

Compulsory Purchase in Poland, Norway and Germany - Part Germany

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KEY WORDS: Compulsory purchase, compulsory taking of land, expropriation, fair compensation, public purpose, market value

SUMMARY

Even in Europe there are different rules, procedures and traditions according to compulsory purchase. Animated by FIG/FAO-Seminar on compulsory purchase and compensation in September 2007 in Helsinki and FIG Working Week in Stockholm 2008 a comparison of first of all three countries is intended. Involved are up to now Poland (University of Warnia and Mazurin in Olsztyn), Norway (Norwegian University of Life Science) and Germany (Leibniz University Hannover).

The paper contributes the German part to prepare a comparison of compulsory purchase systems in different countries. The paper is organized according to a common pattern focusing four main aspects of a compulsory purchase system:

- Law regulations: The differentiation between content and limits of ownership and expropriation is explained according to German Constitution. Sometimes limitations of ownership need to be compensated too, but this is not under the term of expropriation.
- Public purposes: While various laws allow compulsory taking of land in accordance with public purposes in Germany, the rules about the procedure of expropriation and compensation are uniform. If the purpose is in public welfare it is not decisive, if the applicant is a private or private-public organized company.
- Procedure: The expropriation procedure is carried out by independent State's administration authorities. The applicant's "reasonable offer" previously to the procedure is very important.
- Compensation: "Appropriate or fair compensation" should enable the former owner to buy another property with the same characteristics as the taken one. Thus, the compensation has to include i) the value of the taken property depending on the objective current value of the property (= market value) and ii) additional payments because of consequential damages to cover individual losses of the owners.

Priority is given to voluntary agreements between applicants and land owners. It is shown that a system might be in a favourable balance if compensation amounts not less than current market value and if the expropriated person might not be better-off than in case of a voluntary sale.

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1. INTRODUCTION

The practice in compulsory purchase and compensation is quite different in the world. There are initiatives to support best-practice in this field (comp. FAO 2009, Compulsory acquisition of land and compensation; FIG Comm. 9 is working on recommendations to best-practice conducted by Prof. Kauko Viitanen). Even in Europe there are different rules, procedures and traditions according to compulsory purchase. Animated by FIG/FAO-Seminar on compulsory purchase and compensation in September 2007 in Helsinki and FIG Working Week in Stockholm 2008 a comparison of first of all three countries is intended. Involved are up to now Poland (University of Warnia and Mazurin in Olsztyn), Norway (Norwegian University of Life Science) and Germany (Leibniz University Hannover).

At FIG Congress 2010 in Sydney the partners will present papers of their countries; the papers are organized according to a simple common pattern using four main aspects of a compulsory purchase system which are represented by the headlines of the paper's structure (law regulations, public purpose, procedure of expropriation and compensation). Another idea to ease the future comparison is to describe what is typical or normal standard in the rules and in practice of the compulsory purchase system - often used cases of public purpose, of compensation etc. (typical cases) - and which are "extreme" and rare used cases but still being in line with law (special cases).

2. THE INSTITUTION OF EXPROPRIATION IN LAW REGULATIONS

2.1 Legal basics of expropriation in Germany

The German constitution includes the guarantee of ownership and the compulsory taking of ownership, both are ruled in Article 14 of the Constitution (Grundgesetz). Ownership is composed of

Article 14 [property, inheritance, expropriation]

- (1) "Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws."
 - o First sentence includes the guarantee that private property can not be canceled. Second sentence is very important, law may define limitations of free private property. As far as limitation in law are attributed to the category of Art. 14 (1) there is no need for compensation. These limits are part of the character of property; private ownership is not as free as possible. There are many examples: i) if the municipality intends a formal reploting procedere – and all requirements given in law (§ 45 Federal Building Code) are complied with -, the owners of the plots in the area are obliged to take part

in the procedure; ii) during the time a new plan is in process the municipality may prevent planning permissions and other real changes on the plots up to two years, maximum four years, if the individual changes are hindering planning items (development freeze, §14 BauGB); iii) the establishment of landscape protection rules which may limit the use of plots to some extent. (comp. also 2.3)

- (2) “Property entails obligations. Its use shall also serve the public good.”
- This part is called the social commitment of property. It is not the same as mentioned before in sec. (1); these obligations are relevant within the content and limits given in law according to sec. (1). Property includes the request that it has to serve the public wealth as well and that it may limit the use of a property with regard to the vicinity (social commitment, ownership is correlated with duties). Restrictions in the sense of social commitments according to sec. (2) are not subjects to compensation.
- (3) “Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.”
- The possibility to expropriate real property is given in accordance with purposes fixed in law, but only if the rules for appropriate compensation are existing in the law. The legal definition of expropriation is connected with the idea that the property gets into a predicament it has to carry a special burden or is a sacrifice of the planning. In this sense the German law talks of expropriation, not in the sense of limitations as in sec. (1) and (2). The people very often feel that the strong limitations are an expropriation too.

Expropriation is allowed in accordance with different laws for many public purposes; there are many acts which enable the taking of land, at the national level as well as at the level of the 16 federal states. Typical are the acts about infrastructure measures as new national roads, highspeed railway lines, airports, pipeline or other energy routes, atomic power stations etc. There are also acts which does not rule a specific infrastructural measure, but a special field of public interests, e. g. nature and landscape protection, monument protection, protection of water resources or flood prevention. The urban development is in this category too; the Federal Building Code (Baugesetzbuch, BauGB) rules urban planning, settlements and planned development. All these acts could be the basis for an expropriation order because the different public purposes are appointed here.

