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"Transmission easement – selected problems"

The institution of transmission easement

Easement is a limited right in rem, which is expressed by the right to properties of others. Transmission easement cannot be established on movables but only on estate. This right can only be determined for a given entity (undertaking). In the theoretical aspect, we can talk about active and passive easement - depending on the party which the easement concerns. In the case of an entity, who the restriction of the use of the property applies to, we will talk about passive easements, while in the case of an entity which has been granted the right to use someone else's property, we will talk about active easements.[1]

Changes in art. 49 of the Civil Code (CC) have been of great importance to the institution of transmission easement. The change was due to the problem of building transmission facilities by the property owners themselves, not by entities such as transmission undertakings. The previous regulation of art. 49 specifies that: "Devices for supplying or removing water, steam, gas, electricity, or other similar equipment, are not components of the land or building if they constitute a part of a company or undertaking." This regulation affect the collision with art. 47 CC.

Changes in art. 49 CC were also necessary because of the socio-economic transformation in Poland; it should be noted that a significant part of the transmission infrastructure had been built by state-owned undertakings on private land without regulation of their legal status. Other types of easements, by the time of changes, were used in the case law ancillarily.

Conditions and the scope of the easement transfer were introduced in art. 305^1 of the

[1] B. Rakoczy, *Służebność przesyłu w praktyce*, LexisNexis, Warszawa 2009, pp. 14 – 17.

Civil Code, which states: "Property **may be charged to the undertaking** who intends to build or who owns facilities referred to in art. 49 § 1, by the law according to which **the undertaking may use within a specified scope the servient estate**, in accordance with the specifications of these devices (transmission easement)."[2]

In this case, the burden is on the undertaking, resulting in the possibility of building and using a transmission device. At the same time this device is a property of the undertaking, which he or she can use in a specified scope and for its intended purpose.

However, art. 305^2 § 1 states that: "If a property owner refuses to conclude an agreement on the establishment of the transmission easements, and **it is necessary for the proper use of the equipment** referred to in art. 49 § 1, **the undertaking may request its establishment for a suitable consideration**."

Article 305^2 § 1 specifies that in the first place there should be an attempt to reach an agreement with the owner of the property; The undertaking should apply such an attempt. If no such agreement is reached, the undertaking may request the establishment of such an agreement for a suitable consideration. This situation applies to at least two kinds of situations - (1) attempts to build new transmission equipment, (2) attempts to "legalize" the existing transmission unit which was previously built without consent.[3]

Another situation is regulated by art. 305^2 § 2, which specifies that: "If **the undertaking refuses to conclude an agreement** on the establishment of transmission easements, and it is necessary to use the equipment referred to in art. 49 § 1, **the property owner may demand adequate consideration** in return for the establishment of transmission easement."

In the case of art. 305^2 § 2 we deal with a situation in which an undertaking refuses to conclude an agreement to establish a transmission easement. It is therefore the opposite situation in relation to the art. 305^2 § 1, where the refusing party is the owner of the property. This article, therefore, protects the interests of the property owner, who seeks consideration in exchange for establishment of transfer easements or an attempt of its legalization. This provision allows property owners to regulate the state in which the transmission facilities were built in violation of

[2] It should be noted that the government's bill to amend the Civil Code (document No. 74) of 7 December 2011 states that there will be added § 2 to the article 305^1 CC, which indicates that the transmission easement may serve only to increase the utility of the undertaking or its parts.
[3] G. Bieniek, *Urządzenia przesyłowe*, LexisNexis, Warszawa 2008, p. 56.

property rights (with no legal title) – in the case of Poland, it is the result of the functioning of the state in the previous political system.[4]

In the absence of agreement, i.e. the absence of settlement, there is a basis for legal proceedings (non-trial procedure). At this point it does not matter whether the basis will be art. 305^2 § 1 or art. 305^2 § 2 of the Civil Code. The lack of agreement may result not only from the denial of the need to establish a transmission easement in general, but also from the lack of consensus on the position of the transmission device on the property, e.g. the width of the area required to operate the transmission and distribution networks (the so-called operating or technical area). It should be noted that in the second case the problem can be quite substantial due to the absence of a specific type of regulations necessary to determine the operating area of the transmission device. One of the determinants to define this area, which should be specified by the company, will be kind of a transmission device (e.g. transmission line parameters). Another important determinant will be safety reasons related to the operation of the transmission equipment.

