a difference in compensation between the consideration for voluntary telcom rights and the compensation granted for an equivalent compulsory grant of land, did not occur in the UK under the 2003 Code.

The UK approach to consideration and compensation for compulsory Code rights according to the 2003 Code was deliberately different from the act of expropriation, compulsory acquisition of land. The Code was enacted in the 1980's to regulate the privatization of the British Telecom. The aim was to move the previously state-managed telecom-market into a competition-based market.[37] Regarding the basis for the calculation of consideration and compensation in the 2003 Code, the provisions were formulated to create smooth and efficient access to land for telecom-operators without disrupting the effect of the market forces on the consideration paid to landowners. The UK approach was thus different than the Swedish approach

[36] See *The Bridgewater Canal Company Ltd v Geo Networks Ltd* [2010] EWHC 548 (CH); *Brophy v Vodafone Ltd* [2017] EWHC B9 (TCC) (15 March 2017); The Law Commission (2013) The Electronic Communications Code (Law Com Report No. 336) 27 February 2013, paras 5.47–48. For a thorough explanation of consideration and compensation under the Code (2003), see paras 6.5–6.21.

[37] Ibid para 1.4.

with regards to how the privatization of a formerly publicly-run market was handled. The intention with the Code and the regulation of the privatized market in the UK has, at least until the recent reform, been to create the same effect as the one of a free market, despite the fact that rights can also be granted compulsorily.

IV. Two Forms of Equal Treatment – Concluding Remarks to the Swedish and the UK 2003 Code Approaches to Compensation

The different approaches as to fair compensation for telecom-rights in Sweden and the UK according to the 2003 Code represent two ways of dealing with the fundamental principle of equal treatment. In Sweden, the compulsory grant of utility rights is regulated in the same way as other compulsory acquisitions of land. The primary aim is to treat different cases of access to land for societally important infrastructures in the same way. The Swedish approach emphasizes and proceeds from the compulsory acquisition as the normative form for acquisition of land for telecom-purposes. The purpose, the general interest and common good, is used as the basis for fair compensation.

The primary effect of this approach is that compensation is calculated on the basis of the loss of the value of the underlying land. Fair compensation is considered to be the full value of the underlying land, without regards to what the land is used for. On this basis, keeping costs for access to land low is generally reasonable and fair. Lower costs for access to land for important infrastructure projects is historically presumed to be of a general interest and is held as justification for maintaining restrained levels of compensation. Or as in this case, it formally explains and in part justifies that landowners are compensated for the loss of the underlying land and not for example for the value of an equivalent voluntary lease right.

One fundamental reason for why the two rights in Sweden are not perceived as equivalent and comparable with regards to compensation is that the voluntary form and the compulsory grant of utility rights are treated as separate forms of rights. The separate legal forms are regulated by two distinct areas of law, expropriation law and private property law, and when a compulsory right is granted in place of an earlier voluntary right, the shift from voluntary grants by landowners to compulsory grants by *Lantmäteriet* formally changes the underlying basis and assumptions of fairness. It is only

when the two "legal realities" collide that the compensation is perceived as unfair.

The UK approach under the 2003 Code has not resulted in the same problems that the Swedish approach has invoked. The fundamental problem of colliding "legal realities" as occurs in Sweden, did not exist in the UK as compulsory Code rights was regulated to simulate the same legal situation as that of voluntary grants. This approach effectively reduced the possibility of coexistent different levels of consideration and compensation for voluntary rights and compulsory rights. Hence, the perceived unfairness with the regulated compensation levels for compulsory rights, in comparison with the free market level of equivalent voluntary rights, was not found in the UK under the 2003 Code.

The former UK approach also seems to reach a more balanced result with regards to the relevant market situation. In contrast to the Swedish method based on expropriation principles of utility and fairness with an emphasis on the common good, the UK approach from the beginning was based on an awareness of and intention to uphold the specific functions of the free market. The aim of the 2003 Code was to treat both forms of Code rights in the same way, and thereby simulate the effect of a functional competition-driven market. The use of voluntary rights in land entered into under market conditions as the normative form for acquisition of access to land for telecom-purposes therefore appears to produce a more balanced and fair result in terms of consideration and compensation levels.

In comparison with the Swedish approach, which is built on the "exception", the compulsory grant of telecom-rights and the application of expropriation principles of fairness and a fundamental justification of keeping costs for state investments low, the UK approach according to the 2003 Code was more closely linked to the actual market situation. Equal treatment and fairness in consideration have focused on the nature of the right, the specific purpose of the legal entity of the grantee and the relevant market conditions. The Code was intentionally formulated to interfere as little as possible with the market and negotiations. The underlying purpose and use of the land, the fact that it is used for necessary infrastructure purposes was only stressed with regards to the possibility for a Code operator to be granted a compulsory right if necessary.

