

## **SPECIFIC ISSUES REGARDING THE EVALUATION OF REAL ESTATE SUBJECT TO EXPROPRIATION FOR THE CAUSE OF PUBLIC UTILITY**

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### **Abstract**

In the last 20 years, the road infrastructure in Romania has expanded considerably and affected a significant number of natural and legal persons, owners of real estate located on the expropriation corridor. According to the Rejust database, in the last 10 years, annually, on average, approximately 4,000 files were created before the courts with expropriation as their object. In this article, we propose to present the legislative framework and particularities of the evaluation process of real estate properties subject to expropriation for reasons of public utility. The importance and actuality of such a theme was generated by the very large number of cases pending before the courts as a result of the dissatisfaction of the owners of buildings subject to expropriation for public utility reasons regarding the amount of compensation values granted. Also, at the level of the courts, there is a non-uniform practice regarding the method of drawing up evaluation reports. The study aims to review the procedures related to public interest expropriation and to create the premises for future research in the field.

### **Keywords**

Expropriation, fair value, valuation, valuation standards, real estate offers and transactions.

### **JEL Classification**

H13, C52, K40.

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### **Introduction**

The public interest is highly significant when dealing with major public use investment projects or for serving the common need of the society. Concerning the real estate's expropriation for allowing such projects to be deployed, the laws discuss various rules for making it possible. In our study we review these rules and discuss them in order to set the premises for normative research initiatives or to offer various stakeholders an orientation on this topic. In this regard, the study is offering a discussion for both academic support and practical usage.

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A strong regulatory framework and institutional empowerment are significant premises for development. Emerging economies, such as ours, need reliable regulations and an increased level of institutional quality for keeping a steady growth without affecting the social context. In the recent years, as a result of adjusting the national law to European regulations, the national environment predictability improved and created the adequate context for public and private investments. The inflow of European financial support increased due to credible development strategies and an updated bureaucratic framework, allowing the resources to be involved in developing regions and national infrastructure.

Under these circumstances, the expropriation for public utility interests is included in several national laws, starting with the Constitution.

The Constitution of Romania at art. 44, paragraph 3 provides that "no one can be expropriated except for a cause of public utility, established according to the law, with fair and prior compensation."

The common legal framework in the matter of expropriation is represented by Law 33/1994 and contains matters of interest for evaluation. Article 26 provides the following:

(1) The compensation consists of the real value of the building and the damage caused to the owner or other entitled persons.

(2) When calculating the amount of compensation, the experts, as well as the court, will take into account the price at which buildings of the same type are usually sold in the administrative-territorial unit, on the date of drawing up the expert report, as well as the damages caused to the owner or, as the case may be, to other entitled persons, taking into account the evidence presented by them.

(3) The experts will break down the compensations due to the owner from those due to the holders of other real rights.

(4) In the case of partial expropriation, if the part of the building that remains unexpropriated will acquire an increase in value as a result of the works to be carried out, the experts, taking into account the provisions of the previous paragraph, will be able to propose to the court a possible reduction of damages only.

Also, this law establishes the concept of the commission of three experts appointed to determine compensations.

The common legislative framework regarding expropriation for reasons of public utility in Romania is completed by Special Law 255/2010 which establishes the expropriator's activity through the application rules. Article 5, paragraph 1 establishes the expropriator's obligation that, in the first stage of the administrative phase, he also approves "the list of individual amounts related to the estimated compensations based on an evaluation report drawn up taking into account the expertise drawn up and updated by the chambers of public notaries".

Art. 11, paragraph 7 stipulates that the evaluation must be prepared by an expert evaluator specialized in the evaluation of real estate properties, a member of ANEVAR.

Art. 11, paragraph 8 provides that "the evaluation report is drawn up taking into account the expertise drawn up and updated by the Chambers of Public Notaries.

From a procedural point of view, the issuance of the expropriation order for reasons of public utility is preceded by the calculation of the compensation value by reference to the provisions of Law 255/2010.

In order to have an opposable document that protects the expropriator from challenging the decision to trigger the expropriation, it is necessary to draw up an evaluation report that contains both the estimated market value for each of the expropriated buildings, as well as the values contained in the notaries' grid, following which the expropriator must decide on the amount of compensation, the law allowing it to do so.

