Expropriation for Telecom and Other Infrastructure – the Swedish Experience

Anders Victorin

1 Introduction

Like in most countries of the World, in Sweden land is taken by way of expropriation or other similar procedures in order to satisfy the need for infrastructure – for roads, water and sewage, power plants and electric power grids, telephone and data cables, etc.

Also, in Sweden as in many countries of the World, roads, water and sewage, electricity and telephone service used to be provided by state or municipal monopolies and hence regarded as public utilities. Since the 1990'ies, however, this is changing rapidly. In many countries (not yet in Sweden) important public roads are in private ownership and financed by tolls. Also the old monopolies on electricity and other forms of power production and distribution as well as on telephone services are crumbling. Competition from private enterprise is entering the market, bringing alternative service options for business and consumers. The old monopolies follow suit in the sense that they are being privatised, and in consequence become just actors in the market, although still important ones.

Such dramatic changes in some of society's basic structures tend to pose other fundamental questions as well. The very fact that such property now is owned by private enterprise makes it a requirement that it can be handled just like any other assets of an enterprise, e.g. with respect to accounting, as security for loans or in a bankruptcy situation. During the days of the old public monopolies such issues were seldom raised. In Sweden this was particularly evident, since under Swedish law the State and the municipalities cannot go bankrupt.

Further, the introduction of competition requires rules on upholding fair competition in the market for these product and services. Especially in the electricity distribution and in the telecom businesses important problems exist, because of the need of all actors in the market for access to existing networks. It would certainly be counter productive to force each actor to build his own distribution system – if anything that would destroy competition and be an extreme advantage to the old, privatised monopolies, which sit on the better part of such assets.

Another important issue has become the very legitimacy of the taking of property for purposes of profit making private enterprise. A consequence of this has been a heated discussion of the compensation issue. The traditional approach to the issue has been to keep compensation as low as possible, although on a "market" level. With the entry of private enterprise, however, this is being questioned – why should the taking of land be regulated when e.g. power and telephone companies have to acquire all other goods and services they need for their production at market prices in the open market?

During the last two years a Swedish government investigation has grappled with these and several other questions connected with these and other questions related to expropriation for infrastructure.[1] Some of the proposals of the

1 *Ledningsrättsutredningen*, Dir. 2002:17, hereinafter referred to as the *Utility Easement Investigation*.

investigation have already led to legislation. The work of the investigation and its proposals will be the subject of this paper.

Before going into the material discussion, some information must be given about the structure of the relevant Swedish legislation.

The basic rules about expropriation are found in the Swedish Constitution (Form of Government Act of 1974). Ch. 2 of the Constitution contains rules on basic rights and freedoms, and specifically in sec. 18 provisions on protection of property are given, whereby the property of any citizen is protected against expropriation unless it is required to satisfy "urgent public interests". Furthermore, compensation is to be given according to principles laid down in legislation, i.e. according to the Constitution be decided by parliament alone.

It is the subject of some discussion what the expression "urgent public interests" actually means. The level of urgency appears to be lower than the expression normally would indicate – as a matter of fact it appears that no amendment of existing legislation was intended when the provision was enacted.[2] It is an open question, however, whether the provision is intended to impose stricter demands on subsequent legislation on expropriation.

The Expropriation Act of 1972 contains the most important rules on compensation, to which other legislation on expropriation measures refer. According to the provisions of Ch. 4 sec. 1 the market value is to be given as compensation when real property is taken. However, if only part of the property is taken, compensation shall be given in relation to the diminished market value of the property. The latter rule is difficult to apply, particularly when the taking is small in relation to the entire property, since it may be hard or even impossible to establish any change in value at all of the remaining property. These rules are supplemented by rules on the influence of the value of the property of the expropriate undertaking and by rules on the effect of expectations on increasing value because of future change of land use.[3]

Expropriation can also concern right of use and easements where the rules on compensation for expropriation of ownership in principle also apply.