V. Compensation after the 2017 Code Reform in the UK

Even though the UK 2003 Code, in comparison to the Swedish approach, seem to have laid out a fairer and more balanced approach for compensation and consideration for telecom-rights, for a long time before the recent changes it was considered in urgent need of fundamental reform. After a request by the Department for Culture Media and Sport to review the Code, the Law Commission began a first review in 2011 and submitted a report in 2013.[38] Several reports and proposals and minor reforms have been made since this first review.[39] The criticism raised against the 2003 Code was however not primarily aimed at the level of consideration, but at various other problems, for example, of who is bound by rights conferred on Code Operators, how termination of Code rights are to be enforced and the lack of an efficient dispute resolution.[40] One of its most frequently criticized shortcomings was that it was poorly drafted, as can be seen in the often cited remarks of Mr Justice Lewison: "The Code is not one of Parliament's better drafting efforts. In my view it must rank as one of the least coherent and thought-through pieces of legislation on the statute book. Even its name is open to doubt."[41] The Law Commission has described the Code as "complex and extremely difficult to understand".[42]

However, in the latest reform of the Digital Economy Act, which includes the 2017 Code, the levels of compensation and consideration to landowners was lifted as priorities of the highest concern. The 2017 Code, which successively came into force in July, November and December 2017,[43] aims at reducing the costs for Code operators by reforming the calculation of con-

38 The Law Commission (n 28).

39 For an elaborate summary of previous reports, reviews, amendments and proposals see the House of Commons Briefing paper, Reforming the Electronic Communications Code, No 7203, 1 June 2016.

40 The Law Commission (n 28), 3–4.

41 *GEO Networks v Bridgewater Canal Company* (2010) EWHC 548 (Ch) [7].

42 The Law Commission (n 28), 3.

43 The Digital Economy Act 2017 (c. 30) was given royal assent on April 27 2017, the provisions of the 2017 Code came into force on July 31, November 22 and December 28 2017, The Digital Economy Act 2017 (Commencement No. 1–3) Regulations 2017.

sideration to a no-scheme basis, reflecting the underlying value of the land.[44] The UK thereby aims to remove the effect the free market levels have had on the consideration levels for Code rights. One aim of the proposal is to level out the costs of access to land for different forms of necessary infrastructure and thereby treat rights for necessary infrastructure equally. Fair consideration is since the reform measured against the consideration landowners are granted for similar rights used for other necessary infrastructure purposes.[45] According to the 2017 Code, the costs of acquiring a Code right is equivalent to the costs of acquiring a right in land for other similar purposes, such as electricity cables or water pipes. Compensation for such utilities is determined according to the provisions in the Acquisition of Land Act 1981 and The Compulsory Purchase Act 1965.[46]

Since the reform, Code operators are able to enter into negotiations with landowners on the same basis that Swedish telecom-companies can, with the knowledge that if landowners do not enter into lease agreements willingly, the Code operator has the possibility to seek and be granted a right in land for comparatively low consideration. Hence, the effect of the reform will presumably be that the level of consideration for Code rights entered into on a voluntary basis will in time decrease and correspond to the price of a compulsory Code right, which is also the explicit aim of the proposal.[47] The difference between the current market value of telecom-rights and the compensation to be granted using the no-scheme calculation basis, is estimated at a 40–60 per cent decrease in rent value.[48]

For a period of time the reform will create a difference in consideration levels between Code rights granted according to the 2003 Code and Code rights granted after the 2017 reform. The issue of unfair compensation due to different consideration levels, similar to the debated problem of unfair

[44] See part 4 para 23 The Digital Economy Act 2017; Department for Culture, Media and Sport, A New Electronic Communications Code, May 2016, Government response, 15; See further Department for Culture, Media and Sport, Explanatory Notes, Digital Economy Bill, 29 November 2016 (HL Bill 80), 14 and 327.

[45] See Department for Culture, Media and Sport, A New Electronic Communications Code, May 2016, Government response, 15.

[46] See the Electricity Act 1989 Sch 3 Pt II section 5(1) and Water Industry Act 1991 Ch I Pt VI section 155(6).

[47] See Department for Culture, Media and Sport, Impact Assesment (IA) The Electronic Communications Code, 12 May 2016, 13.

[48] Department for Culture, Media and Sport, Impact Assesment (IA) The Electronic Communications Code, 12 May 2016, 11.

compensation for Tower land in Sweden, will remain until there are no Code rights entered into under the 2003 Code left in the UK.