Next to the public purpose the law has to determine the nature and the extent of compensation. This part of the rules is mentioned in the acts indeed, but the detailed rules about the procedure and the compensation are in a special act; each of the Federal States passed a special Expropriation Act which rules the details. In many laws there is a reference to the state’s expropriation act. An exemption is the Federal Building Code which very detailed regulates all aspects relevant to expropriation in terms of urban development.

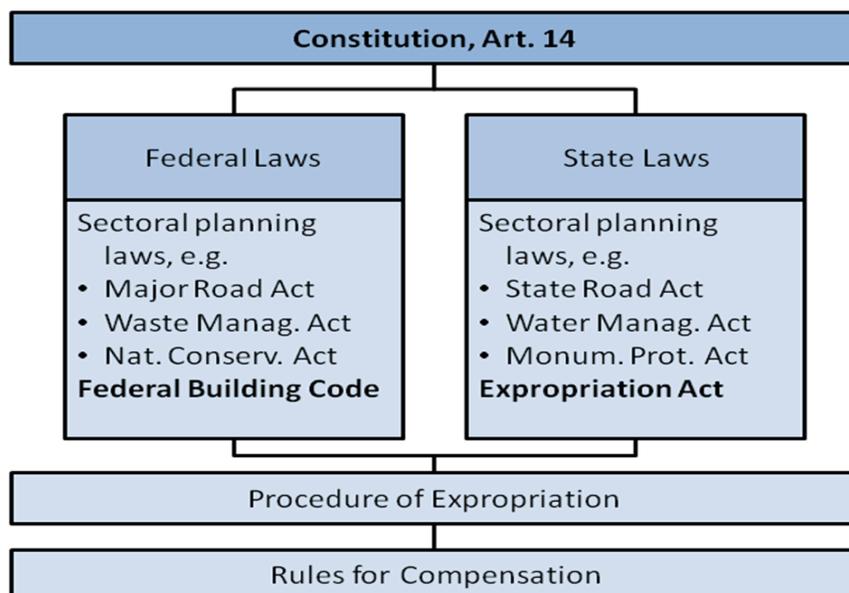


Fig. 1: Legal basics of expropriation in Germany

The legal rules of expropriation in Germany are consistent in all the federal states. Fig. 1 shows that the constitutional base and the rules about the procedure and about the compensation are common. The legal basis for an expropriation might be given in very different acts. Because of the German federal organisation the public purpose can be given in Federal acts as well as State's acts. There are about 20 important laws at the national level only (Runkel 2009). Nevertheless the public purposes themselves, the rules of compensation and the jurisdiction are common.

2.2 Preconditions of expropriation in German law

The legitimacy of expropriation is linked to different preconditions which have to be proved in each individual case if a compulsory taking seems to be unavoidable. These preconditions are ruled in the States' Expropriation Acts, but also in the Federal Building Code according to compulsory acquisitions necessary for urban developments. The Federal Building Code (BauGB) determines the following conditions for the validity of an expropriation (Sec. 87 BauGB):

- Requirement for a public purpose and for common welfare:
The public purposes will be explained in Chap. 3. The common welfare or the public good has to be fixed in legally binding plans. The planning procedure has to involve participation of the public and of different administrative bodies whose belongings may be touched by the planned development. The public purpose has to be a result of publicly organized planning procedures. Procedures for sectoral planning measures, e. g. the detailed planning of a road, railway line or pipeline, result in a legally binding "planning permission" for infrastructure measures (Planfeststellung im Rahmen von Fachplanungen).

The detailed legally binding development plan (Bebauungsplan) is the most important basis for compulsory purchases in the field of urban planning. But a binding development plan does not automatically create a legal basis for expropriating measures. In addition, a particularly public interest-referred justification is necessary and additionally, the implementation must be urgently required, necessary and in relative.

- There is no way to realise the item of the planning with less impact on the land owner than expropriation (subsidiary clause):

The subsidiarity clause should ensure the constitutional requirement of the lowest level of interference. It should be impossible that the expropriation purpose can be achieved in another reasonable way. The subsidiary clause requires that the government should attempt to buy the required land in good faith before it uses its power of compulsory acquisition. Therefore, the public authority has to prove in each case whether the result of the expropriation can be achieved in a less drastic way (e.g. by voluntary contract or by re-allocation of land). There is a priority for using instruments with less impact on the property owner .

Expropriation of portions of a parcel is a consequence of the subsidiary clause and the constitutional requirement to keep the interference into property as low as possible. If the public purpose only requires a part of a plot or can be satisfied by easements or servitudes, then the property may not be extracted in its entirety (Teilenteignung). Compensation covers the expropriated part of the plot plus the disadvantages of the remaining plot. If the owner, however, requires that the remaining property cannot be used any longer economically, the expropriation authority has to compensate the whole property. If the remaining parcel gains advantages this will be mentioned in the compensation too.

- The applicant has to submit a “reasonable offer” seriously for a voluntary acquisition on appropriate conditions, but without success:

In the German system of compulsory purchase and compensation the “reasonable offer” is of high importance. This precondition prevents useless expropriation procedures and encourages a fair process. A “reasonable offer” may include an offer of suitable replacement land.

On the one hand, if the offer of the applicant was at a “reasonable” level but the land owner did not accept the offer, the reasonable offer limits the compensation because future developments of the property are not mentioned any more. In consequence increases in value which arise after the offer was presented, will not be part of the compensation. The Federal High Court of Justice (BGH – Bundesgerichtshof) noticed that an additional compensation because of delaying tactics should be eliminated if the offer was appropriate. The delaying land owner may not be better-off than the land owner who sells his plot voluntary on the basis of a reasonable offer. On the other hand the applicant has to submit the “reasonable offer” previously to the expropriation procedure; if the offer was not “reasonable”, the expropriation procedure will not be started. If in an advanced stage of the process a court decides that the offer was not appropriate the development of the property will be part of compensation up to time of a new “reasonable offer”. These rules should ensure a serious negotiation of the applicant and the land owner before applying to expropriation process and avoid expropriation as far as possible.