The expropriation procedure under the Expropriation Act is fairly complicated. Expropriation requires a permit from the Government, or in cases of minor importance, from the County Board, whereby the Government investigates whether the taking is permissible, also with respect to the question whether the purpose of the expropriation can be reached by less extensive means. After the permit is given, the issue of compensation is settled in court proceedings. In the first instance, the expropriator has to pay for the costs of the proceedings, also those incurred by the owners concerned, up to a reasonable limit. – Because of the complex procedure expropriation is regarded as costly and time consuming. For this reason, simpler rules have been introduced in several special areas. These include takings in connection with planning and real estate formation, minerals and other natural resources, e.g. peat, roads and railroads and conduits for water, sewage, electricity, telephone and computer

2 *See* Bengtsson, *Grundlagen och fastighetsrätten*, 1996, and the Supreme Court Case NJA 1996 p. 110.

3 SOU 2004:7 *Ledningsrätt*, p. 175 f. with references.

communication. All in all there are about 25 special Acts on expropriation measure beside the Expropriation Act itself.[4]

In this context it is not necessary to give an account of the various techniques used in all this legislation. A brief account will however be given of the rules on conduits (The Utility Easements Act) with special reference to telephone and computer communication lines.

2 The Utility Easements Act

Traditionally the various operators have secured their right to power lines, telephone cables, etc., by way of either contractual rights of use or contractual easements. Only in very rare cases expropriation has been used. Traditionally there has also been a difference between power lines and telephone cables in the sense that the former have been secured by way of easements whereas the latter have been secured by way of rights of use. The reason for this difference is the fact that Swedish law does not accept personal easements. The telephone companies do not have suitable dominant properties, since the telephone exchange stations in most cases are built on leased land.

The building of very large infrastructures such as a national power grid or a national telephone network based on contracts with each and every owner on whose land the power lines and telephone cables are situated is of course complicated in itself. One particular complicating factor is the fact that contracts for right of use can only be made for a limited time. According to Swedish law (Ch. 7 sec. 5 of the Land Code) such contracts cannot be made for more than 25 years in urban areas and for 50 years outside urban areas.[5] Easements on the other hand can be made for an indefinite period of time. It becomes even more complicated when some of the landowners do not agree to a contract or require excessive compensation. The operator would then have to ask for expropriation (or, if possible, consider an alternative stretch of the line).

In response to these issues the Utility Easements Act was introduced in 1973. However, for various reasons the response was incomplete. The main attention of the legislators seems to have been focussed on the expropriation process and the main thrust of the new legislation was consequently to provide a simpler and more inexpensive alternative to the traditional expropriation procedure. Therefore a new public law right of access to land was introduced – the *utility easement*, which may be defined as a personal easement created in a process similar to that of real estate formation. Upon request by the operator the utility easement could also be declared an appurtenance to his property, if such suitable property was available. In such a case the utility easement should rather, if not

4 *See* further Peter Ekbäck, *Förfaranden vid planering och markåtkomst,* 2000.

5 This means in practice that the contracts on right of use for a large part of the telephone network have expired or may be terminated by the landowners. It appears, however, that most of the landowners are not aware of this fact. Still the Telia AB has considered it necessary recently to start more than 3 000 utility easements proceedings in order to protect at least the “base stations”, i.e. the telephone exchange stations.

completely, be equated with an easement created in the process of real estate formation.

However, this solution also entailed that the private law measures for securing the rights of the operators were retained and in consequence many operators preferred to use a mix of rights where the utility easement where used mainly in cases where a contract with the landowner could not be reached. This meant that the same power line or telephone cable for the most part was protected by means of private law contracts and covered by utility easements only on certain properties. Thus, different rules and different kinds of legal protection apply on different stretches of the same power line or telephone cable.