VI. Fairness in Relation to the Aims of the Regulations

From the experience and discussions in Sweden, where the difference in compensation levels between the voluntary and compulsory forms is in itself considered the primary concern, it is possible to argue that both countries will in time have a functional and fair system for compensation for telecom-rights. Neither in Sweden nor in the UK will there be a difference between compensation levels for voluntary and compulsory rights. Also, if fairness is measured against equal treatment of different compulsory acquisitions of land or grants of rights in land, it is possible to argue that the chosen calculation bases are fair. The equal treatment is in both countries based on the use of the same fundamental principles for calculating compensation for telecom-rights as for other compulsory acquisitions or rights in land. And the calculation basis used for compulsory acquisitions and grants is in both countries based on fundamental principles of expropriation law, which reasonably can be accepted as generally fair. However, even though the chosen calculation bases can generally be motivated by principles of equal treatment and general principles of expropriation law, the arguments for choosing a no-scheme calculation basis for compulsory telecom-rights are not uncontroversial.

First, the use of expropriation law for creating access to land for privately-owned profit-run companies can generally be questioned. The underlying assumptions of expropriation law, that expropriation is normally instigated by the state and that this motivates keeping cost for expropriation generally low, are not fully applicable to situations of expropriation of land for privately-owned profit-driven companies. The reason for keeping costs low can to some extent be motivated by the purpose, the use of the land for the common good. However, the rather extensive approach to common good and public interest that need to be taken to justify compulsory grants of rights in land for telecom companies can be criticized.[49] Privately-owned profit-run companies will for example only instigate an expropriation scheme where it is financially beneficial for them to do so. The possibility for privately-owned companies to benefit financially from the development of land that is owned

[49] See Sluysmans and Waring (n 3), 150.

by private citizens, without sharing any of the profits with the landowner, is not an obviously fair and reasonable solution.[50] Since the telecom-market is privatized in both Sweden and the UK, the application of expropriation-based principles on consideration and compensation for telecom-rights can be considered less well-founded.

Second, the compulsory grants of telecom-rights are not even acts of expropriation by law. The regulation of compulsory telecom-rights is neither in Sweden nor in the UK intended to be equivalent to compulsory acquisition. The regulations have intentionally been formulated to create a swifter and easier access to land than is the case if rules of expropriation are applied. Since this is the situation, adopting the exact same basis for calculation for compulsory telecom-rights as for expropriation in general can be disputed. Adopting the same basis for calculation is naturally preferable in the sense that it does not add another form for calculating compensation to the generally already heavy regulatory framework. It should however be adopted with careful consideration to the differences in the two forms of compulsory access to land. The less formal procedure for granting rights for telecom-purposes should be emphasized and taken into consideration when deciding levels of compensation and consideration. The compensation levels that are laid down for expropriation are based on the fact that expropriation can only be executed after thorough considerations and balancing of interests. The common good has to be justified and weighed carefully against the interest of the property owner. Hence, it can be argued that the less formal approach to balancing of interests with regards to compulsory rights for telecom-purposes should be reflected in the compensation given to landowners, and that the calculation of compensation levels should be aimed to create a result more similar to a voluntary negotiations for the actual right in land.

Whether the calculation bases for compulsory telecom-rights in Sweden and the UK are fair can further be questioned with regards to another aim of the regulation of compensation levels for compulsory grants of telecom rights. Whether the underlying aims to keep cost for societal important infrastructure low and to treat different forms of compulsory acquisitions and grants of rights the same fully justifies the application of expropriation based principles of compensation to compulsory grants of telecom rights is discussed and questioned above. These two aims are however not the only

[50] See for example the reasoning of Lord Walker regarding public good and private to private acquisitions in *R Sainsbury's Supermarkets Ltd v Wolverhampton CC* (2010) UKSC 20 [81] and [84].

aims and considerations that need to be taken into account. The regulation of compensation and consideration levels for compulsory rights according to the Utility Rights Act in Sweden, and the 2017 Code in the UK, are only partly aimed at regulating compulsory acquisitions and grants of rights. The provisions regulating compensation and consideration for compulsory grants of telecom-rights are as mentioned, also aimed at regulating the free market based consideration for equivalent voluntary telecom rights. It is in both countries used as an indirect form of rent control for telecom rights in general.