In addition, the government's bill to amend the Civil Code (document No. 74) of 7 December 2011 specifies that to the art. 305^2 of CC there will be added among others § 3, which will make the establishment of transmission easements conditional on the consideration of the socio-economic interests and justified interest of the property owner, in such a way that it is the least burden on the land on which the unit will be sited.

Transmission easement is transferred to the purchaser of the undertaking or the purchaser of the transmission device (305^3 § 1 of the Civil Code). Transfer of the easements referred to in art. 305^3 § 1 results in the integrity of the device with the transmission network. Furthermore, the article expresses the difference in relation to other types of easements – land and personal, which is expressed in the statement that the transmission easement is transferred onto the purchaser of transmission network.[5] This means that the existence of the transmission easement depends on the existence of the company responsible for it. However, art. 305^3 § 2 of the Civil Code states that the transmission easement expires no later than the end of the liquidation of the undertaking – this provision defines the termination of a transmission easement in its final form, which does not mean that we can deal with other situations which affect its expiry. The effect of

[4] Cf. K. Bator, *O istocie służebności przesyłu – wnioski płynące z analizy postanowień instytucji*, in: F. M. Elżanowski, M. M. Sokołowski (eds.), *Systemowe uwarunkowania sektorów strategicznych. Wnioski dla energetyki*, Wyd. A. Marszałek, Toruń 2011, pp. 93 – 96.

[5] Analysis of various forms of easements, among others in: Z. Golba, *Służebności gruntowe, drogowe, osobiste i przesyłu*, LexisNexis, Warszawa 2011.

the expiry of transmission easement is the requirement to remove the transmission device (305^3 § 3 of the Civil Code). It should be noted that there is no expiration of the easement during the process of liquidation of the transmission undertaking when the transmission equipment is sold.

In addition, under art. 291 of the Civil Code, when necessary (in the case of an important economic need), the property owner may request a change in the content or performance of the easement. This provision introduces the possibility of verifying the actual status of the transmission easement. However, the request of the owner cannot be based on unreasonable grounds. A justification for such a verification is an important economic need, assuming that it will not cause undue prejudice to the undertaking who owns the transmission equipment.[6]

An important issue for transmission easement is the possibility of acquisitive prescription of transmission easement. Article 292 CC provides that: "Real property easement can be acquired by adverse possession only in the case when it is based on the use of a durable and visible device. The legislation on the acquisition of real property by adverse possession shall apply accordingly." In this case, other purposes of property and transmission easement should be noted, since the latter one is set in order to operate a transmission device, without which the transfer activity of a substance (heat, electricity, gas, water) would be impossible.[7] Another characteristic feature is the connection to the transmission network, which is a property (component) of the transmission undertaking. In the case mentioned in art. 292 CC "permanent and visible devices" do not function as a transmission device, the more that the legislator pointed to the functional interpretation of the equipment in art. 49 § 1 CC (the use of the device for its intended purpose). Thus, the transmission device is necessary for the easement transmission, while the "permanent and visible device" will be optional and will not be a matter of property easement.[8] The possibility of application of article 292 CC in the prescription of transmission easement becomes debatable, which is due to the mentioned features of the devices presented in art. 49 § 1, art. 292, art. 305^1 of the Civil Code.[9]

A problematic issue is the provision of article 3 of the bill amending the Civil Code (document No. 74) of 7 December 2011, which indicates that the "prescription of transmission easement shall include the period of having the easement of the content corresponding to

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[6] G. Bieniek, *op. cit.*, LexisNexis, Warszawa 2008, pp. 62 – 63.
[7] Z. Gołba, *op. cit.*, LexisNexis, Warszawa 2011, p. 141.
[8] "Durable and visible device" is caused by increase in the efficiency of transmission easement (Judgment of the Supreme Court of 24 May 1974, III CRN94/74, OSNCP 1975, No. 6, item 94).
[9] Z. Gołba, *op. cit.*, LexisNexis, Warszawa 2011, pp. 146 – 147.

transmission easement, which existed before the entry into force of the Act of 30 May 2008 amending the Civil Code and other acts (Journal of Laws, No. 116, item 731), but not more than half the time required for the prescription." While the possibility of including other types the power in the prescription of transmission easement is the result of the jurisdiction of the Supreme Court,[10] shortening the time of intrinsic having easement by half seems to be debatable.[11] This solution is debatable in relation to the existing legal possibility of the prescription of transmission easement through another easement corresponding to its content.[12] Although this solution disadvantages energy undertaking, nonetheless, it protects the property owner.