The investigation charged with the task of preparing the new legislation, however, discussed a more radical alternative, based on the model of the Swedish Act on Public Roads.[6] This alternative implied that, just in the case of a public road, where the whole road (or rather, the particular road-building project) is automatically covered by a particular kind of public law right of use (called a right of road), the whole stretch of the line would be covered by a similar public law right, in consequence also excluding private law means of protection. It remains unclear why the alternative was excluded.[7] Perhaps the most important reason was that there is no single authority to charge with such a responsibility, whereas in the case of roads there is, i.e. the National Road Authority (*Vägverket*). Also, the technique used for decisions on roads was perhaps too complicated for short stretches of e.g. telephone lines. Another possible explanation is resistance from the operators, who might have considered it too cumbersome and too costly. Since the existing infrastructure of power lines, telephone cables, etc., was already protected by private law means, any attempt to use the new utility easement instrument would call for a remaking of the whole system of protection.

Still, there is much to be said in favour of public roads alternative. It would have made the handling of transactions concerning infrastructure property much easier. It would have meant uniform rules in relation to all landowners and in consequence lesser transaction costs. One may also suspect that the fear of high initial costs was exaggerated.

Moreover, the Utility Easements Act was restrictively drafted. The new Act was only to apply to conduits of a certain kind. Under the general requirement that the conduits were always to serve a public purpose, the Act applied only to telephone cables that form part of a telecommunication system for public use or for a public wire for signalling, data communications or similar purposes, or electric power cables subject to concession (or for serving telecom wires just mentioned). Further the Act applied to public water and sewage conduits and for pipelines for district heating, oil, gas and similar products.

The reasons for the restrictive drafting were never spelled out in the *travaux préparatoires* of the Act.[8] On might, however, assume that the intention was not to duplicate the corresponding provisions of the Expropriation Act, which are

6 *Väglagen* (1971:948).

7 *Cf.* Prop. 1973:157 p. 81 ff.

8 *Cf.* Prop. 1973:157 p. 90 ff.

much more widely drafted.[9] It is also possible that the simplified procedure was weighed into the restrictive drafting – under the new Act the Land Surveying Authority (*Lantmäterimyndigheten*), i.e. an administrative agency with limited legal expertise, was charged with the responsibility of making decisions on utility easements, although the decisions of the authority can be appealed to a court of law.

3 Telecommunications – the Applicability of the Utility Easements Act to Various Kinds of Messages and Products

As indicated in the foregoing the Utility Easements Act applies only to telephone cables that form part of a telecommunication system for public use or to wires for signalling, data communications or similar purposes, also for public use. This excludes private cables, e.g. serving only one or a few private enterprises, such as banks, from the application of the Act. On the other hand it is clear that although the cable serves only a single user, it might still be considered to be for public use, e.g. in the case of cables for the signalling for railroad use, or for military use, such as for the detection of submarines. It should also be added that if a network is for public use, also the various access wires, serving the individual consumers and customers are considered part of that network.

In the Supreme Court case NJA 1989 s. 650 the then public Swedish Telephone Agency (later privatised and introduced on the stock exchange as Telia AB) was challenged in a case concerning cables for cable TV. The Agency had applied for utility easements in order to lay down such cables in land owned by a municipality. The municipality concerned argued that such an application of the Act was impermissible. Cable TV could not be considered covered by any public purpose, the municipality argued. The Supreme Court, however, disagreed. Telephone cables as well as TV cables could be used for a variety of purposes, services and messages. The fact that additional services would be offered in the future was foreseen when the legislation was enacted. Therefore, the fact that the TV cable was to be owned by the Agency was sufficient in order to make it "public" in the sense of the Utility Easements Act. The Supreme Court agreed, however, that there might be instances where the purposes for which that cable was used were completely alien to the purposes of the Act. What such instances might be is anybody's guess.

Later, in connection with legislation preparing for deregulation of the market for telecom, the Government returned to the issues raised in the case NJA 1989 s. 650 mainly in order to make it clear that also services provided by other operators than the Swedish Telephone Agency could be regarded as public, and that, consequently, the same reasoning applied to cables and other equipment

9 According to Ch. 2 sec. 2 and 3 of the Expropriation Act, expropriation may take place in order to – put in simple terms – secure space for any facility for the needs for public roads, transportation or other means of communication and further securing the need for electric power, water, sewage, heating or similar needs.

owned by non-public operators.[10] It was also made clear that the Government shared the views of the Supreme Court on the development of various kinds of electronic services given by way of telecommunication cables. The borderlines between various kinds of telecommunication will be blurred, the Government thought. In the future it would therefore be a task for the courts to establish whether the requirement of a public interest was satisfied or not.