Even though the regulation of compensation for compulsory grants of telecom rights in both countries are aimed also to indirectly regulate the free market-based consideration for voluntary telecom rights, fair consideration for telecom-rights is measured only against the perceived fairness of compensation that is granted for compulsory grants of rights for other necessary infrastructure. The underlying basis for deciding levels of consideration and compensation is thus formed and formulated only to reflect the first mentioned aims of the regulation of compulsory rights. Given the fact that the voluntary form of grants in both countries is the one that is predominantly used,[51] and that the need for new grants of telecom rights in neither country appears to be acute,[52] it can be argued that fair consideration should also be measured against the underlying aim of controlling the free market. In fact, since it can even be argued that in the UK, the aim of controlling the free market is the actual primary aim of the reform, the measuring of fair com-

[51] In the UK the exercise of Code powers is unusual, only a handful of cases concerning the exercise of Code powers have been decided by the Court, see for example *Mercury Communications Limited v London & India Dock Investments Ltd* (1993) 69 P&CR 135, *Cabletel Surrey and Hampshire Ltd v Brookwood Cemetery Ltd* [2002] EWCA Civ 720, *Bocardo SA v Star Energy* [2011] 1 AC 380, *The Bridgewater Canal Company Ltd v Geo Networks Ltd* [2010] EWHC 548 (CH) and *Brophy v Vodafone Ltd* [2017] EWHC B9 (TCC) (15 March 2017).

[52] Telecom-companies in Sweden by now have access to a more or less sufficient total square meter area of land and the need for compulsory grants to ensure access to land is not found to be substantial, see SOU 2016:61, 238. The situation in the UK is perceived to be more or less the same. The UK Government's strategy to reach 95 per cent coverage by the end of 2017 is reported to be "on track." The need for new sites is primarily a question of reaching the last 5 per cent, see The Department for Culture, Media and Sport, Policy paper 1. Connectivity – building world-class digital infrastructure for the UK, Published 1 March 2017, available at www.gov.uk/government/publications/uk-digital-strategy. See further the House of Commons, Superfast Broadband coverage in the UK, Briefing paper, 9 March 2017.

pensation against the aim of indirect rent control of the free market should be given even stronger consideration.

VII. Justifiability of indirect rent control and fair balance in the ECHR

Fair compensation for telecom-rights is next explored against the aim of using the provisions and principles for compensation for compulsory rights as a form of indirect rent control of voluntary grants of telecom rights. The purpose is to examine further whether the application of a no-scheme basis calculation of consideration as an indirect form of rent control for telecom rights is justifiable. The fairness of indirect rent control over voluntary rights is examined by analogy with the fair balance test,[53] as applied to cases on rent control by the European Court of Human Rights (ECtHR) regarding the right to peaceful enjoyment of property according to Article 1 of Protocol 1 ECHR.

The analogy is based on the UK reform proposal and the compensation levels laid down in the 2017 Code. The balancing of interests and basis for argumentation however are because of the fundamental similarities in regulatory aim and effect, and also with regards to the current market situation in the UK and Sweden, to a large extent also relevant for the Swedish form of indirect rent control. The analogy with the rent control cases of the ECtHR is justified by the similarity of the intended purpose and effect of the regulation of compensation for telecom-rights and the regulating of rent levels for the residential tenancies that have been tried by the ECtHR. The regulation of compensation for compulsory telecom-rights though is not identical with the regulation of rent control as tried by the ECtHR. One significant difference is that rent levels for telecom-rights entered into on a voluntary basis are not per se governed or controlled by legislation, and therefore cannot be regarded as a direct form of control of use. However, the possibility to seek and be granted a Code right by way of compulsory grant by the court, and the negotiation advantage this imposes on the parties presumably will have almost the same effect as direct "rent control." In fact, as mentioned above,

[53] The balance between "the demands of the general interests of the Community and the requirements of the protection of the individuals fundamental rights", See *Sporrong and Lönnroth v Sweden* (App no 7151/75) (1982) Series A No 52 para 69.

according to the UK proposal this effect can even be said to be the primary purpose of the reform.

The ECtHR cases on rent control have primarily been tried with regards to existing tenancies and the loss that landlords have suffered by the application of rent control legislation on these contracts. With regards to the two possible scenarios of granting of Code rights, either a first grant or a grant in place of an earlier right, the analogy is most easily perceived when applied to cases when a Code right is renewed or granted in place of an earlier voluntary Code right. In the case where there is no earlier right in land for telecom-purposes, when a right is granted for the first time, the resemblance to the "normal" case of rent control is less evident. However, the ECHR has applied the same reasoning in a case also similar to this situation. In *Hutten-Czapska v Poland* (*Hutten-Czapska*), the proportionality test of rent control was applied in a situation where the state had granted a first let lease right to a house against the landowner's will. With regards to this case, and the fact that the ECtHR merely regarded the compulsory first let of the lease right as an aggravating circumstance, and not a crucial material difference,[54] the analogy with rent control cases can be justified also to telecom-rights that are granted on land where there previously was no such right.

