GEOMATICS AND ENVIRONMENTAL ENGINEERING • Volume 17 • Number 2 • 2023

https://doi.org/10.7494/geom.2023.17.2.89

Anna Trembecka[1]

The Benefit Principle in Determining Compensation for Real Estate Expropriation

Abstract: Polish expropriation law introduces a compensation system based on the so-called "benefit principle". This principle assumes estimating the value of the property based on its intended use if it results in a greater value. The problem of considering the intended purpose of expropriation and, consequently, the application of the benefit principle is widespread in compensation proceedings relating to road investments.

The research objective of this paper is an attempt to answer the question of whether the benefit principle should be maintained in the real estate appraisal procedure in order to determine compensation, i.e. whether the intended use resulting from the purpose of expropriation should be taken into account if it increases its value. The research also focuses on identifying those factors that should be considered instead of the benefit principle in order to estimate fair compensation for expropriated real estate. Part of the study is also devoted to the assessment of planned changes in legal regulations regarding compensation proceedings.

The subject of the research are procedures and regulations for determining compensation for real estate expropriated for road investments in Poland. The analysis covers the stages of the compensation procedure and the factors affecting the amount of compensation. These procedures were compared with those in force in other countries in the context of applying the benefit principle.

The results of the analysis lead to the conclusion that the amount of compensation should be independent of the intended purpose of expropriation. This is because planning classification for public purposes cannot be treated as a criterion which increases the market value of the expropriated property.

Keywords: compensation, expropriation, property value, benefit principle

Received: 17 October 2022; accepted: 29 November 2022

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[1] AGH University of Science and Technology, Faculty of Geo-Data Science, Geodesy, and Environmental Engineering, Krakow, Poland,
email: trembec@agh.edu.pl, https://orcid.org/0000-0001-5098-7649

1. Introduction

The regulations on real estate expropriation are contained in the Act on Real Estate Management [1]. In Poland, in order to implement key infrastructure investments, special acts were introduced (including Special Road Act) which, in a manner different from the regulations in the Act on Real Estate Management, define the methods of property purchase for the implementation of a public purpose investment. Therefore, in different special acts, the method of determining compensation may vary, e.g. investments in flood protection structures require civil law arrangements as the first stage of determining compensation.

The expropriation procedure is most frequently used for road investments. The development of the public road network, their expansion and modernisation forms the basis for the country's long-term economic and civilisation development. Before Poland's accession to the European Union in May 2004, the country had had the least developed road infrastructure among all candidate countries at that time [2].

In order to accelerate the road construction process, the Act on special rules for the preparation and implementation of public road investments (Special Road Act) [3] was adopted, which facilitated the acquisition of land for these purposes.

The permission for the implementation of a road investment (Road Construction Consent, in Polish: zezwolenie na realizację inwestycji drogowej, ZRID) is a kind of a consolidated administrative decision which has several effects, including:

- it determines the location of a road investment,
- it approves real property division,
- it expropriates rights to properties located within the boundaries of the investment,
- it approves the construction design and grants a building permit,
- it limits the use of the adjacent properties in order to reconstruct technical infrastructure and roads of other categories (if necessary).

These regulations resulted in the replacement of five existing separate administrative procedures with a procedure ending with one administrative decision [4]. Real estate acquisition is executed by virtue of law and takes the form of expropriation. Compensation is determined in a separate procedure, frequently at a distant time from the date of property acquisition by public law entities, and in practice it raises numerous controversies and protests. A significant problem in the process of determining compensation are imprecise regulations and undetermined legal status of real estate expropriated *ex officio* [5].