So far, however, the issue whether some particular kind of service is to be regarded as in the public interest or not, has not been raised in court practice in connection with the Utility Easements Act. The apparent reason is that only the big operators are in the market for utility easements. Obviously, these operators package their services in such a way that the equipment for which a utility easement is asked will be used for a number of services, which all, or most of which, may be regarded as being in the public interest. Most likely, partial use of a fibre-optical cable for non-public interest use, e.g. renting a few pairs of dark fibre to private companies for internal use, does not constitute a violation of the Utility Easements Act. In a similar way, renting transmission capacity in a fibre-optical cable to an around the clock pay-TV porn show, probably does not violate the Utility Easements Act. It should perhaps be added that landowners are seldom aware of for what purposes the wires and cables on their property are used, and it would certainly require some vigilance on their side to find out. Therefore, the requirement of public interest in the Utility Easements Act, as far as contents of the services provided, is, indeed a blunt instrument. And perhaps so it should be – real estate law is probably not the best way of controlling the conduct of media operators, or of drawing fine distinctions concerning freedom of speech or what might be in the public interest or not.

4 Telecommunications – the Applicability of the Utility Easements Act to Radio-communications-only Equipment

As mentioned in the foregoing the Utility Easements Act was narrowly drafted. Although the word "conduit" (*ledning*) was never properly defined in the text of the Act there was a short discussion in the *travaux préparatiores* indicating that the meaning of the word was the same as in everyday language, i.e. a tube or a piece of electrical wire and similar items.[11] With the requirement of a rapid development of the UMTS-system (often called the third generation cellular phone system) the question whether the Utility Easements Act covered the antennas and masts used in that system became acute. The land surveying authorities tended to take a liberal view, in spite of the narrow drafting of the Act, looking upon the issue as a merely technical one. The relevant difference between the UMTS-system and its predecessor, the GSM-system in this particular context is that the communication between masts and antennas in the UMTS-system mainly takes place by radio, whereas in the GSM-system communication takes place by way of cables, in most cases fibre-optical cables.

10 Prop. 1992/93:200 p. 264 ff.

11 Prop. 1973:157 p. 131. The same reasoning excluded gutters, ditches, canals and log shoots. See also below, footnote 15.

Since the antennas and masts form part of an integrated communications system also in the UMTS-system, the land surveying authorities considered the Act applicable, although there were no wires or cables involved. The practice of the inferior courts vacillated and finally the issue was brought before the Supreme Courts.

Also the Utility Easements Investigation originally was of the same opinion as the land surveying authorities. However, when drafting the Bill to parliament the Government took a more cautious position. In the opinion of the responsible minister of justice, a Government Bill, for reasons of legislative quality cannot be based on a controversial interpretation, particularly when the very issue was being brought before the Supreme Court.[12]

The Supreme Court decision was delivered in early June 2004.[13] The Court upheld the principle of a narrow drafting and added that masts and antennas for telecommunications e.g. FM-radio and television, but also for telephone traffic, were well known already when the Act was drafted. Such equipment was, however, not mentioned neither in the statutory text nor in the *travaux préparatiores*. With reference also to the protection of ownership contained in the European Convention on Human rights, it was considered that a narrow interpretation of legislation on expropriation was called for. Because of the amendment of the legislation on this point, the decision of the Court will have little practical importance as far as the Utility Easements Act is concerned, but the principal reasoning will have far-reaching effects on all legislation on expropriation measures.

5 Should the Scope of the Utility Easements Act be Widened in Other Respects?

The question whether to retain the narrow drafting of the Act or to widen it, so as to make it more independent of future technology was discussed rather intensely in the Utility Easements Investigation. Finally, however, the Investigation decided to retain the narrow drafting, but to propose certain technical extensions.[14] These included tunnels for water and sewage, which for obscure reasons were left out of the original drafting of the Act.[15] The Investigation also decided to propose that "canalisations" for telecom and electricity should be included, i.e. in most cases empty pipes in which cable and wires can be drawn, provided that the canalisations would be put to use in the foreseeable future.