The legislative framework regarding the assessment is regulated by Law no. 99/2013 for the approval of OG 24/2011.

Art. 2 paragraph 2 tells us that by evaluation we mean the activity of estimating the value, materialized in a document, called an evaluation report, carried out in accordance with the specific standards of this activity and with professional ethics by an authorized appraiser.

Art. 12, paragraph 1 - The evaluation activity can only be carried out by persons who have the status of authorized evaluator, acquired under the conditions of OG 24/2011, who are registered in the Association Register and prove this with their membership card or authorization valid on the date assessment.

The preparation of evaluation/expertise reports in the situation where no agreement is reached regarding the amount of compensation in cases of expropriation for reasons of public utility is common in most countries around the world (Contreras et al., 2014). In the Republic of Moldova, the appraiser determines the market value of the expropriated real estate property, there being no real value term or ways to determine the damage in the legislation (Leşan, 2020; Albu and Lesan, 2021) In Turkey, a commission consisting of at least 3 members is established to estimate the compensation value. The amount of compensation takes into account factors such as location, area, type of building, slope, utilities (Kurt et al., 2023).

### **The evaluation procedure for public utility cause expropriation**

Valuation is the process of estimating a value at a certain date, for various purposes such as taxation, guaranteeing loans, financial reporting under well-defined assumptions (Bene et al., 2021).

The expropriation process for reasons of public utility includes an administrative phase that involves the issuance of the expropriation order, and if the owners of the buildings (land and buildings) are dissatisfied, they can go to court to determine fair compensation (judicial phase).

Several contradictory elements emerge from the 2 normative acts that legally regulate expropriation for reasons of public utility. Law 33/1994 provides that the compensation consists of the real value of the building and the damage caused to the owner or other entitled persons, while Law 255/2010 stipulates that the evaluation report is drawn up taking into account the expertise prepared and updated by the Chambers of Public Notaries.

A summary of the main differences regarding the method of determining the compensation value between the provisions of Law 255/2010 and Law 33/1994 is present in table no. 1.

**Table no. 1. Differences regarding the method of determining the compensation value between the provisions of Law 255/2010 and Law 33/1994**

Analyzed feature	Law no 255/2010	Law no 33/1994
Market value	NO	YES
Calculation of damages (damage)	NO	YES
Calculation of damages for use, usufruct, dwelling and surface area	NO	YES
Calculation of damages for the termination of the concession or lease	NO	YES
Damage reduction for additional property value remaining	NO	YES
The qualification of the evaluator expert	REAL ESTATE APPRAISER	NOT SPECIFIED
Total expropriation	NO	YES

*Source:* own projection.

We therefore note that the Special Law does not take into account the market value of the expropriated building on the date of the expropriation decision, the damages caused to the owner as a result of the expropriation, nor the situation in which the owner can obtain a benefit through the work of public utility.

The inconsistencies between the two normative acts were the subject of constitutionality challenges and the High Court of Cassation and Justice of Romania issued Decision no. 78 of November 15, 2021, in file no. 2079/1/2021, published in the Official Gazette, Part I no. 1185 of 15/12/2021, which expressly establishes that:

"In the interpretation and application of the provisions of art. 22 para. (6) from Law no. 255/2010 regarding expropriation for reasons of public utility, necessary to achieve objectives of national, county and local interest, with subsequent amendments and additions, and of art. 26 para. (2) from Law no. 33/1994 regarding expropriation for reasons of public utility, republished, with subsequent additions, in the judicial stage of the expropriation procedure, when determining the amount of compensation, the provisions of art. 22 para. (6) from Law no. 255/2010 is interpreted extensively, in the sense that it takes into account both the "expertise prepared and updated by the chambers of notaries public, at the time of the transfer of ownership", as well as the legal criteria provided by the provisions of art. 26 para. (2) from Law no. 33/1994".

Art. 22. - "(...) (6) The experts, when drawing up the expert report, as well as the court, will take into account the expert reports drawn up and updated by the chambers of notaries public, at the time of the transfer of the ownership right. (...)".

