

THE SCOPE OF COMPENSATION PAYABLE FOR THE USE OF A NECESSARY WAY ACCORDING TO THE CASE-LAW OF THE SUPREME COURT OF GEORGIA

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Abstract

The article offers a dogmatic-legal and comparative-legal analysis of one of the specific mechanisms for restricting the right to property - determining the amount of compensation payable for establishing and exercising a necessary way- under Article 180 of the Civil Code of Georgia. Although the right to property is protected by the Constitution of Georgia, the European Convention on Human Rights, and the Civil Code, it may nonetheless be restricted on the basis of strictly defined legal grounds. In this context, the restriction concerns the functional use of a neighbouring parcel of land. Article 180 of the Civil Code of Georgia establishes the essence of the obligation of tolerance and the right to claim compensation; however, it does not set out criteria for determining the amount of such compensation, leaving the assessment entirely to the courts. Consequently, judicial practice constitutes the sole source for identifying the main standards for setting the compensatory amount, allocating the burden of proof, and ensuring the proportionality of compensation.

The aim of the research is to identify, through an analysis of judicial decisions, the factors that determine the amount of compensation payable for the use of a necessary way, its proportionality to the scope of the restriction, the periodicity of payment, and the distribution of the burden of proof between the parties in the process of determining compensatory damages. The article examines decisions of the Supreme Court of Georgia, as well as the relevant provisions of the Civil Code of Georgia and the German Civil Code. The research seeks to assess the legal logic underlying the mechanism for determining compensation and the balance of interests between the parties.

Keywords: necessary way, passage of access, compensation, public road, servient owner, dominant.

Introduction

Article 19(1) of the Constitution of Georgia recognizes the right of every individual to property, which, alongside the rights to life and liberty, holds exceptional importance in a democratic society. However, the second paragraph of the same article allows for the restriction of this right in cases and under procedures prescribed by law.¹

Article 1 of Protocol No. 1 to the European Convention on Human Rights likewise guarantees every natural and legal person the right to the peaceful enjoyment of their possessions. No one may be deprived of their property except in the public interest and subject to the conditions provided by law. The right to property is thus protected for both private individuals and legal entities.²

Similarly, Article 170(1) of the Civil Code of Georgia safeguards the absolute right of an owner to freely possess and use their property. In exercising this right, an owner may prevent others from using or interfering with their property.³

Although the Constitution of Georgia, the European Convention on Human Rights, and the Civil Code protect the right to property, this right may be restricted in exceptional circumstances- though never arbitrarily- only through state or judicial intervention, in order to preserve the essential content of the

¹ Article 19, paragraphs 1 and 2, "Constitution of Georgia", 24 August 1995.; Loladze B., Pirtskhalashvili A., "Fundamental Rights", Publisher "Georgian National University", 2023. Article 19. Right to Property. p. 493.

² Article 1 of Protocol No. 1 to the European Convention on Human Rights.

³ "Commentary on the Civil Code of Georgia", Publishing House "SamarTali", 1999. Book II, pp. 83-85.

right.⁴ A restriction on property may be based either on the owner's consent or on a statutory requirement.⁵

Article 180 of the Civil Code of Georgia regulates one such statutorily prescribed restriction of property rights: the obligation of a landowner to tolerate, for the benefit of a neighbouring land parcel, the establishment of a necessary way or the passage of utility lines across their property. This constitutes a legally mandated restriction on ownership, grounded in the legitimate interest of the owner of the neighbouring parcel.⁶

The purpose of Article 180 of the Civil Code is not to undermine the rights of the landowner whose property becomes the site of a necessary way, but rather to ensure the functional and lawful use of a land parcel that lacks an essential connection to public roads or to electricity, oil, gas, or water supply networks. To this end, the law, on the one hand, obliges the neighbour to tolerate a necessary way or the passage of utility infrastructure across their land; and, on the other hand, grants that same neighbour the right to demand adequate compensation, since the statutory obligation of tolerance is not a gratuitous one.⁷

The dispositive provision of Article 180 sets out the substantive grounds and preconditions required for granting a claim seeking the establishment of a necessary way or the passage of utility lines. Yet, while clear and imperative, the provision limits itself to the following clause regarding compensation owed to the burdened owner: "appropriate compensation must be granted." It contains no criteria for determining the amount of compensation. The only condition explicitly stated is that, by mutual agreement between the parties, such compensation may be paid in a lump sum. This means that if the parties fail to agree on compensation- either on its existence or its amount- the court may impose compensation as a lump sum, or on a monthly or annual basis, on the landowner seeking the establishment of the necessary way or the passage of infrastructure over the neighbouring land. Thus, the law sets neither the criteria for determining the amount of compensation nor those for choosing between lump-sum or periodic payment. These matters are resolved solely by the court, on the basis of the factual circumstances established in each individual case.

