

Security and Equity of Private Mechanisms for Securing Environmental Obligations

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Introduction: Ecological Compensation and “Offsetting”



Ecological obligations and the role of private law

THEORY

Relation between public and private.

Role of markets.

Legal and philosophical nature of env. Interests.

DOCTRINE

Incorporation of administrative justice concerns.

Ecological challenge to 'traditional' property rules.

Project Context

- England: Biodiversity offsetting? Conservation covenants?
- France: Art 72 de loi n° 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages – ‘obligations réelles environnementales’.
- Germany?

The role of land burdens

1. Can obligations be created that both burden land and are enforceable by persons (natural or juristic) who are not neighbouring landowners? Can they involve the imposition of positive duties?
2. i) Are these obligations created voluntarily? Are they incentivised (e.g. by tax breaks) or imposed by the state (e.g. as part of the land-use planning process)?
ii) What provision exists regarding public access to information?
iii) What provision exists for public participation in the creation, enforcement and discharge of these obligations?

Ecological mitigation and compensation in German Law: §15 BNatSchG (die Eingriffsregelung).

“(2)Der Verursacher ist verpflichtet, unvermeidbare Beeinträchtigungen durch Maßnahmen des Naturschutzes und der Landschaftspflege auszugleichen (Ausgleichsmaßnahmen) oder zu ersetzen (Ersatzmaßnahmen).“

(The perpetrator (of an intervention) is obliged to compensate for any unavoidable adverse effects by means of nature protection and landscape protection measures (compensation measures) or to substitute (offset) (substitution measures).

Securing offset measures

- “(4) Ausgleichs- und Ersatzmaßnahmen sind in dem jeweils erforderlichen Zeitraum zu unterhalten und rechtlich zu sichern.“

(„Compensation and substitution measures are to be sustained during the relevant required period of time and shall be legally secured.”)

- “Okokonto” and “okopunkthandels” – §16(2) regulated by Länder.

Property mechanisms

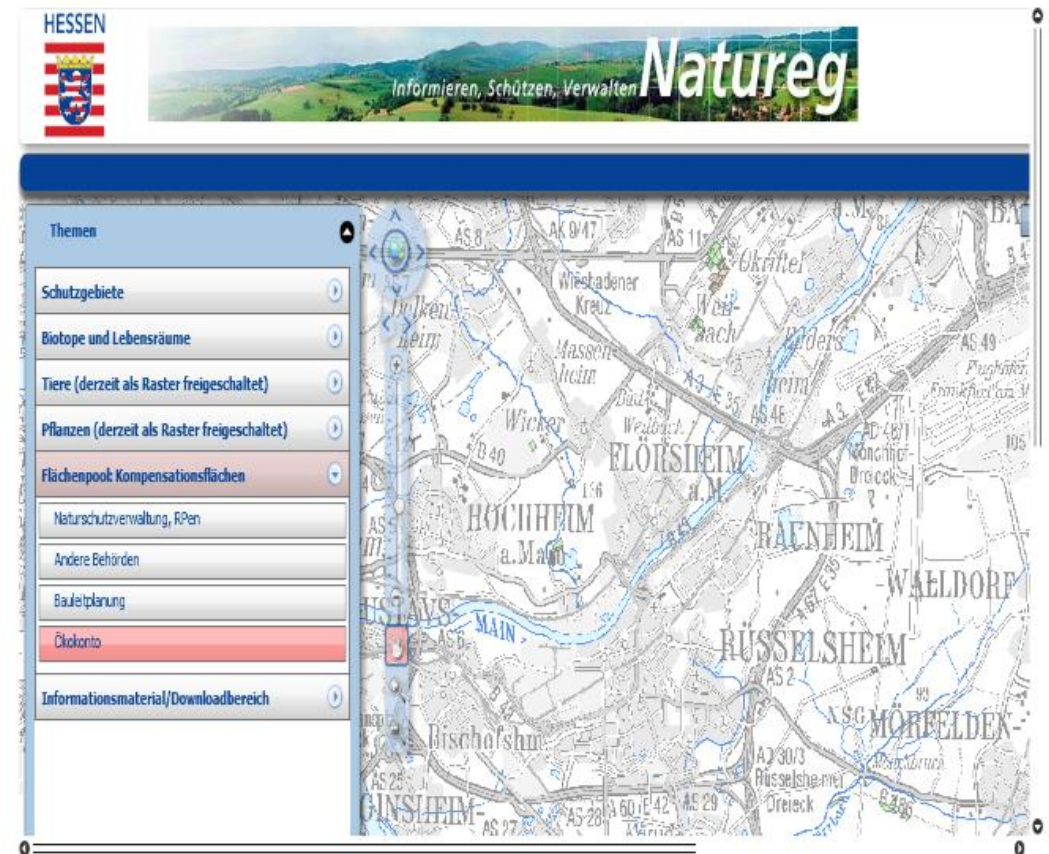
- Limited personal servitude (§1090 BGB)
 - Unterlassungsdienstbarkeit – obligations to refrain from or tolerate.
 - Benutzungsdienstbarkeit – use right of benefited party.
 - Ausschlussdienstbarkeit – exclusion from exercise of a right.
- Reallast (§1105 BGB) – obligation to make a recurring payment.

Public Access to Information

- Obligations generally created in favour of municipalities (Gemeinden).
- BNatSchG §17(6) Competent authorities must establish a register of compensation and substitution measures.
- Example: Hessen – entry in the compensation cadastre secures the status of the right against good faith acquirers due to the public faith in the register. (Compensation regulation)

Compensation registers e.g. Naturreg system (Hessen)

- Local/municipal authority.
- Type of measure.
- Approval status
- Status of measure.
- Responsible nature protection authority.
- File reference.



Participation

- Creation, modification and discharge still primarily a matter for negotiation between the parties.
- Mediating role of state authority.
- Link to enforcement – are different enforcement mechanisms appropriate?

Future directions

- Legal status and function of environmental organisations (Only those associations with legal personality can currently enforce land burdens.)
- Tax implications of compensation measures.
- Organisation of compensation cadastres – ecological and social connectivity.
- Compensation “pools” and trade in environmental “credits”

(Preliminary) Conclusions

- Continuing importance of state – compare English proposals.
- “Bridging” of public and private may require creation of new institutions e.g. compensation registers.
- State involvement allays some concerns regarding access to information, but questions remain regarding participation and construction of environmental interest.