Transmission device

Article 49 of the Civil Code specifies what is a transmission device;[13] § 1 states: "Devices for bringing or removing fluids, steam, natural gas, electricity and other similar equipment are not components of the property if they form part of an undertaking." A transmission device according to the Civil Code is a device which is part of an energy undertaking, assuming that it serves (has the function of) bringing or discharging liquids, steam, natural gas and electricity. In addition, the regulation, in determining the functions of the device, extends the concept by the wording of "similar equipment". On the basis of practice most problems were mainly connected with the qualification of "similar devices" as transmission devices (because here the legislation is not precise) and including devices as undertaking's components. A relatively general formulation resulted in differences, which resulted in various court decisions.

An example of the aforementioned problems is the Supreme Court judgment in 2004 on

[10] Resolution of the Supreme Court of 17 January 2003 (III CZP 79/02). In the resolution, the Supreme Court allows the establishment of easements by contract, to use someone else's property for the use of the transmission facilities. The Supreme Court stated: "The fact that the empowering property is a part of the electricity undertaking itself does not rule out the capacity of the parties to the agreement for the establishment of the easement referred to in article 285 § 2 of the Civil Code."

[11] See: *Notes of PKPP Lewiatan to the governmental bill to amend the Civil Code* (document No. 74) of 20 April 2012, in: http://pkpplewiatan.pl/opinie/prawo/1/_files/2012_04/0136_001.pdf [access: 30 June 2012].

[12] See: Resolution of the Supreme Court on 7 October 2008 (III CZP 89/08), M. Lewandowska, *You could linger transmission easement*, in: (www.rp.pl) http://www.rp.pl/artykul/204650.html [Access: 20 June 2012].

[13] The definition of the very "equipment" was included in the Energy Act - "technical equipment used in energy processes" (Article 3, point 9). However, "energy processes" are defined by the legislature as "technical processes for production, processing, transmission, storage, distribution and use of fuels and energy" (Article 3, point 7). Such a definitions indicate a fairly wide range of possible interpretations of what at all is a "device", although the interpretation of this concept can be used in other definitions, which were included in the Energy Act - for example, systems, networks, pipelines, lines. Attention should be payed to the recognising an object, on the basis of the Civil Code, as a device, but not on the basis of the Energy Law. See: *Energy Law* of 10 April 1997 (Journal of Laws of 2006, No. 89 item. 625, as amended), M. Pawełczyk (ed.), *Prawo energetyczne. Komentarz,* PWP Iuris, Poznań 2012, pp. 56 – 62.

the issue of including the building of substation as a transmission device.[14] The plaintiff claimed that this building was part of the property, and thus, she and not the electricity undertaking is its owner. The problem was the wide or narrow interpretation of what is a transmission device in connection with the "supply and disposal" function. The Supreme Court held that the functioning of the internal devices would be impossible without special cover and construction of the entire station. Disconnecting the two elements (the installation and building) would cause lack of implementation of the function, thus the Supreme Court held that there was no basis for the recognition of the building as part of the land, which was owned by the plaintiff.