Initially, the control of rent levels by way of legislation does not per se give cause for infringement of the right to peaceful enjoyment of property. States have the right to enact laws that control the use of property when it is in accordance with the general interest. In the case of *Mellacher and others v Austria* (*Mellacher*) the ECtHR stated that "The legislature must have a wide margin of appreciation both with regards to the existence of a problem of public concern warranting measures of control and as to the choice of the detailed rules for implementation of such measures."[55] The Court further states that it would "respect the legislature's judgments as to what is in the general interest unless that judgement be manifestly without reasonable foundation."[56]

Judging from the ECtHR's decisions of *Mellacher* and *Chassagnou and others v France (Chassagnou)* it can be assumed that the regulation of rent levels for Code rights in the UK lies within the State's margin of appreciation.[57] The State's view on considering enhanced connectivity to be a problem of

[54] *Hutten-Czapska v Poland* (App No 35014/97) (GC) (2006) para 224.
[55] (App No 10522/83) (1989) Series A 169 para. 45.
[56] Ibid.
[57] Ibid para 46; *Chassagnou and others v France* (App no 25088/94) (1999) (GC) para 79.

general concern, and the measure of control of rent levels to pursue the aim to improve the quality and increase the pace of development of the fourth and fifth generation networks, is probably at least from the outset legitimate with regards to Article 1.[58] However, even though the state has a large margin of appreciation when it comes to choosing and implementing measures that control the use of property, the core issue for judging the permissibility of rent control is whether the interference meets the requirement of proportionality. Proportionality, the fair balance between the demands of the general interest and the requirements of the protection of the individual's fundamental rights, is inherent not only with the compatibility to Article 1 but with the entire Convention.[59] The following examines whether the measure is proportionate with regards to the payment of compensation, the aim and purpose of the interference, the impact of the interference on the individual and alternative avenues of securing the legitimate aim.

The payment of compensation is often an important part of the proportionality test regarding the question of whether there has been an infringement of Article 1. However, the level of compensation in itself is rarely regarded as an infringement of the right to peaceful enjoyment of property.[60] In *Mellacher* the rent income was reduced by as much as 80 per cent without it being regarded as an infringement. The reduction in rent in the UK, which according to the impact assessment may be as much as 60 per cent of the previous rent, will presumably not by itself be considered a reason to view the effect of the legislation on a landowner as an infringement of Article 1. In comparison, if landowners where denied charging telecom-operators any rent, that is to say, if no compensation was awarded, this would presumably be an infringement.[61]

The level of compensation cannot however be measured by itself, it is to be considered with regards to all of the circumstances of the case. In *Mellacher* and *Hutten-Czapska* emphasis was given to the impact of the interference on the individual. It was held that the control of use can be justified as long as the individual is not excessively burdened. One important aspect for deciding whether the impact of the interference is an excessive burden on the individual is in a general sense whether the burden is excessively placed

[58] See also *Sporrong and Lönnroth v Sweden* (n 5) para 69.

[59] See for example ibid para 59 and *Hentrich v France* (n 3) paras 45–49.

[60] See *Lithgow and others v the United Kingdom* (n 3); See further T Allen (n 4), 1055–1077.

[61] See *Kjartan Ásmundson v Iceland* (App No 60669/00) (2004) Series A para 45 and *Chassagnou and others v France* (n 57) para 82.

on a particular landowner or if the same burden is laid upon all landowners who are in the same situation. That is to say whether the legislation itself is general and also applied generally and non-discriminatorily or if the burden is unpredictable and used arbitrarily.[62]

Regarding the impact of the interference on the individual landowner with regards to the way the 2017 Code has been formulated and can be assumed to be applied on an individual case, the impact on the individual would presumably not be viewed as an excessive burden. The 2017 Code provides that all Code rights that are granted by the Court are to be valued and compensated on the grounds set out in the Code. The Code thereby distinguishes between Code rights entered in to voluntarily and Code rights that are granted by the court, but it does not discriminate between landowners as a group,[63] nor is the application of the 2017 Code according to the provisions, arbitrary or unforeseeable.