In Polish regulations, unlike in most Western European countries, the compensation system is based on the so-called "benefice principle" [6]. Pursuant to this principle [1], the value of real estate for the purposes of compensation for expropriation is determined according to its current use, if the intended use of this property, consistent with the purpose of its expropriation, does not increase its value. Thus, when

estimating the value of the property, the benefit principle consists in taking account of its intended use which results in a greater value. However, such an appraisal model for determining compensation for expropriation raises numerous doubts. In particular, there is a conflict between the principle of fair compensation for expropriation and the principle of social justice. The non-compliance with the principle of justice consists in awarding significantly different amounts of compensation in comparable factual situations. The problem concerns mainly real estate intended for road investments. Legislative works are currently in progress to amend the Real Estate Management Act in the part relating to compensation for expropriation.

The research objective of this paper is an attempt to answer the question of whether the benefit principle should be maintained in the real estate appraisal procedure in order to determine compensation, i.e. whether the intended use resulting from the purpose of expropriation should be taken into account if it increases its value. The research also focuses on identifying those elements that should be considered instead of the benefit principle in order to estimate fair compensation for expropriated real estate.

Part of the research was devoted to answering the question of whether the proposed changes to the regulations would enable the proper compensation proceedings. The research thesis is that the benefit principle considering the purpose of expropriation should be eliminated if it increases the value of the estimated property.

2. Literature Review

Compulsory acquisition, or expropriation, is the right of the government to acquire rights to private land without the consent of the owner for the benefit of society and is generally necessary for social and economic development as well as the protection of the environment. The exercise of these powers is frequently controversial and problematic. Good practices in this respect are discussed in [7].

In some countries, e.g. Ghana, compulsory land acquisition has resulted in unfavourable socio-economic consequences, including landlessness, poverty and increased tension in state-community relations [8].

The research described in the publication [9] identifies gaps in the existing process of compulsory acquisition on the example of Scotland, pointing to the need to maintain the basic principles of social justice. In the research paper [10], attention was drawn to the limitations of the ownership of real estate intended for public purposes in local land use plans prior to actual expropriation, which is terminologically referred to as "legal confiscation without expropriation".

Landowners question the compulsory acquisition of land for a variety of reasons, including the amount of compensation offered [9]. Delays in the payment of compensation have a very negative effect on the situation of the former owners [11]. The right to compensation for the deprivation of the ownership right to real estate

is not time-barred, therefore a party to expropriation proceedings may demand it at any time [12] Therefore, attention should be paid to the necessity to update the appraisal report due to the passage of time [13].

The process of the payment of compensation claims in Poland is extended due to the fact that former owners and perpetual users question the proposed amount of compensation, or they object to appraisal reports on the estimated value of the land and its components [4]. Compensation is usually based on economic loss as a direct result of the real estate acquisition [14] and does not sufficiently compensate the expropriated party for the impact that the construction of new infrastructure may have on this land [15].

The publication [16] points to the issue of insufficient compensation paid to farmers for land expropriated for extractive industries in China and the related problems. In [17] the authors focused on the problem of insufficient consideration of customary property rights common in African countries in compensation for expropriated real estate. Using the example of land acquisition for public purposes in Tanzania, the author of the publication [18] concluded that appraisal and compensation, unless supported by clear, institutionalised and inclusive protocols that are transparent and predictable, can result in unintended and undesirable negative consequences.

The issue of the components affecting the amount of compensation is widely discussed in literature as well. In the publication [19] the author analyses whether the effects of land use change and building values should be taken into account – if only a part of the property is subject to compulsory acquisition. This issue was also discussed in the paper [20] where the reduced value of the remaining land was indicated.

Compensation in Poland does not include such elements as costs and fees related to the purchase of a new property (including VAT, costs of drawing up a contract and entries in the land and mortgage registers, costs of legal services, brokerage costs, costs of moving). This particularly affects those owners who are forced to leave their place of residence [21].

Compensation for expropriation should include [22] e.g. the costs of purchasing another property, costs of moving, costs of temporary rental. It should also include lowered income / lost profits and additional costs induced by property acquisition [23]. The author of the paper [24] analyses the possibility of obtaining the right to compensation by a mortgage creditor in the event of expropriation of real estate for public purposes.

