Elimination rules in Norway and the UK

Following expropriation, a crucial question that arise concerns the level of compensation payable to the owner. This question is particularly challenging if the expropriation itself, or the project it forms part of, affects the value of the taken land. In such cases, many jurisdictions employ so-called ``elimination rules’’ to ensure that changes in the value are disregarded for compensation purposes. Instead, an award is made based on the hypothetical value that the land would have had if there had been no ``scheme’’ to expropriate. But what counts as ``the scheme’’? If it only the permission to expropriate itself, or is it the whole package of related activities and investments in the area? Is it only the project as carried out by the taker, or does the scheme also cover all similar projects that could potentially have been carried out by someone else? Such questions often prove contentious and they are typical examples of issues that result in legal battles following expropriation. Clearly, the policy reasons for disregarding the ``scheme’’ depends greatly on the context of expropriation. Hence, a general rule is hard to formulate, and there is need for developing heuristics for approaching these cases with high regard to the concrete circumstances. In this paper, I compare the English and Norwegian approach to elimination rules, focusing particularly on cases when expropriation can result in a commercial profit for the taker. In such situations, I argue that many elimination rules are hard to justify, and should be replaced by mechanisms that ensure benefit sharing. For a concrete example of such a mechanism, I look to recent case law on expropriation for commercial hydropower in Norway, developed by the district ``appraisal courts’’, special judicial bodies that defer largely to the discretion of lay people sitting as appraisers. I then discuss how the Supreme Court has partly confirmed and partly rejected the new approach. In particular, I note how they have applied an elimination rule similar to what is known as the ``Pointe Gourde’’ rule in common law, to reject benefit sharing in cases when it is found to be ``impractical’’. In addition, it has been indicated that in cases when the taker’s project is deemed to be ``superior’’ to alternative hydropower schemes, such schemes will usually have to be disregarded, since they would not have obtained the necessary development licences, not even in the absence of the taker’s scheme. I analyse these developments against the recent debate in the UK, where elimination rules have been flagged as an aspect of compulsory purchase law urgently in need of reform.

A one-size-fits-all approach to this question is inappropriate. This is easiest to see by considering the matter from the owner’s point of view: in some cases, he will benefit from elimination, in some cases he will lose, all depending not on his land, but rather on the nature of the scheme.

What counts as the scheme is often a highly contentious matter, however. For instance, if the current zoning plan, say, or on a even if this plan itself makes expropriation

But what is a scheme? And how can this rule be justified

In many situations, it seems unreasonable to pay out compensation based on the ``new’’ value. If a road is built to

tiomost contentious issues that arise concern the level of compensation