Art. 26. - "(...) (2) When calculating the amount of compensation, the experts, as well as the court, will take into account the price at which buildings of the same type are usually sold in the administrative-territorial unit, on the date of drawing up the report of expertise, as well as the damages caused to the owner or, as the case may be, other entitled persons, taking into account the evidence presented by them. (...)".

Although the entire motivation of this decision refers to the judicial stage (to the stage of determining the compensation before the courts - in the case of an unsatisfied expropriator), unequivocally establishing the fact that the right compensation involves a combination of factors (the characteristics of each building, which constitute in real terms the criteria according to which their concrete evaluation is carried out, e.g. location, utilities, servitudes, access roads, street frontage, proper exploitation method) that lead to a correct market value and by no means taking over some figures from the notaries' grid, we can note that all these arguments are also perfectly valid in the administrative phase of the expropriation (the assessment carried out by the expropriator through authorized assessors).

In the considerations of High Court of Cassation and Justice of Romania, Decision no. 78/2021 it was held that the right compensation provided by art. 44 para. (3) of the Constitution must be established identically, regardless of whether the assessment is carried out under Law 33/1994 or under Law 255/2010 and implicitly, regardless of the administrative or judicial phase of the expropriation.

Additionally, and particularly important, the full High Court of Cassation and Justice of Romania held that the provisions of art. 22 para. (6) from Law no. 255/2010 do not have an imperative character and do not exclude from application the provisions of art. 26 para. (2) from Law no. 33/1994, as it is necessary for a fair evaluation of the property to analyze the particular situation of each property.

An evaluation report cannot legally be drawn up without complying with the Evaluation Standards, and both the Framework Law for Expropriation, whose provisions supplement the Special Law, and subsequent decisions of the Constitutional Court of Romania and the HIGH COURT OF CASSATION AND JUSTICE OF ROMANIA give precedence to the reality of the specific real estate market, with several references to aspects identical to those found in the definition of market value.

The standards applicable in the case of expropriation valuation are no different from the common standards specific to the valuation of immovable property and must be observed in every circumstance in which a valuation of an asset is required.

The use of information subsequent to the valuation date is not allowed according to the valuation standards in force, which state in standard of evaluation 104 (SEV 104) - Types of value, paragraph 30.2.h) that for the estimation of the market value "the market situation as of the valuation date and not taking into account any information subsequent to this date".

The Standards for Valuation of Goods must be strictly observed, both in the administrative and in the judicial phase.

In the judicial phase of expropriation, the real estate evaluation process must take into account the following aspects:

- The opinion of an expert is needed when the issue exceeds the technical competence of a judge or criminal investigation body.

- The only imperative to be considered by the experts who are part of the commission must be the professional argument and not the interest of the parties in the file.

- The evaluation will be carried out in compliance with the Property Evaluation Standards and the Code of Ethics of the authorized appraiser profession.

- The evaluation date is most often the date of issuing the expropriation decision.

From the point of view of the valuation process there should be no difference between valuation of land for expropriation or for loan guarantee / information / financial reporting if we are talking about valuation techniques and type of value required to be reported.

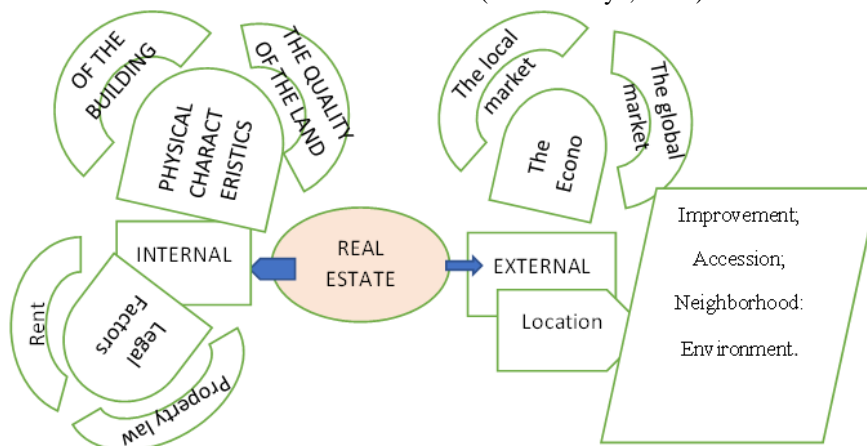
To estimate the market value, experts can use sales offers or sales-purchase contracts. Any option does not violate the legal text that refers to "the price at which real estate of the same kind is sold", which does not mean that sales offers cannot be taken into account in the absence of actual transactions. In interpreting this legal text, the courts have a non-uniform conduct, some accepting only transactions (sales-purchase contracts) and others accepting both transactions and offers. According to assessment guide 630 (GEV 630) par. 50, the preparation of evaluation reports through the partial or exclusive use of market offers, having as object comparable real estate is in accordance with these Valuation Standards.