Accordingly, without reviewing and generalizing judicial decisions, it is impossible to formulate any definitive standard clarifying under what circumstances and in what form the burdened owner may demand compensation; what amount the court may deem proportionate and reasonable to the extent of the restriction; and how the burden of proof is allocated between the burdened and the benefiting landowners.

The present work is structured into five chapters and two subchapters. The first chapter discusses the factual and legal grounds for establishing a necessary way. The second chapter addresses the form of the compensation claim and procedural deadlines. The third chapter analyzes the specificities of allocating the burden of proof. The fourth chapter, consisting of two subchapters, examines the criteria for determining compensation in cases involving both necessary ways and the passage of utility lines. The fifth chapter provides a systemic analysis of the relevant legislative regulations of Germany.

1. Legal and Factual Grounds for Establishing a Necessary Way

The obligation of neighbourhood tolerance under Article 180 of the Civil Code of Georgia, as a statutory restriction upon the right of ownership, must arise from objective circumstances rather than from the "speculative" intentions of a landowner. A parcel of land is considered isolated not only when it lacks access to a vehicular public road, but also when it has no connection to electricity, oil, gas, or water supply networks.⁸

⁴ Chechelashvili, Z., "Property Law", Publishing House "Bona Cauza", 2017. p. 108.

⁵ Shotadze, T., "Property Law", Publishing House "Meridiani", 2014. p. 124.

⁶ see footnote 3, p. 108.

⁷ see footnote 3, p. 110.

⁸ Zoidze, B., "Georgian Property Law", Publishing House "Metsniereba", 2003. p. 126.

The judicial establishment of a necessary way functions as a statutory control mechanism applicable in situations where a land parcel requires a necessary access route, yet the neighbouring landowner either refuses consent or abuses their rights by denying the claimant the ability to use the necessary way.⁹

Accordingly, the establishment of a necessary way by judicial order restricts the right to property based on a unilateral and legally grounded claim.¹⁰

Article 180 of the Civil Code of Georgia defines the objective preconditions that trigger the claim, with the purpose of ensuring the functional and proper use of all parcels of land. Specifically, the owner requesting the establishment of a necessary way or the passage of utility lines across the neighbouring land must be unable to use his own parcel for the following essential purposes: he must lack access to his land; and he must be unable to secure the installation of essential communications to his land without using the neighbouring parcel. The statutory term “proper use” refers to the possibility of establishing the necessary connection to public roads and to electricity, oil, gas, and water supply networks.¹¹

The European Court of Human Rights has clarified in the case of *Fadeeva v. Russia* that interference with the right to property must be necessary; the neighbour’s conduct may be considered legitimate only when it responds to an unavoidable necessity, such as when no other means exist for constructing communications. Otherwise, such interference is arbitrary and unjustified. Any intrusion upon property—be it the installation of sewage pipes, partial encroachment by a structure, or the unauthorised use of land—can be deemed lawful only if it is unavoidable, socially necessary, and strictly regulated by law. In the absence of these conditions, it constitutes a violation of the individual’s right to property, obligating the state to restore the legal balance.¹²

Pursuant to Article 180, when adjudicating a claim for the establishment of a necessary way, the court must not rely on the claimant’s subjective preferences, but must objectively evaluate the facts established in the case that demonstrate the absence of any alternative and the indispensability of the connection with a public road. Such a claim is well-founded when:

- a) the claimant owns a parcel that lacks proper connection to a public road or essential communications,
- b) the defendant owns the parcel across which the access route must pass, and
- c) facts established at the hearing confirm the absence of any alternative route and demonstrate that the proposed route is the only possible and proportionate solution.¹³

Thus, the restriction of property rights through the establishment of a necessary way must be lawful, legitimate, and proportionate. It must rest on facts established at trial indicating the absence of any alternative access route, the exclusive nature of the requested route, and the fact that, without such access, the property cannot be used for its intended purpose or its use is substantially diminished.¹⁴

2. Form and Time Limits of the Compensation Claim for a Necessary Way

In Georgian judicial practice, a recurring question concerns when and in what procedural form a burdened landowner must request compensation for the establishment of a necessary way. Specifically, when responding to a claim seeking the establishment of a necessary way, the defendant often asserts

⁹ Zarandia, T., “Property Law”, Publishing House “Meridiani”, Second Revised Edition, 2019. p. 281.