- The applicant assures to use the property within an appropriate period for the intended purpose:

The applicant – normally a municipality or a State’s administrative body – is not allowed to apply for compulsory taking of land without a concrete perspective, in time and financing capacity etc., that the plot is urgently needed to implement a public purpose measure. The expropriation is directly connected to a specific public purpose measure. This rule shall prevent a bright use of expropriation for land assembly. If the public purpose is changed by revision of planning, is deferred or even abandoned the former owner may use his right of re-expropriation (§ 102 –103 BauGB).

2.3 Other restrictions and limitations of ownership

Other restrictions and limitations of ownership had already been mentioned in connection with the content and limits of ownership in the German constitution. But within the legal framework of ownership (full ownership according to Art. 14 (1)-(2)) as described before further restrictions and limitations are possible in individual cases. If the restrictions are stronger than the limits of Art. 14 (1)+(2) they have to be compensated (called “enteignender Eingriff” or “expropriation-like intervention”). Compensation is necessary for notable disadvantages and damages caused by public purposes. The rules of determining the compensation are the same as in cases of compulsory taking of land.

These interventions are legal actions of the administration, leading to relevant disadvantages of nearby properties; these kinds of damages usually are atypical and unexpected. Examples: i) During the construction period of a metro-line in a retail area business might be endangered. ii) Within a period of 4 years a restriction as ”development freeze” (§14 BauGB) has to be accepted, but if the period exceeds the restrictions have to be compensated. iii) If a legally binding development plan is changed within a period of 7 years since coming into force and the new designation is less worthy than before the damage for the owner has to be compensated (called ”planning damages”, § 42 BauGB).

Nevertheless according to the theory of ownership of the German Federal Constitutional Court it is not an expropriation in the sense of Art. 14 (3) of the Constitution, because the property still stays in the hands of the owner. The jurisdiction recognizes compulsory purchase as the definite extraction of full ownership rights.

3. THE PUBLIC PURPOSE

Compulsory purchase is permissible if it serves the public welfare. Public welfare is defined as a public interest, which weights higher than the interest of a landowner in the individual case of acquiring the property (Lege, 1997).

Article 14 (3) German Constitution does not characterize the compulsory purchase in terms of benefited bodies but of pursued purpose. The purpose is relevant, not the benefited party. In

principle it does not matter, if the beneficiary is a public body, e. g. the municipality, or a private party. Essential for compulsory purchase is the necessity of the public good. Though in German law, compulsory purchase for private use without public good does not exist. The axiom of legality of a compulsory purchase is important – that is also true for compulsory purchase benefitting private persons (Schmidt-Aßmann, 1987), if they implement measures with dominating public interests.

3.1 Typical public purposes

The most typical public purposes are that of infrastructure measures like motorways, main roads out of towns, railway lines, airports, harbours, flood protection, energy supply, pipelines, high voltage power lines etc. Traditionally different public bodies are responsible for planning, constructing and financing the different types of infrastructure. There is a special law for many of these types of infrastructure; they allow compulsory purchase to acquire the land the infrastructure measure will cover. Acquiring additional land needed during the construction period next to the new roads etc. also is possible. In the last decade the construction of new high speed railway lines was on the top of the agenda. Most of the plots covered by the new railway lines were acquired voluntarily by a subsidiary company of the German Railway (Deutsche Bahn). It is not known how many expropriation procedures had been necessary.

Furthermore expropriation is legitimated in urban settlements. The typical public purposes are listed in the Federal Building Code (BauGB). The rules about taking land for implementing plans for the built-up environment or the planned urban developments are fixed here. It is the most important legal basis for the municipalities, which normally are the applicants. The BauGB terminally regulates the expropriation concerning town and country planning issues. Expropriation may be possible if it serves one of the following purposes:

- to use a plot, or to prepare a plot for use according to the designations of a binding land-use plan
- in case of land which is not developed or only developed to a very low level and is not within the area covered by a binding land-use plan but lies within a built-up area, to use this land or to supply it for a use for infill development in accordance with regulations under building law
- for the procurement of plots for compensation in form of land
- to replace rights taken away by expropriation with other rights
- to make plots available for development where an owner has not met an order to build (section 176 BauGB)
- to preserve a building structure situated within the area covered by a preservation statute (section 172 BauGB)

The first aspect is most relevant. The sentence seems to open a wide range of possibilities. But the conditions of validity reduce the applications to a nucleus. This means that the public welfare can only be stated for land designated for public utilities, e. g. technical and social infrastructure as public roads, waste water facilities, schools, Kindergartens, hospitals, public

greens, public transport facilities etc. The land designated for private land use like land for residential or commercial development is not allowed to acquire compulsory.

3.2. Compulsory purchase benefitting private bodies

Compulsory Purchase according to privatized public purposes

Today many public duties are privatized; the operating companies are in private or mixed public-private ownership. Compulsory purchase benefitting for private parties is possible, if they perform a task for public good. The private parties act instead of public authorities. The public task is delegated to the private entity. Examples for a delegated task to private bodies are postal system and railway system in Germany (Petz, 2009). Further examples are hospitals and elderly care facilities. Compulsory purchase is also possible for private schools or electric power companies. Both private schools and electric power companies serve the public good. Legitimation can be found in acts of private schools (state acts) and energy industry act. If private bodies serve the public good, they are equated with public authorities (Ernst et al., 2008). Federal Constitutional Court explicitly approves electric power companies, because of their use for public good. Another example within planning law is compulsory purchase benefitting bodies charged with carrying out redevelopments (Battis et al., 2009).