A similar issue was considered by the Regional Administrative Court (RAC) in Warsaw in its judgment of 2006. In this case, the Administrative Court held that: "The building together with the wiring is a transformer station, which is a device for electricity supply in the meaning of art. 49 of the Civil Code." In addition, the RAC stated that when devices are connected "in a sustainable manner with the undertaking in such a way that they cannot be disconnected from it without a damage or a significant change of the total or the disconnected object, they become part of the undertaking."[15] However, in 2010 the Supreme Administrative Court (SAC) in its judgment of 2008 stated that: "The fact of connecting the device as a whole (the building and located there wiring and electricity devices) causes that it no longer is a component of the land and is not owned, by the art. 191 of the Civil Code, by the entity who has the right of perpetual usufruct of the property on which the unit - transformer station - is located."[16]

Of great importance are the prepared changes to the Civil Code (2011/2012), which relate to the institution of transmission easement.[17] The changes state that the directory of transmission facilities included in article 49 § 1, will be expanded to (1) telecommunications infrastructure equipment, (2) devices for railway traffic, (3) device for tram routes, cable transport, trolleybus lines.[18]

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[14] Supreme Court's judgment of 18 June 2004 (II CK 359/03, LexPolonica No. 38955).
[15] Judgment of the Regional Administrative Court in Warsaw of 13 June 2006 (I SA / Wa 2312/05, LEX No. 219241).
[16] Judgment of the Supreme Administrative Court in Warsaw of 22 February 2008 (I OSK 196/07, LEX No. 453403).
[17] New amendments prepared in relation to the amendment of the Civil Code are due to low efficiency of use of the provisions on the establishment of transmission easement. The main problem concerning the status of the property owners, who are de facto obliged to prove and assert their rights to the property, since the electricity undertaking is unlikely to be interested. In this legal situation the citizen has less legal support and financial capabilities required in judicial proceedings. The basis of the changes are controversies concerning what transmission easement includes; an additional factor contributing to the change is the desire to control the issues which started began to consolidate in the case law.
[18] *Governmental bill to amend the Civil Code* (document No. 74) of 7 December 2011.

New § 2 defines the moment when transmission facilities are incorporated into the undertaking – that is, once the undertaking has connected them in a permanent manner to their networks. However, § 6 extends the concept of devices for buildings and structures used exclusively for the use of transmission facilities. The bill also adds statement that: "Ownership of the buildings and structures is the law related to the transmission easement." This record is the result of the jurisdiction of courts of different instances which involved the problem of buildings accompanying or rather complementary to transmission facilities *sensu stricto*, most often associated with technical safety of the devices.

Moreover, the bill to amend the Civil Code clarifies the situation in which buildings and structures built for the use of transmission facilities have been constructed on the property by the owner – in this case the property owner may request the transmission undertaking to purchase these constructions for an appropriate consideration, unless the parties have agreed otherwise. The same request may also be made by the transmission undertaking (proposed art. 49 § 7 of the Civil Code). This provision clarifies the situation in which there would be doubts as to the qualifications of the equipment as "transmission facilities".

Transmission corridors

Bill on transmission corridors

Transmission corridors are the subject of the bill prepared in 2012. The bill on *transmission corridors*[19] determine the rules of (1) establishing a corridor for new transmission facilities, (2) granting permission for the construction of transmission facilities, (3) determining a transmission corridor for existing transmission facilities, (4) locating further transmission equipment and other transmission facilities in the corridor, (5) establishing transmission easement and land management in the area of the transmission corridor, (6) determining and awarding compensation for the transmission easement encumbrance of real estate.

In 2012 the bill was one of the priorities in the energy sector – not including the amendment of the Energy Law, the work on the bill on renewable energy sources and work on the project of the gas law. The intention of the Act on transmission corridors is to organize the legal system in order to ensure effective development of transmission infrastructure in Poland.

[19] Draft bill on *transmission corridors* of 19 January 2012 (Version 4).

The problem with the electricity infrastructure should be considered in a broader context, which means with its poor condition, increasing demand for energy, the need to diversify the energy structure in Poland. The problem with infrastructure will continue to grow due to the need to develop renewable energy sources and the planned construction of a nuclear power plant. Current state of transmission lines threatens the development of renewable energy to the level required by the European Union. However, in the case of the plan to build a nuclear power plant, it will be necessary to condense the grid in areas of poor infrastructure and ensure proper grid balancing.

Despite the government assurances that the bill is not yet another "spec Act", we should be inclined towards the interpretation that the new provisions and *de facto* the new institution of transmission easement on the basis of administrative law, is a tool that is to speed up the current legal procedures to enhance the interference in the property rights of citizens. In contrast to the previous legal solutions, transmission easement on the basis of administrative law is to strengthen the position of the entities implementing investments in the public interest; however, it will be verified in practice how widely the public interest will be understood in the context of this type of easement.