Another important aspect for deciding the burden on the individual in the rent control cases has been the issue of whether the landlord can recover the costs for inter alia maintenance, repairs and administration of the property. If the rent control is "tough", it might not only result in a loss of profit, it can even amount to a situation where the rent hardly covers the costs of maintenance, administration and repair. The economic impact on the landowner was for example in *Hutten-Czapska* found to be an excessive burden as the rent control made it impossible for the landlord to even recover costs for ordinary property maintenance.[64]

In comparison with the rent control cases, the economic impact on individual landowners who have to accept the compulsory grant of a Code right for a lower than market level rent, presumably in general does not reach the threshold established by *Mellacher* and *Hutten-Czapska*. The economic impact on landowners affected by rent control legislation in the housing cases and the economic impact on the landowners affected by the no-scheme calculation basis for establishing consideration for Code rights are arguably not the same. A person or company who owns a plot of land on which there is a building with residential flats, presumably holds the property for the sole purpose of "making money". A building with residential flats normally produces a predictable and reliable cash flow and legislation limiting the level of rents that the owner of a residential building is allowed to charge tenants can

62 *Hentrich v France* (n 3) para 47.
63 See *Chassagnou and others v France* (n 57) para 90.
64 *Hutten-Czapska v Poland* (n 54) paras 82, 104 and 138.

affect the core use and purpose of that property, and also significantly lower the market value of the property.

In comparison, a person or a company holding a property on which there is a lease for instalment and maintenance of telecom-infrastructures presumably, on average, does not own the property with the sole purpose to "make money" from the telecommunication lease. More likely the property is primarily and mainly used for other purposes, and the income that is earned by the granting of a right to a strip or plot of land for telecom-purposes to a telecom-operator is rather a secondary source of income. The landowner is also not normally responsible for the maintenance of the installed equipment and has no costs that need to be covered by the rent income. The result of the reform will merely render a loss of profit from a secondary source of income, which in itself most likely will have little impact on landowner's possibility to manage the property in a satisfactory and adequate manner.[65]

Hence, since the primary issue for landowners in telecom-cases is loss of profit, the indirect rent control of telecom rights most likely does not measure up to an infringement due to the economic impact on the individual according to Article 1. Even though the economic impact on landowners as a group in time might be substantial, the application of Article 1 is to be measured against the impact on the individual applicant. This means that even if the aim of the reform is achieved, to lower the costs for telecom-operators by an estimate of £1.02bn within the next twenty years,[66] which will result in a substantial redistribution of wealth from landowners to the telecom-industry, this is not the economic impact that will be measured by the ECHR, and the general substantial redistribution of wealth will not result in an infringement of the peaceful enjoyment of property for the individual landowner.

However, the proportionality of the effect on individual landowners with regards to the proposed reform in the UK is also to be balanced against the aim and purpose of the interference, whether it is proportionate to the measure and whether there are alternative avenues of securing the legitimate aim. As mentioned above, the States have a large margin of appreciation when it

[65] The right to earn profit is implied as being a part of the protection under Art 1 by the case of *Hutten-Czapska v Poland* (n 54); See further T Allen (n 4), 1074.

[66] The Net Present Value benefit to MNOs and WIPs of £1.02bn is calculated on a restrictive assumption of 40 per cent decrease in rents (the estimated rent decrease interval is between 40–60 per cent), and comprises £709m lower rent and potentially up to £307m lower business rates. Department for Culture, Media and Sport, Impact Assesment (IA) The Electronic Communications Code, 12 May 2016, 12.

comes to deciding if there is a problem that justifies state intervention and also by which measure the problem is to be addressed. This does however not mean that the ECtHR does not make any kind of judgement as to whether the measure is "fit" for purpose and it does not mean that all legitimate purposes justifies the measure taken. The measure needs to be proportionate to the aim, the interference and also be justified as against alternative avenues of securing the aim.[67]

The aim and purpose of the control of use in the rent control cases in the field of housing are regarded as a "central concern of social and economic policies."[68] The measure of rent regulations in the field of housing, to address shortage of affordable accommodation, is not only common in many countries it is also regarded as a justified and suitable means to the end.[69] The aim of the government is directly achieved by the impact that the lower rent levels have on the "beneficiaries", the persons living in the flats that are under rent control who pay less rent. As such, the measure has by the ECtHR been assessed as striking a fair balance between the interest of landowners and the general interest, as long as the burden on the individual is not excessive.

The proportionality between the demands of the general interest and protection of the individual's fundamental rights is not as compelling with regards to the "rent control" of the telecom-market. The aim of the rent control is to cut costs and simplify the building of superfast broadband.[70] It is presumably an aim that can be said to be legitimate, as mentioned the threshold for legitimacy is fairly low according to the ECtHR, and the States are explicitly given a large margin of appreciation in deciding this. But, even if the aim in itself is regarded as legitimate, it does not mean that this will weigh heavily in proportion to any other interests.