The expropriation procedure, including that for road investments, is different in other countries. For example, in Germany [25], the process of land acquisition includes:

1. initial negotiations for voluntary disposal,
2. a petition for expropriation,
3. a formal expropriation procedure, in the course of which the public purpose of the real estate and the fulfilment of other conditions for expropriation are assessed, as well as compensation is determined.

Should the implementation of a public purpose require the immediate acquisition of the property by the state, the authority initially grants ownership rights. In this regard, it is similar to making the decision on permission for the implementation of a road investment immediately enforceable, which authorises the immediate commencement of road lane construction works.

In France, the process of expropriation for public investment purposes consists of two stages [26]:

- stage I (administrative), in which two documents are issued:
  - a statement on the property being intended for a public purpose,
  - an order to transfer ownership rights to the property to a public entity;
- stage II (judicial), in which the expropriation judge:
  - adjudicates on expropriation,
  - determines the amount of compensation.

In terms of compensation, Great Britain exhibits significant differences compared to the regulations which are binding in Poland [27]. Compensation for expropriated property includes, in addition to its market value, also intangible losses resulting from discomfort and inconvenience suffered, as well as the costs of moving, adapting substitute rooms, and in the case of enterprises – temporary and permanent loss of profits. Moreover, the determination of the amount of compensation occurs simultaneously with the deprivation of rights to land.

3. Materials and Methods

The analysis covered applicable statutory and executive regulations on real estate management, expropriation and compensation, real estate appraisal, special acts, rules for the preparation and implementation of public road investments, land and building records. Quantitative, qualitative, and comparative analyses concerning the amount of compensation for expropriated properties were conducted based on the data acquired from the provincial road administration and the General Directorate for National Roads and Motorways as well as our own observations.

The subject of the research are procedures and regulations for determining compensation for real estate expropriated for road investments in Poland. The analysis covers the stages of the compensation procedure and the factors affecting the amount of compensation. It was examined how compensation for expropriation is determined in other countries, what components are taken into account and whether the benefit principle is applied.

Despite inquiries being sent to road administrators in six provinces, only two of them responded. The remaining administrators refused to provide data, pointing to the requirement to demonstrate that there was a public interest in disclosing it. Further searches were abandoned due to the data being acquired from the General

Directorate for National Roads and Motorways presenting the structure of obtaining compensation from various places in Poland, which allowed for an analysis regarding the entire country.

The prices of properties earmarked for roads and of agricultural land in Poland in selected areas were analysed. This allowed for the assessment of potential effects when applying the benefit principle for public road investors, such as the State Treasury and local government units. The works aimed at amending the Real Estate Management Act in the part relating to compensation for expropriation were also analysed.

4. Results and Discussion

4.1. Procedure for the Determination of Compensation

The compensation procedure is presented in Figure 1. In Poland, the amount of compensation for expropriated properties is determined based on their market value assessed by a property appraiser (Fig. 2).