¹⁰ “The right of necessary passage is a statutory restriction on the right to property (the so-called ‘necessary road servitude’, *servitus necessaria*) and it arises on the basis of a request which constitutes a unilateral manifestation of will.” - Totladze L., “Commentary on the Civil Code”, Book II, 2018, Art. 180, Section 1; SCG decision No. სბ-1147-2021, 31 March 2023.

¹¹ see footnote 3, pp. 107-109.

¹² Judgment of the European Court of Human Rights: “*Fadeyeva v. Russia*”, No. 55723/00; 09/06/2005.

¹³ SCG decisions: No. სბ-157-147-2015, 14.05.2015; No. სბ-815-763-2017, 11.01.2018; No. სბ-965-2019, 10.04.2020; No. სბ-1513-2018, 08.02.2019; No. სბ-848-848-2018, 11.12.2020; No. სბ-45-2021, 22.04.2021; No. სბ-832-2020, 21.04.2021; No. სბ-568-2021, 26.11.2021; No. სბ-1022-2019, 30.07.2021; No. სბ-1107-2020, 2.02.2022; No. სბ-558-2023, 30.11.2023. SCG No. სბ-1869-2018, 25.10.2019; No. სბ-367-2021, 15.10.2021; No. სბ-258-2019, 30.10.2023; No. სბ-827-2023, 25.04.2024; No. სბ-1620-2023, 30.04.2024; No. სბ-1147-2021, 31.03.2023.

¹⁴ SCG decisions: No. სბ-102-100-2011, 24.05.2011; No. სბ-70-68-2014, 6.04.2015; No. სბ-870-2018, 17.05.2019; No. სბ-1022-2019, 30.07.2021; No. სბ-558-2023, 30.11.2023.

in the statement of defence that, should the claim be granted, the claimant must be ordered to pay compensation. The question arises whether this reference alone requires the court to decide the issue of compensation together with the principal claim.

The Supreme Court of Georgia has clarified that the landowner whose parcel becomes subject to a necessary way has the right to request compensation either through a counterclaim or through the filing of an independent claim.¹⁵ Because the determination of compensation involves establishing a range of factual circumstances, which will be examined below, the issue cannot be resolved merely on the basis of a defendant's indication in the defence. A counterclaim or an independent claim must be filed, setting out specific facts and formulating a clear claim for relief. The mere expression of willingness to receive compensation, even with an indication of a desired amount, is insufficient for the court to consider and adjudicate the question of compensation alongside the claim for the establishment of a necessary way. In such circumstances, the party retains the right to bring an independent action for compensation.¹⁶

The burdened landowner becomes entitled to compensation from the moment the right to property is restricted. According to the Supreme Court of Georgia, the commencement of the period for compensation must be linked to the date on which the judicial decision imposing the restriction enters into force. Therefore, compensation is owed not from the filing of the claim or counterclaim, but from the date on which the court formally establishes the necessary way over the burdened parcel for the benefit of the neighbouring land.¹⁷

With regard to the limitation period for demanding compensation, the Supreme Court has explained that interference with the use of property is not subject to a statute of limitations. Consequently, the party obliged to pay compensation cannot defend itself by invoking limitation.¹⁸

3. Allocation of the Burden of Proof in Determining the Amount of Compensation

In civil proceedings, the burden of proof concerns the allocation between the parties of the obligation to prove facts material to the proper adjudication of the case. Under the principle of adversarial proceedings, the claimant must prove the circumstances upon which the claim is based, while the defendant must prove the circumstances supporting the statement of defence. The purpose of party competition is to persuade the court of the existence of facts relevant to the fair resolution of the dispute. A general denial of facts by one party is insufficient; explanations must address, specifically and in detail, all material facts requiring judicial assessment.¹⁹

The allocation of the burden of proof and the assessment of evidence submitted by the parties is carried out by the court according to an objective and equitable standard. Both claimant and defendant bear the burden of proving those facts that they are objectively capable of establishing. Their explanations must be reasoned and supported by relevant and admissible evidence.