The Federal Building Code (BauGB) does not prohibit compulsory purchase for private persons. Though, an application of private persons for compulsory purchase is permissible. But legitimacy of compulsory purchase according to section 85 BauGB is a precondition, as well. Only compulsory purchase with the object of procuring plots for compensation in the form of land or replacing rights taken away by compulsory purchase with other rights is not allowed for private beneficiaries (Battis et al., 2009).

If purpose of compulsory purchase is focused on preparing and delivering land use, beneficiaries are limited to municipality or public utility provider or bodies charged with the provision of public infrastructure. This is called transitory compulsory purchase, because the realization of the purpose is not done by the applicant but by a third party, who buys property. Example is compulsory purchase for using an estate according to the binding land-use plan. The applicant of the compulsory purchase only prepares the estate. The third party buys and realizes the (re)development and the use of the estate (Ernst et al., 2008).

Compulsory Purchase according to private-public purposes

Is expropriation possible in cases of a combination of public and private purposes? In 1987, Federal Constitutional Court came to a basic decision concerning indirect public good and the legitimacy of compulsory purchase – so called “Boxberg”-decision (BVerG, 1 BvR 1046/85).

Content was compulsory purchase for the benefit of public good as an indirect effect of activity of a private company. Therefore, public good does not result from the purpose of expropriation directly. In this case court decided, that there is a need for complying with legal requirements on compulsory purchase and on constitutional legitimation (Stürer, 2009). The lawmaker has to describe purposes for compulsory purchase very detailed. In the

“Boxberg”-case was decided, that the creation of new employment opportunities and improving the economic structure is only an indirect public good; the legal basis to expropriate for these purposes is absent. Both mentioned purposes are not urban-planning measures (defined as section 85 BauGB for using a plot, or preparing a plot for use in accordance with the designations contained in the binding land-use plan), which are needed for legitimation of a compulsory purchase according to Federal Building Code (Petz, 2009). Therefore, compulsory purchase was not permissible in this case. But the possibility exists that lawmaker enact an specific law (BVerG, 1 BvR 1046/85), although he did not exercise this right yet (Battis et al., 2009).

However, pursuing private interests besides public welfare does not exclude compulsory purchase. Therefore, profit maximization is allowed besides the public purpose (Ernst et al., 2008), though compulsory purchase is not allowed if private and public interests are involved at the same level. Therefore, compulsory purchases with benefit for private companies – e. g. with the aim of building airports, traffic infrastructures and so on - are acceptable according to sectoral planning. But compulsory purchase is not permissible for benefitting a private company including new employment opportunities with predominantly private sector profits (Battis et al., 2009).

The state did not have a monopoly on compulsory purchase to achieve public good. But compulsory purchase benefitting private persons needs precautions by lawmaker (Petz, 2009). The reason according to Battis is the higher risk of misuse for concerned landowners. That is why the purpose for public good has to be assured (Battis et al., 2009). For these cases, additional legal provision under constitutional law is needed. Lawmaker has to decide for which purposes such a compulsory purchase is permissible – especially, if the purpose is not obvious by the character of the company (Stür, 2009). But there are different opinions upon this item (negatory Schmidt-Aßmann (1987) expecting destructive results). According to Battis, nearly 16 % of all compulsory purchase proceedings are benefitting private persons (Battis et al., 2009).

4. THE PROCEDURE OF EXPROPRIATION

4.1 The normal procedure

The expropriation procedure is carried out by special higher State’s administration authorities, the Expropriation Authorities. In most of the German states they are set up at the regional level of administration. This special authority is responsible for a fair procedure including a fair compensation in each case of expropriation. The Expropriation Authority acts as a mediator and has the duty to do the best to achieve a voluntary agreement between applicant and land owner. The expropriation authority is independent and especially not responsible for the public purpose that should be reached by taking the land.

The complete procedure is subdivided in

1. Pre-negotiation of the applicant to acquire the land without expropriation; a “reasonable offer” is necessary
2. Application for expropriation and preparation of the procedure (preliminary proceedings)
3. Formal procedure of compulsory purchase, split up in
 - proving if the public purpose and the transfer of ownership is legitimate and
 - determining the appropriate compensation.