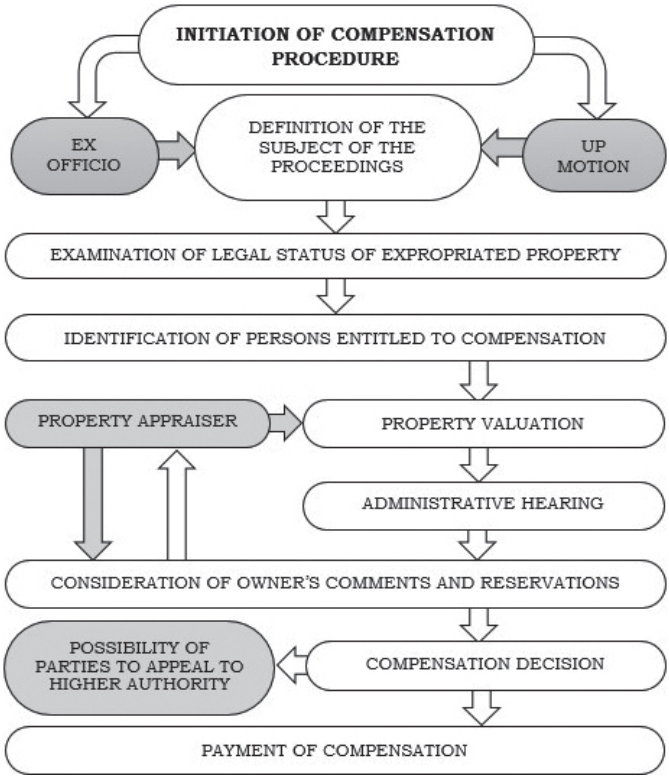

Fig. 1. Procedure for determining compensation for expropriation

Source: own elaboration based on [31]

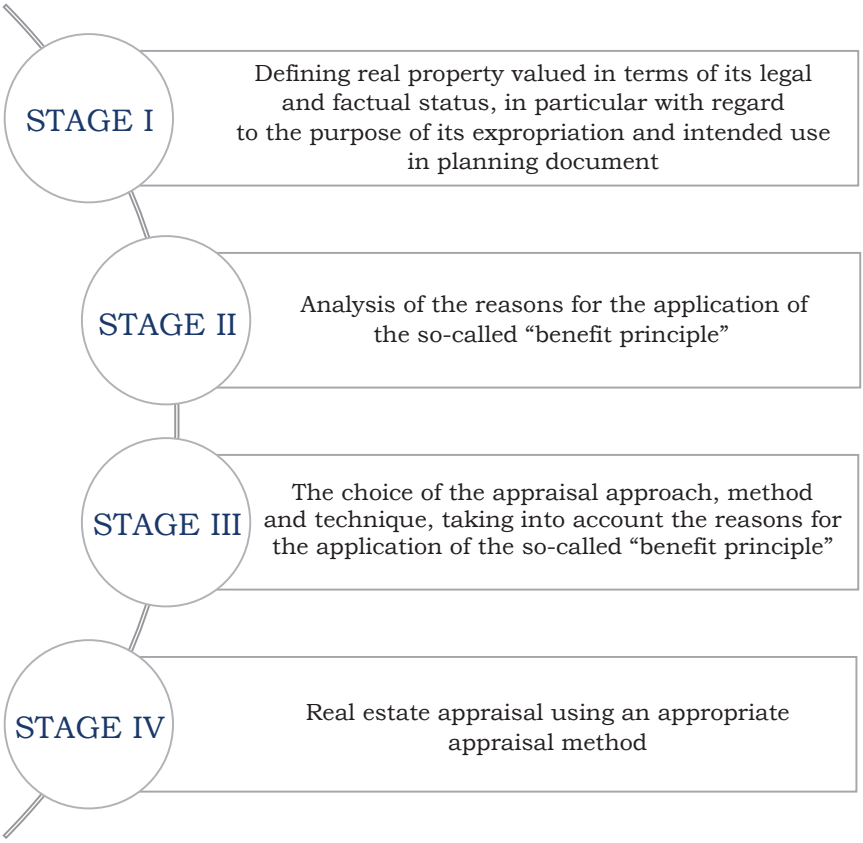

Fig. 2. General procedure for real estate appraisal for the purpose of determining compensation for expropriation

Source: own elaboration based on [32]

The compensation is determined by the competent authority based on the value of the property. The assessment of whether a party is entitled to compensation and in what amount undoubtedly belongs to the administrative body competent to determine the compensation. The prepared appraisal report is necessary evidence in the proceedings and it also directly affects the content of the decision determining the compensation. Public administration bodies, similarly to the administrative court, are obliged to evaluate the appraisal report in formal terms and assess its probative value.