According to Article 102 of the Civil Procedure Code, in adjudicating a claim for the establishment of a necessary way, the burden of proving that the use of the defendant's land constitutes the only and most appropriate means for the claimant to exercise the use of his property lies on the claimant. However, once the claimant submits *prima facie* evidence, the burden shifts to the defendant to rebut such evidence with countervailing and relevant proof.²⁰ The same principles apply when adjudicating a claim (or counterclaim) for compensation. When the owner entitled to compensation presents evidence

¹⁵ Article 6 §1 of the European Convention on Human Rights obliges a court to substantiate its judgment, which must not be understood as requiring a detailed response to every argument." - ECtHR, "Jgarkava v. Georgia", No. 7932/03, 24.02.2009.

¹⁶ SCG decision No. 3b-568-2021, 26.11.2021.

¹⁷ SCG decision No. 3b-568-2021, 26.11.2021.

¹⁸ SCG decision No. 3b-569-2024, 08.11.2024; SCG decision No. 3b-568-2021, 26.11.2021.

¹⁹ Biolingi, H., Chanturia L., "Methodology of Rendering Decisions in Civil Cases", 2003, p. 64; SCG decisions No. 3b-1298-2018, 22.03.2019; No. 3b-1329-2018, 22.02.2019; No. 3b-1610-2019, 07.02.2020.

²⁰ "The evidence presented by the claimant cannot be invalidated by the defendant's explanations." - SCG decision No. 3b-165-2025, 7 May 2025. Also: "The Supreme Court of Georgia notes that when the claimant indicates that the condition reflected in the expert report has remained unchanged, the burden of proving that the condition has changed lies with the party alleging otherwise, which in this case was not done." - SCG decision No. 3b-1111-2024, 13 November 2024.

in support of his claim, the burden of presenting counter-evidence shifts to the owner benefiting from the necessary way. Ultimately, it is the court that evaluates the totality of evidence.

The Court of Cassation has consistently explained that the probative value of an expert opinion submitted by one party depends on the qualified contestation presented by the opposing party. A mere oral disagreement is insufficient. Even a preliminary expert conclusion, when assessed together with other evidence, may outweigh the defendant's oral assertions because a specialist's opinion holds evidentiary weight unless rebutted by objective and substantiated proof. The obligation to rebut an expert conclusion is of high importance at the evidentiary evaluation stage. Success in civil disputes depends on the parties' proper exercise of procedural rights, including the identification of relevant factual circumstances and the presentation of evidence capable of proving or disproving them. This procedural right is equally afforded to the claimant (proving the facts underlying the claim) and the defendant (rebutting those facts).²¹

4. Scope of Compensation Payable for the Use of a Necessary Way According to the Practice of the Supreme Court of Georgia

4.1 Scope of Compensation Established for the Use of a Necessary Motor Road

Compensation is owed for the pecuniary loss arising from the lawful restriction of ownership or possession caused by objective necessity. For determining the amount of compensation, it is essential to identify the extent of the restriction and the interest that the owner or possessor would have enjoyed in the absence of such restriction. The assessment must be based not on the subjective perception of a particular owner, but on the interest of an average owner of a comparable parcel.²²

The Court of Cassation has clarified that the restriction of the right to property is legitimate only when accompanied by fair compensation. Compensation is fair when it is proportionate to, and equivalent with, the burden imposed through the obligation to tolerate the restriction.²³

In situations involving competing interests, the owner whose connection with the property is restricted for the benefit of another must receive adequate compensation. A restriction is legitimate only if fair compensation is provided, ensuring reasonable remuneration for the duty to tolerate the limitation. This remuneration must be equivalent to the burden.²⁴

The Supreme Court of Georgia has held that when a necessary way is established by judicial decision over the land of an owner for the benefit of a neighbouring parcel, fairness requires that the burdened owner receive compensation equivalent to the extent of the tolerated restriction. Compensation is fair only when it ensures reasonable remuneration for the obligation to endure the restriction. The court must first assess the extent to which the burdened owner's use of the land is restricted, as compensation must correspond to the scope of the burden. Such burdens may manifest in reduced income, impediments to ordinary use of the property, deterioration in the market value of immovable property, or other analogous effects.²⁵