Also, in assessment guide 630 (GEV 630) par. 52 states: information on transactions or offers those present significant differences (quantitative and/or qualitative) compared to the subject property.

they cannot be used as sources of information for comparable properties because of the large adjustments required to be applied.

The most common elements of comparison are, but are not limited to: conditions of sale, necessary expenses immediately after purchase, market conditions, location, physical characteristics, economic characteristics, legal characteristics, non-real estate components of the property.

There are numerous studies in the specialized literature (Joseph, 2021) which analyzed the factors affecting the value of a property (Crosbyetal., 2011). A possible diagram of internal and external factors is shown below (Bhattacharya, 2013).



**Figure no. 1: The factors that influence the estimation of the value of a real estate property**

Source: own projection

Of course, these factors are not exhaustive. Depending on the specifics of each real estate property, other factors may be used, the appraiser based on professional judgment will determine the appropriate factors for each evaluation mission.

The prices requested in the sales offers cannot be considered unrealistic, the sellers' interest being to dispose of their property. It is true that, as a rule, following the negotiations between the seller and the buyer, the price can decrease, but the difference cannot be significant, and the evaluators in the comparison grid will also take this aspect into account when performing the expertise. Furthermore, the parties involved must make available to the experts' sales contracts for similar real estate properties.

From practical experience we raise the following issues in relation to sales purchase contracts. In these, the location is not specified very clearly (here we refer in particular to the extra-village lands that are identified by the Tarla and Parcela number, without specifying, for example, the coordinates in the Stereo 70 system), utilities (water network, electricity, sewage, gas), servitudes, access roads, street frontage. All this information represents elements of comparison in the analysis to estimate the market value. Without this information, the valuation of a land does not comply with the Valuation Standards. Also, there is a possibility that the actual transaction price may not be the one declared by the participants in the transaction to avoid taxes and fees. This finding is also supported by the fact that the prices in the "Notaries' Grid" are very low compared to market prices and this is the main reason why expropriated people decide to go to court to determine fair compensation. The values in the grid of public notaries represent the minimum in a certain area for each type of property.

The state aims to offer relatively low prices for expropriated real estate. This situation is encountered both in Romania and in most countries of the world.

Estimating a fair compensation value is a difficult task for state institutions as well as for authorized appraisers. An example of a situation where compensation values have fluctuated greatly is that of the compensation offered by the French state for the expropriation of the land related to the Chauvet cave. In December 1994, three cavers discovered an incredible archaeological heritage, the Chauvet cave. Drawings, paintings and engravings dating back 30,000 years have been discovered there.

The French state wanted to protect the cave by trying to buy the land. The attempt to reach an amicable settlement failed and the expropriation procedure was initiated. The owners felt wronged. Domestic law granted them compensation, but they wanted more.

The first judgment was pronounced on February 4, 1997. The expropriation judge awarded a modest compensation of 4,837.28 euros. At the Court of Appeal in Toulouse, it goes from one extreme to the other, as the owners received a compensation of 11,339,289.20 euros. The French state considered itself wronged and filed an appeal against this decision. At the last court, a final compensation value of 767,065.63 euros was established.

### **Partial expropriation**

A special situation is the partial and not total expropriation of a building. In this situation, several aspects must be taken into account:

- The appraiser of an asset or a right targeted for partial expropriation must estimate the expropriation-related allowance and compensation for the consequences of this

partial expropriation on the value of the outstanding part; any damage derived from this partial expropriation must be taken into account.