Detailed rules for determining the value of real estate are contained in the Regulation of the Council of Ministers [28]. When determining the market value of real estate, its type, location, use, purpose, state, and the current real estate prices are considered. Pursuant to Article 4 clause 17 of the Act [1], the state of the property should be understood as the state of its development, legal status, technical

condition, equipment in technical infrastructure, as well as its surroundings, including the size, type and degree of urbanisation of the town where the property is located. While examining the state of the property, the data contained in the land and building records kept based on the regulation on the register of land and buildings [29] under the Act [30] should also be taken into account.

The compensation does not cover damages related to the compulsory deprivation of property rights, e.g. costs of moving, losses due to downtime in business operations, costs of acquiring a new property. Additionally, in the case of properties in poor technical condition, the problem is the cost of restoration of housing conditions.

The value of the property for compensation purposes is determined by applying the benefit principle, i.e. by adopting the intended purpose of the property that results in a higher value. The source of this principle was in the 1970s and 1980s [22], when agricultural land was taken over for housing purposes. The amount of compensation for farmers was increased when the farm was the only source of income. This was to compensate for the loss of not only real estate, but also their source of income.

Currently, a bill has been prepared to amend the Act on Real Estate Management [6] concerning new rules for determining compensation for expropriation, disregarding the benefit principle, and taking into account other conditions. It provides for the determination of the amount of compensation as the value of the property, increased by an amount corresponding to 20% of the value of the land and 40% of the difference between the value of the property and the value of the land. Additionally, it will be possible to claim damages before a common court for expropriation-related losses incurred by the owner to the extent other than loss consisting in deprivation of property rights to real estate.

From the moment of presenting its assumptions, the bill has aroused numerous protests from the public, mainly from those whose property is located in areas of the planned construction of the Solidarity Transport Hub (STH) or the accompanying infrastructure.

The Solidarity Transport Hub or Central Communication Port (in Polish: Centralny Port Komunikacyjny, CPK) is a planned transfer node]located between Warsaw and Łódź, occupying an area of approximately 30 km². The investment is to include the Airport, railway investments and connections throughout the country, which will enable travel between Warsaw and the largest Polish cities in no more than 2.5 hours.

At the meeting on October 6, 2022, the Senate rejected the proposed amendment to the Real Estate Management Act. The Senate stated that for the persons subject to possible expropriation, the proposed regulations introduce rules for determining the amount of compensation that are less favourable than the existing ones, and that they do not fulfil the constitutional obligation to provide fair compensation for expropriation [33].

In the opinion of the Senate, the expected scale of the expropriation process for the planned construction of the Central Communication Port should require extra measures to be taken with respect both to the amount of compensation and the time of its payment. The proposed statutory amendment does not introduce regulations enabling the restoration of the current situation of the expropriated, including covering the costs of acquiring real estate of a similar standard, the costs of moving, especially with regard to agricultural activity which is their main source of income (justification to the resolution of the Senate).

4.2. The Benefit Principle in Other Countries

The benefit principle does not apply in other countries [22]. For example, in the French expropriation code, earmarking for a public purpose is irrelevant with regard to the compensation process [34]. Similarly, in Germany, the change in the value of the property resulting from the planned expropriation is not taken into account when determining compensation [35].

In the British legal system, the principle of not considering the expropriation benefit is referred to as the "no-scheme rule" [36]. This principle has been regulated in the Land Consolidation Act since 1961. A similar structure applies in Canada [37].

4.3. Acquisition of Land Pursuant to the Decision on a Permission for the Implementation of a Road Investment in Selected Areas

The benefit principle applies most frequently when road investments are planned on agricultural land. To illustrate the analysed problem, the tables below present data on compensation for expropriation from selected areas, i.e. Podlaskie and West Pomeranian provinces (Tab. 1) as well as the city of Krakow (Tab. 2) Data from the provinces were captured in response to a questionnaire addressed through access to public information. They include the number and area of plots of land expropriated for road investments (pursuant to a decision on the permission for the implementation of a road investment), the number of decisions issued, compensation paid, the value of 1 m² of land intended for road use determined as compensation for the plots acquired for a public-law entity pursuant to a decision on the permission for the implementation of a road investment (ZRID decision). The analysed period covers the years: 2020–2021.