This aim for example cannot be regarded to be of equal societal and economic importance for the Member States as is the aim to provide affordable housing for citizens. Further, although broadband and connectivity in general without a doubt are important for economic growth and efficiency, it is questionable whether all access to land for telecom-purposes is. For example, is it of general interest to enhance broadband speed in an area that already has broadband coverage? Is there a lower threshold for how much faster

67 See *Hentrich v France* (n 3) para 47 and *Larkos v Cyprus* (App No 29515/95) (1999) (GC).

68 *Mellacher and others v Austria* (n 55) para 45.

69 Ibid.

70 See The Queen's speech, Her Majesty's most gracious speech to both Houses of Parliament on 18 May 2016, 14.

the connection should be after an improvement for it to be considered of general interest? How important the aim and purpose of the rent control of Code rights would be perceived is naturally hard to interpret. What can be said though is that it presumably is weaker than the aim and purpose of rent control in the field of housing.

The presumably weak but legitimate aim of the 2017 Code must be balanced against the chosen measure, whether the measure is fit for purpose and whether there are alternative measures that can be adopted instead. In *Mellacher*, the legislation was directly aimed at lowering the costs for the tenants and the legislation also provided incentives for landlords to make improvements and invest in the managing of the estate. As such, the measure made it possible for landlords to raise the level of rent if they improved the conditions of their property, which is to be viewed as another question of general interest, that properties are properly maintained which generally entails higher property values.

In comparison, the measure according to the 2017 Code, the rent control, is neither aimed directly at reducing costs for citizens and companies nor is it aimed at directly increasing connectivity. Such aims for example could be met by adopting "rent control" for telecom-services by inserting maximum rates in customer broadband agreements, or by obliging telecom-operators to build on remote sites and less well developed areas. If such measures were taken, the interference with a landowner's individual interest of peaceful enjoyment of property could be balanced against the positive effect of other citizens and the society as a whole. The reform however entails neither any provisions requiring that telecom-operators make any commitments to increase connectivity nor any provisions requiring enhance capacity in remote locations.

Whether the aim of the rent control will have a positive effect on the telecom-market in the UK beneficiary to the end users of the infrastructure, is not apparent. Whether these measures will have a positive effect is neither well-sustained nor supported by evidence,[71] it is merely hopefully wished that the citizens/ consumers will gain from the measure in due time.[72] The

[71] See The Department of Culture, Media and Sport, Impact Assessment, 12 May 2016, 9 and 15.

[72] According to the Law Commission, the proposed move to a no-scheme calculation is risky and cannot be justified with regards to the fact that there is an established market that is functional and generally stable. See The Law Commission (n 28) para 5.76.

founding argument for reform appears to be that digital communications and investment are high priorities.

The immediate effect that will follow from the reform is that telecom-operators will need to pay less to get access to land. It is therefore rather a question of redistribution of wealth than correction of social injustice. Although redistribution of wealth by way of control of use of property arguably can be justified in some circumstances, this is probably not the case with the redistribution of wealth according to the 2017 Code. Redistribution of wealth can only be justified if the aim is to protect the weak.[73] It has been justified when used as a correction of an earlier wrong, such as the confiscation of property under an earlier communist regime, or to redistribute wealth between private persons who otherwise will suffer "unduly", as was the case in the UK "lease buy out" regime.[74]

In comparison, the redistribution of wealth initiated by the reform seems poorly justified, as it is from private property owners to privately owned large corporations and aimed at helping the state be in the forefront of connectivity. The purpose, or rather the wishful result, of the redistribution of wealth is that these large corporations will use the surplus, the gain, for the greater common good, a result that according to the Law Commission report seems unlikely. The report notes that none of the Code operators stated that lower costs for access to land would be reinvested in upgrading of infrastructure and new development or passed on to consumers.[75]

The underlying reasons for interfering with the market level rent of telecom-rights are not comparable with the aim and purpose of regulating rent levels for housing. The purpose to enhance broadband speed does not weigh as heavily against the rights of landowners as does addressing a shortage of affordable housing. Further, the measure taken to address the formulated problem, loosely defined as a problem of a too slow development of broadband technology and roll out of telecom-equipment, does not seem to be well-suited for its designated purpose.[76] The measure of controlling rent for telecom-rights is not combined with any requirements for telecom-opera-

[73] T Allen (n 4), 1075.

[74] Ibid, 1070–1071.

[75] See The Law Commission (n 28) para 5.63.