According to the case-law of the European Court of Human Rights, the lawfulness of a restriction is examined through the proportionality test: the restriction must have a legitimate basis, be justified by a pressing social need, and the objective pursued must not be achievable by a less restrictive measure.²⁶

Consequently, when a claim concerns the establishment of a necessary way for connecting to public roads through a neighbouring parcel, the Supreme Court evaluates each case individually by

²¹ Gagaa, I., "Evidence and the Burden of Proof in Private Law Disputes", Publishing House "Bona Cauza", 2020, pp. 97–122; SCG decisions: No. სბ-45-2021, 22.04.2021; No. სბ-1152-2021, 31.01.2022; No. სბ-666-2022, 07.07.2022; No. სბ-1038-2022, 20.07.2023; No. სბ-687-2021, 16.05.2024; No. სბ-637-2024, 26.07.2024; No. სბ-1038-2024, 11.10.2024.

²² SCG decisions: No. სბ-803-762-2013, 10 October 2014; No. სბ-171-2021, 30 March 2022; No. სბ-395-2021, 20 April 2022.

²³ SCG decisions: No. სბ-568-2021, 26 November 2021; No. სბ-1762-2019, 5 October 2020.

²⁴ SCG decision No. სბ-568-2021, 26 November 2021.

²⁵ SCG decision No. სბ-1240-2023, 29 October 2024.

²⁶ SCG decision No. სბ-965-2019, 10 April 2020.

establishing and assessing the specific facts: the degree to which ownership is restricted; the extent of pecuniary loss suffered by the burdened owner; whether income has decreased; whether ordinary use of the land remains possible; and whether the market value of the immovable property has worsened.

It must be underlined that the obligation to pay compensation by the owner requiring a necessary way does not entitle that owner to demand recognition as owner of the land burdened by the necessary way. Since the Constitution of Georgia protects property rights and allows deprivation only in cases of essential public necessity, established by court decision or organic law and subject to prior, full, and fair compensation, a claim by the beneficiary seeking recognition as owner of the burdened parcel constitutes, in substance, a claim for expropriation. Even when compensation ordered exceeds the proportionate value of the restriction and reflects the full market value of the burdened property, this does not entitle the beneficiary to claim ownership. This conclusion follows from Article 180 of the Civil Code, which provides for adequate compensation as the proper remedy for interference with ownership, but does not authorize transfer of ownership in exchange for payment. Recognition of ownership in exchange for compensation would constitute expropriation.²⁷

The Supreme Court has also clarified the limits of compensation where a necessary way was established for one person, yet six legal entities used the same access route. The court rejected the expert opinion which calculated compensation by dividing the amount among six users. Since the legally enforceable court decision registered in the public registry recognized the right of only one beneficiary, the court held that the argument that compensation must be distributed equally among all users of the claimant's land was unfounded.²⁸

4.2. Scope of Compensation Established for the Passage of Utility Infrastructure

In one case, the court found that a linear structure (110 kV overhead transmission line wires) crossed above a portion of a building, thereby placing that portion of the structure within the protection zone. The court considered it appropriate to impose on the defendant the payment of the full market rental value of the entire building, as the remaining portion of the building lost its substantive functional value due to the restriction.²⁹

In another case, the court established that an operational gas pipeline (approximately a 1200 mm diameter pipe, according to the applicant's submissions) ran not across the parcel itself but in its immediate proximity, and that no public-law restriction had formally been registered on the land parcel. Nevertheless, the proximity of the active pipeline and the associated constraints reduced the market value of the land by approximately 30–50 percent. The court ordered the restricting party to pay half of the property's market value to the burdened owner. The court reasoned that when a land parcel subject to a necessary-way obligation possesses market-based functional significance, compensation may be determined on the basis of its market value, since market price is the primary criterion for valuing immovable property. The extent of the restriction, whether full or partial, must therefore form the basis for determining compensation.³⁰

The court rejected the claimant's argument that compensation should be calculated as the full loss in market value caused by the presence of the linear infrastructure. The court held that the claimant had purchased the property already burdened by the infrastructure, and this did not entitle the claimant to demand monetary compensation from the defendant for the mere fact of restricted use. The Court of Cassation upheld the appellate court's reasoning, noting that more than half of the land parcel remained free from the restriction. When a parcel subject to a necessary-way obligation possesses market-based value, compensation may indeed be determined according to market price; however, when a linear structure affects only part of the land, compensation must reflect the actual scope of the restriction.