The presented data demonstrates that expropriation based on the provisions of the Act [3] is widely used in road investments. In Podlaskie province in 2020–2021, approximately 8 ha of land were expropriated for the benefit of the province and 146 compensation decisions were issued. In West Pomeranian province, approximately 48 ha of land were acquired, and 538 compensation decisions were issued.

In the city of Krakow in 2020–2021, approximately 13 ha of land were expropriated and 268 compensation decisions were issued. The year 2021 hit the highest amount of compensation: of approximately PLN 40 million.

Table 1. Expropriation of plots for road investments for Podlaskie and West Pomeranian provinces

Expropriation of plots for road investments	Province			
	Podlaskie		West Pomeranian	
	2020	2021	2020	2021
Number of plots purchased for the province under ZRID decisions	173	40	784	361
Area of plots purchased for the province under ZRID decisions [ha]	3.4644	3.9139	36.8957	20.2494
Area of agricultural plots covered by ZRID decisions [ha]	no data	no data	27.4386	20.2484
Number of decisions on compensation for plots purchased for the province under ZRID decisions	127	19	494	44
Total amount of compensation for plots purchased for the province under ZRID decisions [PLN]	926,537	605,387	9,155,429	243,698
Average value of 1 m² of land for road investments [PLN]	26.74	15.47	46.95	61.51

Source: own elaboration based on responses from managers of provincial roads

Table 2. Expropriation of plots for road investments for the city of Krakow

Expropriation of plots for road investments	City of Krakow	
	2020	2021
Number of plots purchased for the city under ZRID decisions	no data	no data
Area of plots purchased for the city under ZRID decisions [ha]	2.9458	9.7462
Area of agricultural plots covered by ZRID decisions	no data	no data
Number of decisions on compensation for plots purchased for the city under ZRID decisions	95	173
Total amount of compensation for plots purchased for the city under ZRID decisions [PLN]	20,459,140	39,666,560
Average value of 1 m² of land for road investments [PLN]	400	500
Average value of 1 m² of agricultural land in the city of Krakow [PLN]	30	35

If the effects of the benefit principle are to be assessed, the differences between the price of agricultural land and road plots are important. Significant differences were observed for the city of Krakow between the value of the land intended for road investments and the price of agricultural land. Therefore, the benefit principle results in the amount of compensation for the expropriated land being several times that of its market value. There are no known estimates of the total costs of the benefit principle in all public purpose investments.

In the course of the preparation of the bill to the Act [1], the Ministry analysed the data provided by the General Directorate for National Roads and Motorways which, as a result of the development and construction of roads in Poland, implements the greatest number of expropriation decisions for public purposes. It demonstrated that mainly agricultural land is expropriated, often being meadows, pastures, wastelands, ditches, and soils of low valuation class [6].

In order to present the effects of the benefit principle, Table 3 lists some specific examples of expropriation of real estate for roads in the last two years. The expropriated land was intended for agricultural use and the benefit principle was applied in the process of determining compensation.

Table 3. Examples of differences in the amount of compensation for the expropriation of agricultural land resulting from the benefit principle

Location	Average value of 1 m² of agricultural land [PLN]	Average value of 1 m² of land for road investment [PLN]	Area of expropriated real estate [ha]	Amount of compensation paid [PLN]	Amount of compensation paid without the benefit principle [PLN]	Difference in compensation amounts due to the benefit principle [PLN]
Węgierska Górka	3.00	32.33	0.3247	104,975.51	9,741.00	95,234.51
Smardzew	3.00	36.00	1.5000	540,000.00	45,000.00	495,000.00
Lućmierz	3.00	35.90	2.0000	718,000.00	60,000.00	658,000.00
Warszawa Wilanów	50.00	650.00	2.5000	16,250,000.00	1,250,000.00	15,000,000.00
Radziejowice Przeszkoda	8.00	50.00	1.8000	900,000.00	144,000.00	756,000.00
Gadka, Kołbiel commune, Otwock district	6.00	45.00	0.1289	58,005.00	7,734.00	50,271.00

Table 3. cont.