The Act was also narrowly drafted in the sense that it only covered real property, i.e. real property units subject to ownership, including fixtures and appurtenances. However, properties owned under site leasehold or buildings erected by tenants were not covered. Particularly as far as site leasehold the

12 Prop. 2003/04:136 p. 12 ff.

13 Supreme Court decision Case No. Ö 956-03, June 7, 2004.

14 SOU 2004:7 *Ledningsrätt. Slutbetänkande av ledningsrättsutredningen*, p. 78 ff.

15 Other contraptions were also excluded, such as open channels for water or sewage, log chutes and aerial cableways. Cf. above, footnote 11.

opinion of the land surveying authorities was that this was a genuine problem, particularly in towns and cities, where site leasehold is quite common. The solution as far as site leasehold is concerned was obvious – site leasehold must be covered by the Act. Site leasehold is in principle a permanent right. If it is discontinued for some reason, the landowner has to give compensation to the leaseholder for the property erected on the land.

However, with regard to buildings erected by tenants, a problem of principle appeared. A utility easement is in principle a perpetual right – compensation is given only initially and in order to amend the right or to abolish it, a decision of the land surveying authority is required, based on change of circumstances. If such a right is to be granted in a building erected by a tenant, one has to take into consideration that such a building may be moved or torn down, because the tenancy has expired or because the tenancy is forfeit because of breach of contract. One also has to take into consideration that the parties to the tenancy might agree to discontinue their contractual relation.

The solution to the problem of building erected by tenants was in a way typical to the thinking of the Investigation. In order to guarantee the permanence of the utility easement, any utility easement granted in such property must also be granted in the real estate. Therefore, should the tenancy be discontinued, the holder of the utility easement right would still have a right against the landowner. The difficult question of compensation to the utility easement holder if the building was to be torn down or removed was more or less left out of the discussion – the same issues would anyway appear when any building, subject to a utility easement, is to be demolished. In much the same way the question of compensation to the tenant and the landowner, respectively, was discussed mainly with reference to the fact that very much the same issues appear in ordinary expropriation of land subject to tenancy.

Technically, under Swedish law, buildings erected on leased land or on site leasehold are not real property. The proposal of applying the Utility Easements Act to property other than real property could also be used to grant utility easements for an operator to install equipment in the masts and pylons of a competing operator. Although the proposal was controversial in some quarters it also aimed at implementing European Union directives, in particular that on access and joint use of electronic communications networks (2002/19/EG). Another possibility might of perhaps have been to use the new Act on Electronic Communications (2003:389) but it seems that that Act does not give physical access to the equipment – it only gives the Swedish Post and Telephone Agency a right to fine operators who deny access to competitors.

Still, there is a risk that the proposed legislation will prove ineffective. In order for the land surveying authority to grant a utility easement in such property, this must be technically feasible. New antennas in a mast must not cause overload, to give a simple example. Therefore, it cannot be excluded that owners of masts and annexed equipment try to fill it so that there is no room for the equipment of the competitors, or make their mast so weak that they will not carry additional antennas and other equipment.[16]

16 This has happened in a well-known case. See SOU 2004:7 p. 96 f.

Another matter, which gave rise to considerably controversy in the Investigation, was that of access for cables, wires, etc., in public road banks. As already indicated public roads in Sweden are protected by a particular kind of public law base right of use – right of road. Such a right has an extremely strong position under Swedish law. It cannot be expropriated and should the real property "underlying" the right of road be expropriated, the right of road is unaffected by such a measure. Most certainly the right of road is impervious to any attempts of applying the Utility Easements Act. The right or road also includes a right for the owner of the road in lieu of the owner of the real property to make any decision concerning the use of the land on which the road is situated. This includes the right to lease space for cables, wires and other conduits. Therefore, the only way for operators of electronic services to get access to the road bank is by way of contract with the road authority. In such a case the landowner gets no compensation, whereas the question what compensation the road authority might charge is subject to some controversy. The fact that the road authority is a public agency certainly imposes limits on what it might charge for access to road banks, etc. On the other hand, the objection is often heard from the operators that they are being overcharged. Yet, the alternative of creating new infrastructure by drawing wires and cables across woods and farmland is often too expensive to be an option.