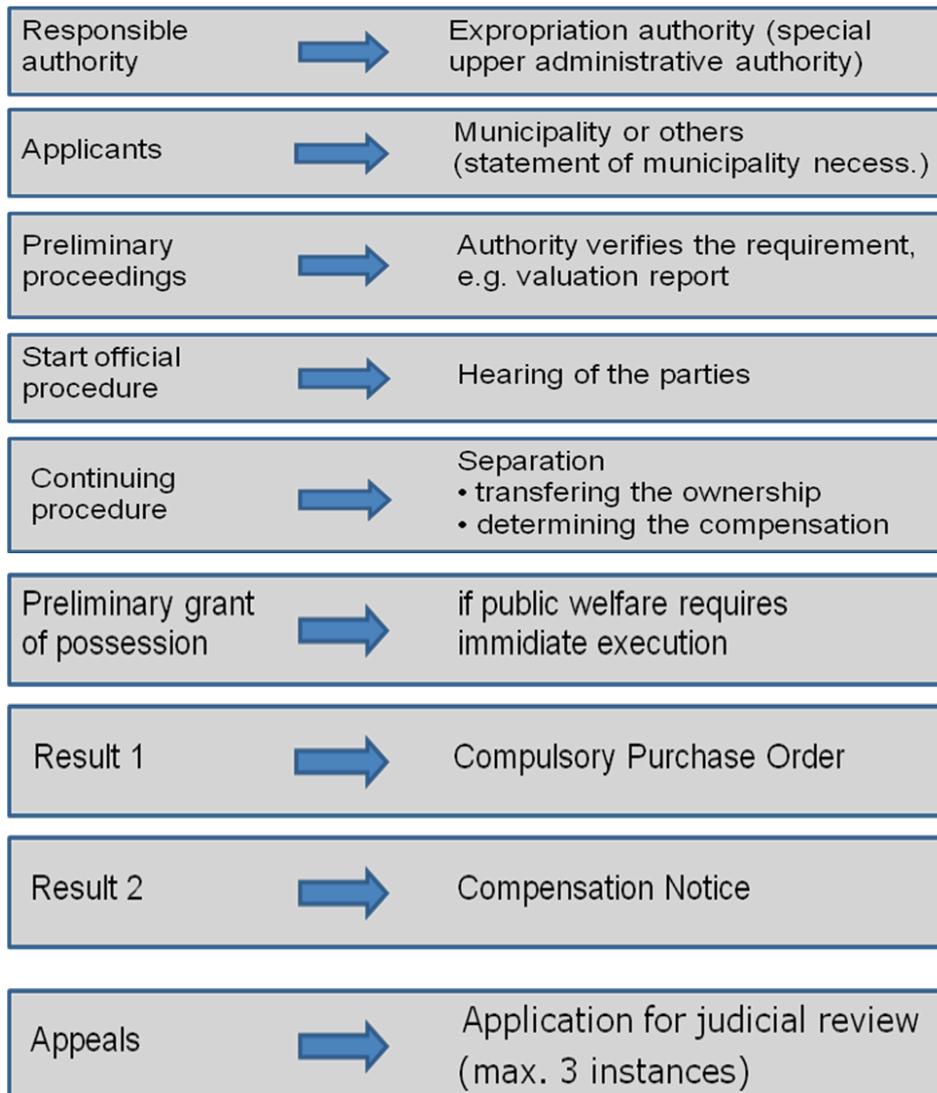


Fig. 2: Main steps of the compulsory purchase procedure

The important actors involved in the procedure are the applicant, the land owner, the municipality, the Expropriation Authority, the Valuation Committee and finally the courts. The expropriation procedure takes place on request of the applicant only. The application for expropriation has to be submitted to the responsible municipality first; the municipality adds her statement submits the application including her statement to the expropriation authority.

The pre-negotiations of the applicant (No. 1) are not a part of the official procedure but this part has to be documented and will be proved during the procedure in order to verify if the application are conform to the pre-conditions (comp. chap. 2.2); e. g. the applicant has to demonstrate that a “reasonable offer” had been offered.

The preliminary part of the procedure (No. 2) is very important. The Expropriation Authority inspects the whole situation according to the statements of the parties and the municipality, gets to know the involved parties, inspects the local situation – the responsible persons of the Authority are obliged to get an intuitive impression of the local situation (date with the involved parties at the location of the land owner) -, proves the possibilities of a voluntary agreement and prepares the formal procedure. The applicant has to verify that he tried to buy the property by submitting reasonable offers, that he noticed the possibility of the compulsory purchase and that he made a last offer which was suitable to come to a voluntary agreement.

In the preliminary part the Expropriation Authority checks the pre-conditions. The authority commissions an independent valuation of the property. The valuation of the property is done by the Valuation Committee responsible for the area or by experienced valuers. A survey of the official board of experts (Gutachterausschuss) is prescribed in case of property withdrawal or order of a hereditary building right. The valuation is the basis judging the “reasonable offer”. If the expropriation authority comes to the conclusion that the legal requirements of an expropriation are complied the formal procedure will be opened. In the majority of cases the formal procedure of expropriation can be prevented by agreements between the parties during the preparation of the procedure. Official data about the quote are rare; e. g. the Expropriation Authority in Münster (Westf.) published that 80 % of the applications could be completed by agreements before starting the formal procedure.

The formal procedure (No. 3) starts that the parties are invited to a trial or hearing. According to law the formal beginning of the expropriation procedure is not the application for expropriation, but the date of the official hearing which is a very important part of the procedure. At this stage the procedure becomes public; the beginning of the expropriation procedure is published in the lokal newspaper and a notice is taken into the land register. During the official hearing, the Expropriation Authority is still obligated to work towards an agreement between all involved parties. Again a majority of the remaining cases can be solved by voluntary agreements.

If not, the full procedure will be continued, i. e. proving if the public purpose and the transfer of ownership is legitimate and determining the appropriate compensation. The second part only includes the determination of the appropriate compensation; very often the landowners accept the legitimacy of the compulsory taking of the land, but the second part (compensation) needs to be decided by the authority. A “partial agreement” about the aspects agreed upon is possible, requires however a supplementing expropriation resolution. The agreement and/or partial agreement is like a contract under public law, which is equal to a contestable expropriation resolution. It requires an execution order to become effective. As already mentioned statistical data about the frequency of applications of the compulsory purchase procedure in Germany are not known. But experts estimate that less than 10 % of the cases

where expropriation seems to be unavoidable, do need a final decision of the Expropriation Authority. If a compulsory purchase order or a compensation order was unavoidable and became necessary, in not a few cases the results are not accepted and one of the parties appeals against the decision by court.