Location	Average value of 1 m² of agricultural land [PLN]	Average value of 1 m² of land for road investment [PLN]	Area of expropriated real estate [ha]	Amount of compensation paid [PLN]	Amount of compensation paid without the benefit principle [PLN]	Difference in compensation amounts due to the benefit principle [PLN]
Kmiecin, Nowy Dwór Gdański commune	5.50	43.56	36.3223	1,582,199,388.00	1,997,726.50	13,824,267.38
Poznań – Konin section	5.00	500.00	4.0000	20,000,000.00	20,000.00	19,800,000.00
Kamień, Szemud commune	8.43	105.25	5.2542	5,530,045.50	442,929.06	5,087,116.44
Total	–	–	53.8301	59,923,019.89	4,157,130.56	55,765,889.33

Source: own elaboration based on [29]

The analysis of the selected compensation amounts (Tab. 3) demonstrates that considering the current purpose of the real estate, the amount of compensation for the land of 53.8301 ha would amount to approximately PLN 4,157,130, while considering the purpose consistent with the purpose of expropriation, this amount is more than 13 times higher, i.e. approximately PLN 59,923,019. The difference in the amount of compensation resulting from the benefit principle reaches approximately PLN 55,765,889.

5. Conclusions

The problem of considering the purpose of expropriation and, consequently, the application of the benefit principle is widespread in compensation proceedings relating to road investments. The amount of compensation determined using the benefit principle is significantly different from the market value of the expropriated property due to the fact that it does not take into account the current purpose of the expropriated property. At the same time, however, compensation does not recover damages related to the forced deprivation of property rights.

The research confirms that the expropriation of agricultural land results in the payment of compensation which is far higher than the market value of the expropriated property, which is a direct consequence of applying the benefit principle.

There are no known estimates of the total costs of the benefit principle in all public purpose investments.

While implementing the research objective, the author states that the benefit principle should be eliminated from the procedure of estimating the value of real estate for the purpose of determining compensation, i.e. the intended use resulting from the purpose of expropriation should not be taken into account. The amount of compensation should be independent of the purpose of expropriation. The intended public purpose cannot be treated as a criterion for increasing the market value of the expropriated property, especially that the former owner would not be able to implement the investment for which the property is intended, i.e. a public road. Pursuant to Art. 2a of the Public Road Act [38] determining the ownership status of public roads, the implementation of such investments is the responsibility of public entities.

In most European Union countries, the amount of compensation is based on the market value of the property, without applying the benefit principle. At the same time, however, the compensation is increased by other damages related to the deprivation of property rights.

The adoption of such a solution in Poland would require the payment of compensation related to the compulsory nature of the real estate acquisition. The compensation should cover damages associated with e.g. the costs of purchasing another property, the costs of moving, the costs of temporary rental, restoration of living conditions after the expropriation, losses due to downtime in business operations.

The proposed regulations (rejected by the Senate) do not solve the problem. They introduce rules for determining the amount of compensation that are less favourable for the expropriated than the existing ones. The bill does not fulfil the constitutional obligation to provide fair compensation for expropriation.

The legislator's attempts to amend the regulations prove the topicality and importance of the issues discussed in this research paper. The analysis carried out herein confirms the hypothesis formulated in the Introduction.

Acknowledgements

Founded by research subsidies provided by the AGH University of Science and Technology, no. 16.16.150.545.

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