²⁷ SCG decision No. *qpsb-1240-2023*, 29 October 2024.

²⁸ SCG decision No. *sb-568-2021*, 26 November 2021.

²⁹ SCG decision No. *sb-1486-2024*, 2 May 2025.

³⁰ SCG decision No. *sb-383-2024*, 24 May 2024.

Under these conditions, the court determined appropriate compensation based on the degree to which the restriction impaired the property's intended use.³¹

In another dispute, the claimant's land was affected by the construction project of an overhead transmission line. The defendant required the use of this land to transmit electricity to its consumers. The cassation chamber accepted the appellate court's factual findings as properly established: the claimant could continue cultivating the land, but would no longer be able to plant trees exceeding four meters in height or construct buildings. The value of the land would significantly decrease, and its functional use would henceforth be limited to growing annual crops and planting low trees. The absence of a construction permit did not preclude the claimant's right to compensation. On this basis, compensation for the duty of tolerance was deemed justified.³²

In another case, five transmission-line support pillars belonging to the defendant were located on the claimant's land, supplying electricity to the defendant's pumping station. Two pillars were located at the parcel boundaries and two within the interior of the parcel, restricting the claimant's use of 1096.4 square meters while leaving 1403.6 square meters unrestricted. However, the unrestricted segments were scattered in various parts of the parcel, significantly reducing the functional utility of the remaining land. The parcel had commercial designation. Although no commercial activity was ongoing at the time of adjudication, the court held that compensation should be based on market rental value, as leasing constitutes the standard form of ordinary commercial use of immovable property. The duty of tolerance thus required compensation measured by the fair rental value of the property.³³

In another matter, underground communication cables belonging to the defendant were located on the claimant's land, and a telecommunications box was affixed to the front façade of the claimant's dwelling. Additional aerial communication infrastructure passed above the claimant's land. The court determined that these installations did not materially interfere with the claimant's use of the land or building. In light of the minimal degree of interference, the court awarded a one-time compensation of 600 GEL, considering this amount proportionate and adequate to the actual level of disturbance.³⁴

In a separate dispute, five transmission-line support pillars crossed the claimant's land, and the estimated annual rental value of the parcel was approximately 500 GEL. The court determined that the claimant had suffered pecuniary loss due to lawful restriction of ownership and possession caused by objective necessity. As the defendant offered no alternative method for calculating compensation, the court imposed the amount indicated by the claimant as fair compensation.³⁵

In another case, a high-voltage cable and distribution device belonging to the defendant were located on the claimant's land. The claimant requested a monthly payment of 200 GEL. The appellate court partially upheld the claim and ordered the defendant to pay 93 GEL monthly until the cessation of use of the distribution network. The calculation was based on the methodology established by the Georgian National Energy and Water Supply Regulatory Commission (GNERC) under Resolution No. 15 of 30 December 2013, using transmission tariffs and kilowatt-hour data.³⁶

In another case, a landowner whose parcel was crossed by a main gas pipeline sought a one-time compensation of 2000 GEL for the duty of tolerance, 4580 GEL for the cost of a house foundation previously constructed, and 344.70 GEL for loss caused by the destruction of plantings. The first-instance and appellate courts partially upheld the claim, awarding 1500 GEL for the duty of tolerance and 580 GEL for the foundation. The claim for damage to plantings was rejected. The Court of Cassation emphasized that determining the amount of compensation requires individual assessment of factual circumstances. The court agreed with the appellate court's conclusions and found the

³¹ SCG decision No. სბ-395-2021, 20 April 2022.

³² SCG decision No. სბ-583-2021, 26 April 2023.

³³ SCG decision No. სბ-172-2021, 30 March 2022.

³⁴ SCG decision No. სბ-786-2020, 20 January 2022.

³⁵ SCG decision No. სბ-176-2019, 15 February 2021.