4.2 Special aspects of the procedure

The special importance of the “reasonable offer” and the independent position of the Expropriation Authorities have already been mentioned.

The compulsory purchase procedure in its completeness often takes a long time. In many cases it is connected to the planning procedure of the public purpose measure, e. g. a new railway line; as long as the result of the planning process, the “planning permission” (Planfeststellungsbeschluss), is not in force an important pre-condition of the expropriation is not existent.

The progress of the compulsory purchase procedure itself can be accelerated very much by putting the applicant into possession before the procedure is completed. Quite often the immediate execution of the intended measures for reasons of the well-being of the public is urgently required. In these cases, a premature possession briefing of the applicant (putting in possession before completion of the procedure) is usually possible by decision of the Expropriation Authority. To the preservation of evidence, the condition of property has to be determined before the putting in possession. In addition, a verbal negotiation and the expropriation resolution are necessary. The putting in possession also requires the payment of the compensation in the size of the reasonable offer to the hands of the Authority.

The procedures by court after the decisions of the Expropriation Authorities can strongly influence the results. Maximum three instances are possible; the decisions often need more than a few years. Mostly the compensation is subject of the appeal; so the courts have to assign independent valuation surveys. In consequence two aspects are very important for fixing the final compensation: Because the decision of the courts takes time, the development of land prices in the meantime has to be mentioned; the former land owner must be able to buy a similar property with the amount of compensation at the time when the courts decision comes into force.

The special aspects of the procedure are closely linked to duration of the procedure and the date of valuation as well as to the final amount of compensation.

5. THE RULES OF JUST/FULL/FAIR COMPENSATION

5.1 What does “appropriate” in terms of compensation mean?

The most important question in international discussions about compulsory purchase and compensation is: What could be accepted as an appropriate or fair compensation? The FAO Guidelines on Compulsory Land Acquisition and Compensation have been coming into force

in 2008. They are dealing with many different aspects of compulsory purchase. The important aspect of compensation is mentioned as follows: “Compensation, whether in financial form or as replacement land or structures, is at the heart of compulsory acquisition.” (FAO 2008, p. 23)

An appropriate compensation has to keep the balance between the irreversible impact on the situation of the land owner and the importance of the public purposes and their implementation in an economic manner. It is unjust and abuse of public power if the compensation is rather low; on the other hand the public purposes can not be supported any more if the compensation is rather high. The compensation might be in a favourable balance if the price agreed upon in a voluntary contract is on the same level as the compensation in a compulsory purchase procedure. The expropriated person may not be better-off than in case of a voluntary sale.

The situation of the expropriated person is described by the theory of sacrifices: In case of expropriation the land owner makes sacrifices for a public purpose. The basic idea of the compensation in case of a compulsory taking of private land is that the expropriated owner shall be able to buy a new plot of the same quality and characteristics as the expropriated land (Battis/ Krautzberger/ Löhr (2009), § 93 Rn. 4). In this sense the compensation has to be a “full compensation”; it has to cover the market value of the plot at the current date and the additional expenses the owner has to invest for acquiring another comparable plot and to establish the same business or situation of living as before.

The FAO Guidelines on Compulsory land acquisition and Compensation explain the balance as follows:

“If compulsory acquisition is done poorly, it may leave people homeless and landless, with no way of earning a livelihood, without access to necessary resources or community support, and with the feeling that they have suffered a grave injustice. If projects carry out compulsory acquisition satisfactorily, they leave communities and people in equivalent situations while at the same time providing the intended benefits to society.” (FAO 2008, p. 2)

“Compulsory acquisition requires finding the balance between the public need for land on the one hand, and the provision of land tenure security and the protection of private property rights on the other hand. In seeking this balance, countries should apply principles that ensure that the use of this power is limited...” (FAO 2008, p. 5)

„The principle of equivalence is crucial to determining compensation: affected owners and occupants should be neither enriched nor impoverished as a result of the compulsory acquisition. Financial compensation on the basis of equivalence of only the loss of land rarely achieves the aim of putting those affected in the same position as they were before the acquisition;” (FAO 2008, p.23)

Unsecured expectations (up or down) are not part of the compensation. The future possibilities of an upgrading development of a property or location will be part of the

compensation only, if the general market situation already reflects on this possibility. The subjective hope of the land owner for further improvements and increase in value is not subject of the compensation. “Lost profits” in this sense are part of the compensation if they could realistically be expected; maybe existing chances for future profits are not part of the compensation. The compensation shall be sufficient to enable the owner to buy a comparable property and to continue the land-use at a new place without losses; this refers to the market conditions at the date of expropriation.

5.2 Standards for compensation

The requirement of compensation results directly from constitution Article 14 (3) GG. The compensation is not a payment of indemnity. It concerns rather a fair weighing of interests between the interests of the involved landowners and the interests of the public. The range of the compensation covers:

- The loss of property rights due to expropriation (real asset loss).
- Other property losses due to the expropriation (consequential damages).
- Increasing values of the remaining property have to be mentioned.

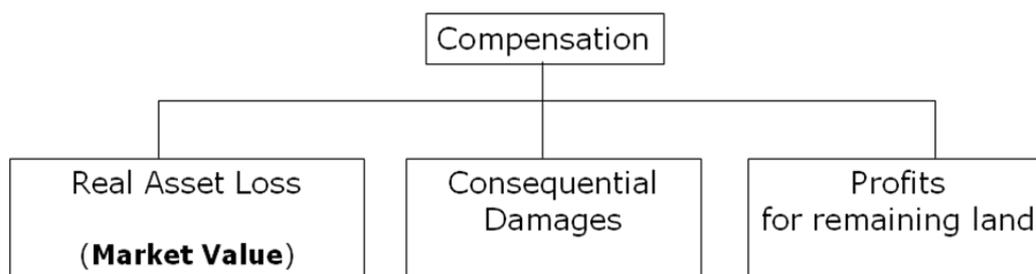


Fig. 3: Compensation might be composed of three parts

The expropriation acts consider three different kinds of compensation:

- in money,
- in property,
- by grant of other rights.