[76] Alternative measures to address the problem have for example been given by the Law Commission: the market level rent for telecom-rights was in Law Commission report number 336 found to be functional and well established in general. The recommendation in the report was not to change the underlying calculation model that was based on market-level rents, but to insert safeguards to address the problem of certain landowners

tors to reinvest the created surplus. Nor is the formulated problem of a too slow development of broadband closely linked to the costs of access to land. According to the Impact Assessment of the 2017 Code, the costs of land are not even of primary concern for telecom-operators.[77] Land access only measures up to a small fraction of the overall costs of telecom-operators and hence cannot be perceived as causing any severe disruption of the market, nor be considered the primary problem for telecom-operators and their possibilities for expansion and development of their infrastructure.

VIII. Summary – do the ends justify the means?

As shown by the Swedish experience regarding different compensation levels for telecom-tower land space, a fundamental issue with regards to perceived fairness in compensation for compulsory telecom-rights is that there is no difference in compensation between voluntary and compulsory rights. With regards to this issue, both Sweden and the UK are currently facing problems of fairness. However, the problem of different levels of compensation for voluntary and compulsory telecom-rights will not exist for long in either of the two countries. In Sweden the problem will only prevail as long as there exists binding voluntary agreements of telecom-tower land space that can be converted into utility rights. In the UK, the problem will only prevail for as long as there are agreements that have been entered into according the 2003 Code. The UK estimate according to the reform proposal is that this will take approximately ten to twenty years.

Even though the application of no-scheme calculation bases for compensation for grants of compulsory telecom-rights in a way solves the problem of unfair compensation, at least with regards to the unfairness of different levels of compensation for voluntary and compulsory granted rights, reducing the difference in consideration between the two forms of rights does not per se qualify the regulation and calculation basis for compensation as fair and reasonable. In this article the fairness of the application of no scheme-based calculation principles for compensation for telecom-rights in Sweden and

being able to demand ransom rents for particular plots of land, see The Law Commission (n 28) paras 5.46–5.88 (The law Commissions recommendation paras 5.73–5.88).

77 Department for Culture, Media and Sport, Impact Assessment (IA) The Electronic Communications Code, 12 May 2016, 13; See further Nordicity, Modelling the Economic Impacts of Alternative Wayleaves Regimes, 2013, available at www.gov.uk/government/publications.

the UK is questioned. It is held that the arguments for adopting a no-scheme calculation basis for compensation for telecom-rights are weak.

In the article it is argued that the reasons for regulating the level of compensation for telecom-rights in accordance with the expropriation-based underlying assumptions and arguments for keeping costs for compulsory acquisitions of land low does not have full bearing on telecom-rights. One reason for this is that the regulation of compulsory grants of telecom rights in Sweden and the UK is intentionally less complex and detailed than the regulation of expropriation. This less formal approach to the balancing of interests with regards to compulsory rights for telecom-purposes should be reflected in the compensation given to landowners. Another reason for not adopting no-scheme calculation basis is that the underlying principles for compensation in general are not entirely suited for compulsory takings of land by privately-owned profit-driven companies. Given the fact that the telecom-market in both countries is privatized and competition based, adopting expropriation-based principles for compensation and consideration is questionable.

Further, it is argued that, since compensation principles and provisions are used as a form of indirect rent control of voluntary telecom rights, the level of compensation should be justifiable also with regards to the aim and purpose of the interference, the impact of the interference on the individual and alternative avenues of securing the aim. The analogy with the rent control cases and the UK approach in the 2017 Code shows that rent control can be justified under certain circumstances, if a fair balance between the common good and the interference with the individual property owners can be struck. However, the aim and purpose of the control of rent in the UK, and the chosen measure to reach the aim, does not strike a fair balance between the interest of property owners and the common interest.

The main criticism here is aimed at the fact that both countries have interfered with a functional market situation in order to lower costs for telecom-operators. The initial result of the interference in Sweden and the UK is that certain landowners facing renewal of an existing telecom-right will be forced to accept a consideration level that is substantially lower than the previously mutually agreed and negotiated rent. The long term result is that telecom-rights will not have a market level rent. The no-scheme calculation basis for consideration and compensation will primary benefit telecom-operators, who will be able to lower their costs due to the fact that the calculation model does not reflect the market value of telecom rights, without

any requirements of reinvesting the financial surplus in measures that for example would enhance broadband speed or coverage in remote areas.

The issues discussed in this article form part of a wider general discussion of the functionality and appropriateness of expropriation-based principles for compensation. A conclusion that can be drawn from the discussion and analysis in this article is that expropriation-based principles for compensation are not suited for all kinds of compulsory takings of land or grants of rights in land.