³⁶ SCG decision No. სბ-1453-2019, 2 November 2021.

compensation amounts reasonable and fair, including compensation for the house foundation, as the landowner could no longer use the land for building purposes.³⁷

In a further case, the claimant constructed the first floor and columns of a house without a construction permit, left the country, and upon return discovered a high-voltage transmission pillar erected near the house. Upon attempting to complete the building, representatives of the defendant informed him that, for safety reasons, neither residing in the house nor using the land was permissible. The court deemed it reasonable to award compensation equal to the full market value of the immovable property. The court held that the compensation was proportionate to the severity of the restriction.³⁸

Another claimant sought compensation equal to the full monthly rental value of the land for both past and future periods due to overhead power lines crossing the parcel. The court determined that the market value of the property was reduced by 30 percent due to the presence of transmission lines and that the lines crossed only part of the parcel. Consequently, the court considered proportionate the imposition of compensation corresponding only to the restricted portion, rather than the entire parcel. As to the commencement date of compensation, the court linked it to the moment the claimant acquired ownership.³⁹

Thus, when a land parcel is intersected by utility infrastructure and lacks connection to public networks, judicial practice reflects nuanced approaches to determining the amount of compensation. This variation stems primarily from the claims asserted by the burdened owner, who, under the principle of party disposition, defines the scope of relief sought. Accordingly, some claimants request compensation equal to rental value, others demand full or partial market value, and still others seek reimbursement for specific losses.⁴⁰

Nevertheless, the foundational principles guiding judicial assessment are consistent: the court must evaluate the extent and intensity of loss of functional use caused by the linear infrastructure; whether the restriction is total or partial; the percentage reduction in market value; the interest the owner would have had absent the restriction; whether the ability to use the land for its intended purpose is lost or diminished; whether the restriction interferes with non-pecuniary rights; and the nature and amount of pecuniary loss.

5. German Legislative Provisions on the Necessary Way and Determination of Compensation

The right to demand the establishment of a necessary way is regulated by Section 917 of the German Civil Code (Bürgerliches Gesetzbuch, BGB). According to this provision, if a parcel of land lacks the necessary connection to a public road for its proper use, the owner may require neighbouring owners to tolerate the use of their land for the purpose of establishing such a connection until the deficiency is remedied.⁴¹

Section 917 BGB is, in this regard, more general than Article 180 of the Civil Code of Georgia. It does not specify what is meant by “proper use” or “necessary connection”. However, it expressly limits the duty of tolerance to the period until the deficiency is eliminated, which is not explicitly reflected in the Georgian provision. The German rule also stipulates that, where necessary, the direction of the necessary way and the scope of the right of use are determined by the court.⁴²

In proceedings concerning the establishment of a necessary way, the claimant must be the owner, not a mere bona fide possessor.⁴³ Such an owner may assert a claim against that neighbour whose land

³⁷ SCG decision No. 3b-1762-2019, 10 May 2020.

³⁸ SCG decision No. 3b-965-2019, 10 April 2020.

³⁹ SCG decision No. 3b-1306-1226-2017, 30 January 2018.

⁴⁰ German Civil Code, Second Revised Edition, 2019, §917.

⁴¹ Wellenhofer W., “Property Law”, 29th Edition, 2016, pp. 704–705.

⁴² German Federal Court of Justice (BGH) decision, Case No. V ZR 139/05, BGH NJW-RR 2006, 1160.

⁴³ Author’s note: “The right to demand the shortest reasonable access must not be understood as a right to demand the physically shortest path if the plot already connects to a public road via a long or complicated route. ‘Shortest and reasonable access’ refers to choosing, among several alternatives, the route that is shorter and less costly.”

provides the shortest and most reasonable access route to the public road. Considerations of comfort or convenience alone cannot justify the establishment of a necessary way. Without the necessary way, the economic viability or profitability of the parcel's use must either be lost altogether or unreasonably diminished, and access to the public road must be impossible without establishing a necessary way over the neighbouring parcel.⁴⁴ A necessary way may also be established for the installation and maintenance of power and water supply lines, that is, for necessary utility connections.⁴⁵

As regards compensation, Section 917 BGB similarly contains only a general clause requiring that the neighbour whose land is burdened by the necessary way receive compensation. In exchange for the right to use the necessary way, the claimant may be obliged to pay periodically a monetary charge (a so-called "necessary way rent", Section 917(2) BGB). In determining the amount of such compensation, Section 917 refers to the application of Section 912 sentence 2(2) as well as Sections 913 and 916 BGB.⁴⁶

Section 912 BGB⁴⁷ concerns boundary encroachment in the course of constructing a building and provides that the amount of periodic monetary payments is determined with reference to the time of the encroachment.