The compensation in money is the normal case. It has to be paid in one amount, unless the concerned party requests the compensation in regular instalments. On the request of the owner the compensation should be granted in property (suitable replacement land), if a compensation in money burdens the concerned party more strongly than other kinds of compensation. Compensation in land is imperative if business or livelihood of the owner depend on land.

5.3 Compensation of real asset losses

The compensation of the loss of real estate assets is estimated by valuating the current market value. This part of the compensation is independent from the expropriated person. The official

“Gutachterausschuss” (Committee of Valuation Experts, responsible for a “Landkreis”) is consulted to estimate the current market value (Verkehrswert, §194 BauGB). The valuation is done with the help of valuation standards defined in the Valuation Ordinance (Wertermittlungsverordnung – WertV).

5.3.1 Expropriation and the quality of land

The market value of built-up properties mainly can be calculated with the three standard valuation methods (comparison method, capitalization method, cost method) in dependency of the type of property. In case of expropriation the properties predominantly are not built up. Here the “stage of development” of the land is significant. The “stage of development” is correlated to the progress in urban planning and development procedure.

The valuation standards define four steps of “quality of land for development” within the planning and development procedure of land from “agricultural land” to “building land” (comp. §4 WertV). Relevant are the formal urban plans of the municipality (designations in the Preparatory Land-use Plan (Flächennutzungsplan) and in the legally binding Local Development Plan or Detailed Land-use Plan (Bebauungsplan)). The next development steps depend on the re-organisation of the plot structure (“gross”-development area is changed into “net”-development areas) and on the servicing of the plots (technical infrastructure). Fig. 4 shows a scheme of the stages of development.

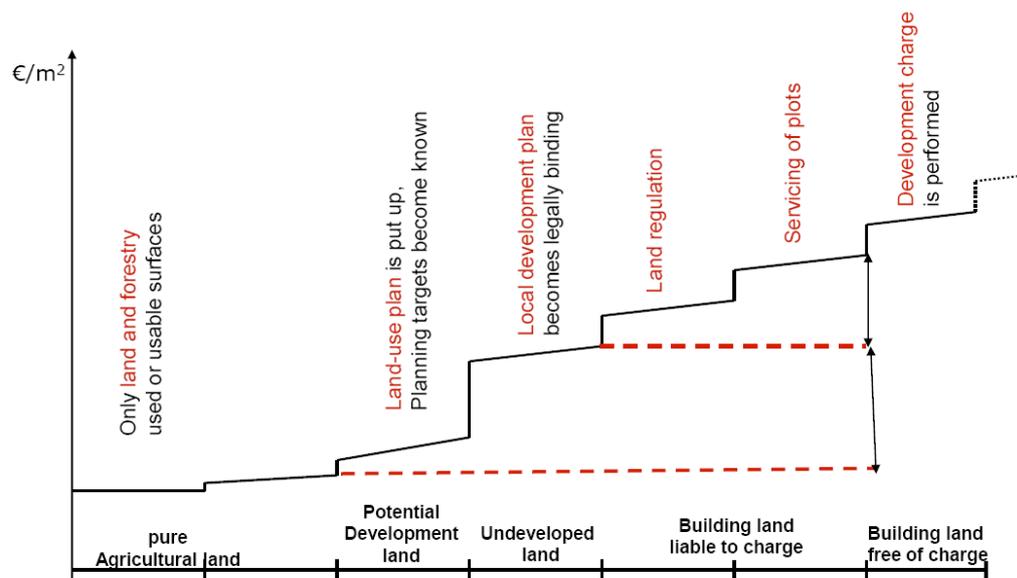


Fig. 4: Correlation of planning/ development procedure and quality of land

The legal rules concerning compensation determine that the land designation prior to expropriation is relevant. If a parcel is designated for public purpose, the quality of the land – correlated to the “stage of development” - will not rise furthermore. The stage of development which the parcel reached before the public purpose was destined, determines the quality of land which has to be compensated (development of the land is frozen). This date has to be fixed as important aspect of the valuation and determines the quality of land for the proposed

compensation. It is called “the preliminary effect” of the expropriation (§ 95 (2) BauGB). For example, if urban planning designates agricultural land for residential development the compensation includes the future perspective of the parcel and is clearly higher than the value for agricultural land; the value depending from the state of development (comp. example below). If developed land is needed for a less valuable land use, e.g. for urban greens, the value of developed land is the base for the compensation (= land designation prior to expropriation). These rules guarantee in principle that the compensation will enable the expropriated person to buy another property with the same quality of land as the taken property.

The importance of the planning system is responsible that the market value of a property in Germany includes – deviant to the value of the existing land use – the expected development potential of a site according to the stage of planning and development. The aspect of “justified expected future” of a parcel from the perspective of public planning is included in the market value and thus in the compensation of the real asset losses.

5.3.2 Expropriation and the date of valuation

Different dates of valuation are possible depending from the procedure of the expropriation.

- The valuation date (Wertermittlungsstichtag) usually is the date of the decision about the expropriation request (§ 95 (1) BauGB).
- In case of granting possession prematurely (§ 116 BauGB) the date of valuation shifts to the day of the change of possession.

