

### INNOVATIVE LEGAL INSTRUMENTS IN NATURE AND LANDSCAPE CONSERVATION

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One of the huge problems related to the creation and management of nature and landscape values, is finance, i.e. insufficient funds. Another problem related to compensation is that it takes time to create or improve a biotope. Nature and landscape policy could learn from experiences with more economic approaches in the broader environmental policy: one can mention here for instance the tradable emission rights.

I want to discuss here two interesting new legal-economic instruments, "habitat banking" in the U.S.A. (normally called mitigation banking in the U.S.A.), and "Ökokonto" in Germany. They are laid down and regulated in the law.

#### A. Habitat Banking (U.S.A.)

In the U.S.A. one has in the framework of the Clean Water Act more than 10 years of experience of mitigation banking for wetlands. The bankers (e.g. private nature conservation organizations, but also companies, even project developers themselves) buy, create, enhance or restore degraded wetlands and they get therefore mitigation credits once the wetlands have been accredited by the government. The mitigation credits can be sold to project developers who will damage or destroy wetlands by carrying out allowed development projects. The price of mitigation credits is set by the market, it depends on the relation between supply and demand. Theoretically mitigation credits will be produced as long as the market value is higher than the expenses for conservation measures done by the banker before. The land remains in ownership of the banker.

The advantages of mitigation banking are that an ecologically sound (accreditation is necessary) compensation is carried out before damaging or destroying the (other) wetland, that planning a compensation in a geographical region becomes possible (in comparison with a single-project compensation), and that nature and landscape values get financially validated.

Most of the disadvantages that are sometimes mentioned in literature are in fact no disadvantages of the banking system but of the system of mitigation itself.



(By the way the term mitigation means in this context what we normally call compensation.) A disadvantage of mitigation itself is e.g. that the banker needs a large starting capital.

#### B. Ökokonto (Germany)

In Germany since 1993 not only permit but also planning

decisions are subject to the Eingriffsregelung and therefore also to the compensation obligation in it.

In all German states Ökokontos now exist in one or other form. The system in Saarland, one of the smaller states in Germany, is a good example. It is very similar to the mitigation banking for wetlands in the U.S.A. If the municipality draws up a spatial destination plan on basis of which nature and landscape damaging activities will be allowed for later, it must also designate a compensation zone in that same plan. The compensation zone must be an ecologically degraded (but with ecological potential) piece of land. Then the municipality itself, (public-)private nature conservation organizations, companies and even private natural persons, can buy land there and develop the nature and landscape values. Once developed, these may be booked on an Ökokonto that is registered by the central government of the state. Certainly when a nature conservation organisation does it, it can by buying different types of land, create different biotopes, and so develop a catalogue that project developers can choose the appropriate biotope from. Project developers have to buy compensation from the banker (if I may use the same word as in the U.S.A.) at market value. The land also remains in ownership of the banker.

The advantages and disadvantages of the Ökokonto are the same as for mitigation banking in the U.S.A. The role of the government seems more prominent or leading in Germany because of the designation of compensation zones in the spatial destination plan.

New legal-economic techniques such as habitat banking and Ökokonto facilitate not only a proactive and more eco-regional approach to project development in relation to ecological restoration, but are also market based instruments that help to finance the nature and landscape conservation policy.

The main problem with the two systems, i.e. that the banker needs a large starting-capital, can be reduced by the government by means of prefinancing for instance private nature conservation organizations. But if everyone is allowed to be a banker, some legal problems concerning subsidizing could arise in relation with the principle of equality and not disturbing the free competition according to E.C.-law. Also banking systems are of course only interesting for bankers if there are enough developments, but this does not seem a problem today ...