Under Section 913 BGB,⁴⁸ such periodic payments must be made annually in advance.

Section 916 BGB,⁴⁹ stipulates that, where boundary encroachment impairs a structure or easement on the neighbouring parcel, the injured party may invoke Sections 912–914 BGB.

Section 914 BGB,⁵⁰ confers priority upon the right to periodic monetary payments over all other rights affecting the burdened parcel, including earlier-established rights. The right to payment ceases once the boundary encroachment has been removed. It need not be entered in the land register. However, where the right is waived or where the amount of periodic payments is to be determined by agreement, registration is required. In all other cases, the provisions governing real encumbrances benefiting the owner of the dominant parcel apply.

Thus, the German Civil Code, like the Civil Code of Georgia, does not establish precise rules for calculating compensation for the use of a necessary way. The amount of compensation is determined by the courts on a case-by-case basis, in light of the factual circumstances established in each individual case.

Conclusion

In conclusion, it must be emphasized that the law does not lay down specific criteria for determining the amount of compensation payable for the establishment of a necessary way. The courts therefore determine the amount of compensation individually in each case. As the examined case-law demonstrates, courts sometimes impose on the benefiting owner the full market value of the immovable property, sometimes only a part of that value, sometimes the full market rental value of the entire parcel, sometimes the rental value of only the affected part, and in other instances they calculate compensation on the basis of transmission tariffs and kilowatt-hour volumes.

All of these methods, however, share a common foundation: when determining the amount of compensation, the court assesses whether, and to what extent, the establishment of the necessary way deprives the property of its substantive functional value in whole or in part; whether the burdened owner's income has decreased; whether and to what extent the ordinary use of the property has been restricted; whether the market value of the immovable property has diminished; and whether the

⁴⁴ BGH decision, Case No. V ZR 159/05, BGH NJW 2006, 3427.

⁴⁵ BGH decision, Case No. V ZR 233/10, BGH NJW-RR 2011, 1458.

⁴⁶ "Neighbours over whose land the necessary path passes must be compensated through periodic monetary payments. Accordingly, §912(2) sentence 2 and §913 and 916 apply." - Kropholler I., "German Civil Code", Study Commentary, 13th Revised Edition, 2014, p. 693.

⁴⁷ German Civil Code, Second Revised Edition, 2019, §912, p. 268.

⁴⁸ See footnote 46, §913, p. 269.

⁴⁹ See footnote 46, §916.

⁵⁰ See footnote 46, §914.

necessary way has affected the owner's non-pecuniary rights. On the basis of these factual findings, the court determines, in each concrete case, a reasonable amount of compensation for the duty to tolerate the restriction on property.

Courts regard compensation as fair only when it is proportionate and equivalent to the obligation to endure the restriction imposed on the property. It should also be stressed that, in determining the amount of compensation, the court is not bound by the method of calculation proposed by the claimant. Compensation must constitute an adequate response to the interference with the right, and it is the court that is empowered to determine objectively the amount of fair compensation.

It is likewise important to underline that where adequate compensation has been imposed for restrictions on the use of land, the owner who requires the necessary way does not have the right to demand recognition as owner of the land burdened by the necessary way in exchange for payment of compensation.

With regard to whether compensation should be paid in a lump sum or periodically, the courts, by way of statutory analogy (Article 5(1) of the Civil Code of Georgia), rely on the clause providing that "neighbours whose land is used for a necessary way or the passage of utilities must receive appropriate compensation which, by agreement of the parties, may be paid in a lump sum".⁵¹ This does not, however, preclude the court from deciding that compensation be paid periodically (for example, annually).

It is also essential that the burdened owner request compensation either through a counterclaim submitted in the course of proceedings concerning the establishment of a necessary way or through an independent claim. The court links the commencement of compensation to the date on which the restriction arises.

Which facts are put in issue by the neighbour-owner's objections determines the subject-matter of proof (the contested facts) and, in light of the procedural nature of those objections, the allocation of the burden of proof between the parties. When the claimant submits an expert opinion, the burden shifts to the defendant to rebut that opinion.

The burdened claimant must formulate the claim in such a way that the amount of compensation sought is adequate and proportionate to the restriction of their rights.

⁵¹ SCG decision No. 5b-965-2019, 10 April 2020.

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