Additional the valuation date becomes special importance in times of variations in real estate prices. The problem of changing price levels is important especially in case of appeals. If the indemnity refers to the amount of compensation the beneficiary of expropriation may fix price conditions by early payment or deposit of the compensation amount specified in the resolution or at first instance. The Federal High Court (BGH) developed a special case law according to the changing value in times of rising as well as decreasing prices (Steigerungsrechtsprechung). This can lead to renewed valuations and/or actualizations in particular when the procedure of expropriation takes a long time.

The following example assumes a period of raising prices:

The expropriation authority marks the compensation for 1000 square metres with 80.000 € (80 €/m²) in the expropriation resolution. The party entitled to compensation complains against the amount of compensation. The party obligated to compensation offers the amount for the payment and deposits it with the district court. The court states that the appropriate compensation would have been 95 €/m² at the time of the expropriation resolution, thus an amount of 95.000 €. The obligated party has thus already deposited 84.2% of the appropriate amount, which leaves a rest of 15.8%. Because of intermediate increase of market prices till to the court’s decision, the market value of the land rose to 105 €/m²; the property has therefore gained a market value of 105.000 € in the meantime. Because of raising prices the compensation would not be sufficient to replace the property at current market prices. The “balance” in this case means that the deposited portion of the compensation will not be

changed, while the remaining portion (15.8% of the compensation) shifts to the new market conditions (remaining sum to be paid = 16.590 €).

5.4 Compensation for consequential damages

Next to the real asset losses the consequential losses caused by the expropriation are compensated according to § 96 BauGB. The compensation because of consequential damages considers disadvantages caused in the person of the owner and his business, not in the property; this part of the compensation is individual and has to be a result from the compulsory taking of the land; the relationship between the owner and/or his fortune and the expropriated property is decisive. The compensation is conceded to property owners as well as tenants. In case of tenants the consequential losses are calculated with regard to the contract period.

Many items are possible in the categories of consequential damages. Three categories of damages are usual.

General damages:

- temporary or permanent losses suffering pursuant to owner's profession or livelihood,
- depreciation of the remaining property (e. g. if can not be used independently),
- compensation of the physical structures (walls, fences, pavements) in case of partial expropriations, compensation of the plant cover in case of horticultural use,
- removal expenses or costs for substitute living space, cost of organizing a property.
- Broker's cost, notarial deed cost, land register cost, surveying cost, transaction tax, if replacement property is part of the compensation.

In case of farming land the compensation may include:

- Damages or losses because of separation of the remaining fields after expropriation (side-gated, cutted diagonally or transected),
- additional cost because of enlarged routes to the fields (detours),
- lost profits from harvests which already had been sown,
- compensation of the tenants.

An orientation and pattern for calculating the mentioned losses are given in the Agricultural Compensation Guidelines (Entschädigungsrichtlinien Landwirtschaft - LandR), but they are not obligatory. There also are guidelines relevant for compensations of woodland (WaldR). There are specialized valuers for agriculture, forestry and ornamental trees, listed at the Landwirtschaftskammer (self-governance of agricultural matters).

Additional consequential damages in case of resettlement of a firm or farm:

- Travelling cost for resettlement, incl. additional manpower, cost of site inspections,
- negotiation cost, experts advice,
- cost of relocating the business, production downtimes,
- expenditures for unusable inventory (if not included in the asset compensation),
- loss of earnings during the resettlement period,
- cost of initial difficulties in the management, change in customers, etc.

The compensation should cover the expenditure necessary to drive the business at a new location in the same manner as the previous one. The relocation is compensated, if the commercial business persists, if it is worthy to relocate and if relocation is economically acceptable. Compensation only is granted for existing parts of the business. If a new sector should start soon or a spatial extension is planned, not yet operating parts cannot be compensated. If the owner prefers the closing down of the company likewise all typical consequential damages are compensated, although the costs will not incur thereby. In most cases in practice, the compensation can not be orientated at the real expenses of the relocation, but it has to be estimated and fixed in advance. There are specialized valuers for resettlements of firms (listed at the Chambers of Commerce and Industry).

6. CONCLUSIONS

The paper contributes to prepare a comparison of compulsory purchase systems; up to now Poland, Norway and Germany are involved. The information is structured into 4 main aspects:

- Law regulations: The differentiation between content and limits of ownership and expropriation is explained according to German Constitution. Sometimes limitations of ownership need to be compensated too, but it is not under the term of expropriation. While various laws allow compulsory taking of land in accordance with public purposes in Germany, the rules about the procedure of expropriation and compensation are uniform.
- Public purposes: The possibility to implement public purposes with the help of expropriation is laid down in many national laws as well as Federal states' laws. It is possible to pass a bill especially for an important public infrastructure development like Stuttgart airport extension which allows expropriation. If the purpose is in public welfare it is not decisive, if the applicant is a private or private-public organized company; public purposes have to overbalance private purposes considerably.
- Procedure: The expropriation procedure is carried out by special higher State's administration authorities. The Expropriation Authorities are independent and especially not responsible for the public purpose that should be achieved by taking the land. A "reasonable offer" of the applicant previously to the procedure is very important.
- Compensation: "Appropriate compensation" should enable the former owner to buy another property with the same characteristics as the taken one. Thus, the compensation has to include i) the value of the taken property depending on the estimation of the objective current value of the property (= market value) and ii) additional payments because of consequential damages to cover individual losses of the owner's business or depending on costs necessary to reinstate in the same standard as before. Advantages of a remaining part of the property will be equalized.

Although the decisions on the individual compensation are the main subject of appeals against compulsory purchase resolutions the general principles of expropriation and compensation explained in this paper are established and not in doubt in Germany.

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