After careful deliberation the Utility Easements Investigation decided to propose a change of this order of things.[17] It was felt necessary that the operators were to be given a right to use roads and road banks for their particular infrastructure, whenever this was feasible and also to give them an opportunity to have the issue of compensation decided in an impartial way. The proposal was to make the Utility Easements Act applicable also on public roads under the Act on Public Roads. In this way the land surveying authority would handle disputes between operators and the Road Authority just as it handles disputes between operators and landowners. In the view of the present author this reform is important, since the *de facto* monopoly on land of the Road Authority is far greater than that of any individual landowner.

6 Infrastructure Property as Assets

As mentioned in the foregoing an important part of the task of the Utility Easements Investigation was to look into the matter how infrastructure property could be adapted to the needs of business and enterprise, so that it could be handled as any normal kind of property, subject to private ownership.

The original design of the Utility Easements Act was evidently made for state and municipal monopolies only. According the Act pipes, wires, cables, etc., could not be sold separately, but only in combination with the utility easement right. There were neither provisions on lease of such equipment, nor on using it as security for a loan. A further difficulty was the fact that should these problems be solved, one still had to tackle the problems created by the fact that the same stretch of wire or cable could partly be secured with utility

17 SOU 2004:7 p. 106 ff.

easement, partly with an ordinary right of use and perhaps also with an ordinary easement. On top of this part of the stretch could be regarded as real property whereas other parts could be regarded as chattels. Add to this genuine doubt as to what was required for property law protection in transactions with this particular kind of property, particularly when secured with utility easement, and one understands that the Investigation was facing a genuine Gordian knot. Fortunately, or perhaps unfortunately, however, the terms of reference only required answers and solutions as far as utility easements were concerned. This will be discussed later in this paper.

Already before the Investigation had started, revision of the public-monopoly oriented Utility Easements Act had begun. The first attempts at reform, however, were not as much concerned with public monopolies as with the rapid propagation of high capacity computer communications in the various parts of the country, mainly by connecting the various municipality centres with fibre-optical cables. Such a grand project required the cutting of some corners and the Utility Easement Act was one of the most solid ones – very much like public roads, the national power grid is an excellent infrastructure for the rapid deployment of fibre-optical cables for computer communications and similar purposes. Therefore a new rule was introduced in the Utility Easements Act to the effect that the owner of electrical power cables, secured by utility easement, also was given the right to use this infrastructure for wires and cables for telecommunications.[18]

Originally the notion was that such added use of the national grid normally would not give rise to claims for compensation from the landowners. The infringement on ownership was simply too minimal to give cause to any such claims. Furthermore, no consent from the landowners was necessary. All that was required from the electrical power operator was to inform the landowners some 2 weeks in advance that such wires, fibre-optical cables, etc., were to be installed in the pylons and masts supporting the electrical cables. Compensation would, however, always be given for damage and inconvenience caused on the ground by the additional work on the power line.

Understandably this piece of legislation caused considerable controversy. Even though the taking in a case like this must be considered minor, the thought of not giving any compensation at all contravened all sense of justice, especially since the operators of the electrical cables were given an opportunity to open up another, presumably profitable, activity on the various properties concerned. The criticism against the new legislation implied, although not quite clearly expressed, the notion of some kind of profit-sharing arrangement – compensation should somehow take into consideration the profit-making opportunities of the infrastructure for which land was taken. This will also be discussed further on in this paper.

The idea of making the owners of power lines the owners also of fibre-optical cables, etc., was also questionable from another point of view. What would make such owners particularly fit to operate computer and telecommunications equipment? Could one assume that they even were

18 Prop. 1999/2000:86 p. 131 f.

particularly interested in doing so? Later, however, the Utility Easement Investigation introduced some proposals to resolve such doubts.