It is a recognized principle of compensation that it is the value to the owner that must be sought and that this value to the owner includes the potential value.

The compensation must therefore be obtained according to the concept of "value for the owner" which takes into account the following conditions:

- the owner is not an ordinary seller who sets the price at will with the buyer;
- the owner is forced to conclude an agreement at a time that he did not choose;
- the potential value, included in the commercial value, must include any particular element of adaptability;
- in order to obtain the amount of the compensation, the purpose of the expropriation must be disregarded.

From the perspective of the assessment for expropriation for reasons of public utility, the just compensation represents a special value for the owner and must be established according to the owner of the building and only by him, depending on the current use, to be added to the market value, thus entailing a subjective value.

The assessment for expropriation is carried out on the date of issuing the expropriation order and must take into account the current use. Conform with SEV 104 "Types of value", the market value of an asset will reflect its best use, i.e. the use that maximizes its potential and that is physically possible, legally permitted and financially feasible. The best use may be the continuation of the current use of the asset or it may be another use. This is determined by the use that a market participant would intend to put to an asset when setting the price, they would be willing to offer. Vacant land or land under construction presents a particularity in the sense that a town planning certificate is required to show the development possibilities. The analysis of any plot of land must be carried out under the assumption of the best use, the one that maximizes its value regardless of the category of use.

Also, fair value (Nuță, 2015) of compensation also represents a value of satisfaction, respectively:

- Personal value assigned to a property by its owner.
- It is related to certain arrangements, comforts and combinations of advantageous places for him.
- It has an atypical character and generally results from a personal choice and a particular arrangement of the owner.
- It is distinguished from the special value for the owner because it does not constitute an economic advantage.

### **Market limitations**

In the real estate valuation process, the most widely used method of estimating value is the market approach. This approach is applicable to all types of real estate when there is sufficient credible information regarding recent transactions and/or offers of properties similar to the subject property. If there is insufficient information, the applicability of the market approach may be limited. The most common limitations are generated by an



inactive sales or rental market, a non-transparent market specific to small communities, markets with multiple deviations and special motivations.

In order to minimize these limitations, it is recommended to expand the market area to relevant historical transactions, the analysis of lower or higher markets, to different geographic markets but equivalent from the point of view of purchasing power or macroeconomic indicators.

### **Conclusions**

Expropriation involves the procedure following which a private property changes its legal regime, becoming a public property. This transition is forced and is carried out for reasons of public utility and involves the payment by the state of a compensation to the owner of the building. The regulations that govern expropriation for reasons of public utility are Law 33/1994, as general provisions of common law, and Law 255/2010, which contains special rules. The principles of expropriation for reasons of public utility require a fair and prior compensation, respectively a value consistent with the utility of the expropriated asset, granted at the time when the right of private ownership ceases and the right of public ownership is born.

In this article, practical aspects were debated in the evaluation process of real estate for public utility. When determining the amount of compensation, the price at which buildings of the same type are usually sold will be taken into account, as well as the damages caused to the owner or, as the case may be, to other entitled persons. The fair compensation will be determined taking into account a number of factors that actually constitute the criteria according to which the concrete evaluation of the real estate is carried out (e.g.: location, utilities, servitudes, access roads, street frontage, method of exploitation itself) leading to a fair market value. The evaluation date will be represented by the date of issuance of the expropriation order. The establishment of the fair value of compensation will be carried out by ANEVAR member appraisers, specializing in "Evaluation of real estate properties". The most used approach in the evaluation process is the one that involves the use of market data. Both sales offer from the specific market and transactions will be considered if they contain minimum information for their inclusion in the comparison grid. The fair value in case of expropriation will reflect the best use of the real estate, regardless of the category of use provided in the cadastral documents. The economic regime prevails in this case.

Last but not least, in estimating the fair value it must be taken into account that the owner is obliged to give up his asset at a time he did not choose and the value must include any element of adaptability.

The main limitations of this study concern the data availability for realizing a more in-depth assessment of specific initiatives and cases. The scarcity of relevant documentation in this research area is challenging and also an incentive for developing more research in the field.

Future research directions will consist in the analysis of the differences between the values in the notaries public grid and the actual compensation values established by the court.

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