A second piece of legislation was intended to facilitate privatisation mainly of district heating stations combined with pipes and other equipment. The idea was to make it possible to transfer pipes in the ground of the receiving properties into the ownership of the private operator of the district heating system.[19] Normally such a measure is not allowed under Swedish real property law, since the pipes are in the ownership of the owner of the receiving properties. However, by making such transfer possible in connection *inter alia* with decisions by the land surveying authority on utility easements, the owners of the district heating system could gain full control of the whole distribution line, including pipes, heating converters and accumulators, etc.

In its first report, the Utility Easements Investigation attempted to rectify some of the shortcomings of the more provisional legislation, referred to above on the right of the owners of electrical power lines secured by utility easement rights also to include cables and wires for data- and telecommunications. The proposal was to make it possible for the owners of data- and telecommunications cables and wires to let some other enterprise install and use further cables and wires of the same kind. The owner could also avail himself of this possibility.[20] All this, however, required a decision by the land surveying authority. In its second report the Investigation suggested that the right to let some other enterprise install data- and telecommunications cables would be open to all kinds of utility easements – also pipelines, water and sewage pipes, etc., were regarded as suitable infrastructure for data- and telecommunications cables.[21]

However, the original thought of the Investigation was to make it possible for the holder of the utility easement to transfer such "extra" cables and wires to another owner. The idea was that, as already indicated, that owners of electric power networks might not be interested in owning or operating such cables and wires for data- and telecommunications. Also, the option of selling such property would increase competition by making it possible for competing operators to acquire their own networks, although still making efficient use of existing infrastructure.

On this point, however, the resistance from operators and other interested parties became too strong. The original plan had to be abandoned. The final outcome of the discussion was that the Government Bill prescribed that it would indeed be possible for third parties, given a right to install their own cables in the utility easement of someone else to sell their property. However, if the holder of the utility easement himself had availed himself of the possibility to install new cables and wires, this right would not apply. Instead the basic principle that wires and conduits cannot be sold unless in connection with the transfer of the utility easement itself would apply.

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19 Prop. 2000/01:138 p. 18 ff. A great deal of the pipes was also in the property of the municipalities themselves and was for that reason to be regarded as fixtures, that needed to be released into the ownership of the new private operator.

20 The proposal lead to legislation, with some modifications. Prop. 2003/04:136 p. 17 ff.

21 SOU 2004:7 p. 92 ff.

In the opinion of the present author this regulation falls short of the goal of adapting the utility easement system to the requirements of a market system. One may accept the fact that, for ideological reasons, the utility easement originally decided, cannot be separated from the object of such a right. We are actually witnessing a conflict between basic goals and issues in society – should property taken from individual citizens by expropriation be allowed to be treated just like any business commodity or should be given special treatment? The basis of the conflict is most likely the fact that the property is expropriated and not acquired by means of contract. On the other hand, the basis of the conflict is multifaceted. Perhaps the difference in views could be bridged if the conditions under which expropriation takes place were made more similar to those of contractual bargaining. This issue will be discussed in the following section of this paper.

Yet, it would have been better from a market oriented perspective, if the holder of the utility easement would be able to divest all "extra" cables, wires and conduits. As indicated above it is far from certain that the holders of utility easements for electricity are interested in holding on to the fibre optical cables they were allowed to draw in their networks according to the first piece of legislation introduced on this theme. Nor is it certain that a holder of utility easement right for "canalisation" would find it in his best interest to hold on to all the wires and cables he has drawn himself. One may indeed ask as why the holder of such a right should not be allowed to transfer all the wires and cables in the "canalisation", while remaining as holder of the right of the "canalisation" only.

7 The Issue of Compensation for the Taking

The matter of compensation when land is expropriated has always been controversial. The basis of the controversy can be explained in simple economic terms – most properties are not for sale, and the reason is presumably that the owners, for various reasons, value them higher than the market value. The fact is that a contract of sale is only concluded when both parties are convinced that they make a good deal – their appreciation of the value of the property differ in the sense that the seller values the property lower than the buyer.

When there is a matter of expropriation, however, the party seeking expropriation is likely to meet an unwilling "seller". Most likely the expropriator has made attempts to reach an agreement with the owner, and most likely the expropriator has done his best in reaching an agreement by sugarcoating his bid. – There is a natural explanation for this. By reaching an agreement with the owner, the expropriator will avoid the trouble and expense of going through the process of expropriation. One has also to take into account that the bargaining takes place under the threat of expropriation, which naturally is an advantage to the buyer/expropriator. There is an iron fist under the silk glove.

Should the bargaining fail, however, it is a sure sign that the owner has a high appreciation of the value of his property. There may be many reasons for this, including sentimental values (e.g. the property has been in the possession of the family for hundreds of years), an unrealistic view of the prospects of success

in the expropriation process, or high non-financial transaction costs (e.g. the children are going to school and don't want to move). It will also follow that the owner will feel that the compensation settled by the court is inadequate.

Perhaps in appreciation of such reasoning the first expropriation legislation in Sweden offered compensation over the market price as compensation for the taking without the consent of the owner. This overcompensation was however later reduced and has been removed completely since the 1960'ies. As indicated above, the market price is now what the court has to determine as compensation for the taking, unless of course, the expropriator offers more. After the bargaining has failed, there are, however, hardly any reasons for him to do so – the gloves are off.

For the majority of landowners the fairly low price offered in expropriation has nevertheless been acceptable, since the taking is for an important public need. When land is needed to a new road, for an airport or for rental housing everyone can see and appreciate the importance of the measure, and perhaps also accept that payment is only given at market price level. When, however, land is taken for a private purpose, the situation may be different. The legislator has also to some extent accepted this. Amendments to the Real Estate Formation Act in the 1980'ies pertaining to land readjustment have introduced another principle, the principle of "profit sharing". In fact, the term "profit sharing", although the principle is called so in every-day language, is completely misleading. What the principle tries to do is to simulate the outcome of bargaining between the parties, taking into account the gains and losses of both sides. Therefore, to put it simply, the land surveying authority, fixing the compensation to be paid in cases of land readjustment, shall not try to determine some abstract "market value" of the land, but shall look at the value for the property gaining land in relation to the property loosing land. In bargaining one may presume that the "seller" is aware of the loss to his property and the "buyer" is aware of the gain to his property. The minimum price of the "seller" is his loss and the maximum price of the "buyer" is his gain – the outcome of the bargaining should therefore be somewhere in between. Both parties are to gain from the transaction; otherwise the deal is off. (Hence the term "profit sharing".)

In the discussion following in the wake of the amendments already decided and those proposed of the Utility Easements Act, the organisations of landowners claimed that the valuations principles of the Expropriation Act needed to be adjusted. The claim was supported by the argument that privatisation had fundamentally changed the environment in which the taking of land was exercised. Now land was taken from landowners by profit-making private companies, whose claim to work for an urgent public interest was doubtful, at least as seen in relation to the old public monopolies.

The Utility Easement Investigation was impressed by those arguments.[22] However, the terms of reference had tied its hands. The terms of reference gave the Investigation freedom to propose changes of the principles of compensation for the taking, but only insofar as it concerned widening of the field of application of the Utility Easements Act. The Investigation found it impossible to propose different sets of rules of compensation in the same Act, in particular

22 SOU 2004:7 p. 190 ff.

since the most important amendment, i.e. that of masts and antennas for the UMTS system, was being brought before the Supreme Court.[23] The decision of that Court could not be foreseen, but would have a fundamental effect on what principle of compensation would apply. If the Supreme Court would find that such equipment already was covered by the Act, there would be no widening of the field of application of the Act and *vice versa*.

In this situation the Investigation decided to recommend that the whole issue of compensation in cases of takings for private enterprise should be subject to a new public investigation charged with the task of proposing new rules. In May 2004 Parliament's standing committee on housing decided to request such an investigation from the Government.[24]

23 *Cf*. above footnote 13.

24 2003/04 BoU5.