Another problem will be the way of calculating compensation/consideration in connection with the establishment of the easement, which was criticized by the Polish Federation of Valuers' Associations (PFVA). PFVA indicates that in the law there is used the concept of "core values", which may not necessarily mean the market value of the property, which poses a significant threat to the interests of the citizen/owner. This can result in abnormally low compensation/consideration granted to the property owners.[20]

There is no doubt, however, that, due to the economic interest and the public interest, which should be guided by the central government and local government, the records of the bill will facilitate: (1) investment process, (2) procedures, and (3) will regulate the previous problems associated with similar investments.

Corridor transmission and transmission facilities

Article 3, point 1 of the bill introduces the definition of a transmission corridor, which is

[20] *Investor's interest - owner's expense* (Position PFVA February 8, 2012),
in: http://www.pfva.com.pl/sites/default/files/Stanowisko% 20PFSRM% 202012-02-08.pdf [access: 15 May 2012].

to mean "legally separated ground necessary for foundation and proper operation of transmission facilities." Thus, we deal with an attempt made by the legislature to determine what can be called an operational (technical) area. In addition, the legislature introduced a distinction between local transmission corridors (county area) and supra-local transmission corridors (area of two or more counties).

It is interesting to introduce by the legislature another definition of "transmission device" together with the existing definition in art. 49 CC. Article 3, point 5 of the bill states that the device is: "placed under the ground, on the ground or above the ground drainage lines, technical equipment and facilities to supply or discharge of electricity, natural gases, including carbon dioxide, heat, oil and petroleum products, water, sewage collection and fluids necessary for the construction and operation of underground non-tank storage systems for natural gas, crude oil and petroleum products, with the installations, equipment and facilities necessary for their proper use. " In comparison with the record of the Civil Code we deal with a broader catalogue of various types of equipment, moreover, there was a new term introduced to the definition - a "drainage line." However, it is clear that the provision of art. 49 CC was the basis for a broader interpretation, hence greater flexibility. In addition, the legislature has identified an additional category of "an above ground object", which means: "an item, which is a part of a above ground or underground transmission equipment located on or above the land in a way that prevents the use of the land beneath the object for any other purpose than transmission or distribution" (article 3, point 10). Specification of this element is likely to be a solution to the problem which occurred earlier in jurisdiction, and concerned the scope of elements belonging to the transmission device.

Establishing a transmission easement in the transmission corridor

The basis for the isolation of a new type of transmission easement under the bill on transmission corridors was the inefficiency of the regulations and the insufficiency of the legal system and institutions for the provision of public services or services of economic interest. The solutions of the bill introduce a considerable confusion in the legal system, because it is not known whether special arrangements, characteristic for transmission easement under the bill is *lex specialis* or perhaps a new kind of transmission easement. If this is a new kind of transmission easement then we deal with a situation in which the institution of transmission easement will operate on the basis of civil law and administrative law.

The bill specifies that the date on which the decision to establish a transmission corridor becomes final, the property in the corridor will be charged with transmission easement (article 40). The legislature clarified in art. 40, paragraph 2, points 1 - 3 the range of competences of the transmission undertaking to actively perform the easement, which includes: (1) foundation of the transmission equipment, (2) maintenance, operation, servicing and repair, fault recovery, remodelling or rebuilding a transmission device, (3) entrance or exit (including heavy equipment) to perform the activities referred to in point 2. Compared to the provisions of the Civil Code, we deal with an exhaustive list of activities. In the case of civil law a significant part of activities concerning the easement is based on case law.

Establishing transmission easement in the transmission corridor results in restrictions on its use, which is reflected in the prohibition of (article 43, paragraph 1, points 1 - 6): construction of buildings, location of objects (including temporary facilities), changes in the shape and destiny of the land, activities which could jeopardize the operation of transmission facilities, activities which could lead to a failure or damage of the device, activities which could lead to difficulties of access to the device, afforestation, maintenance of plants with a height exceeding 2 m (in the case of electricity transmission equipment).

The legislature has provided a possibility to withdraw from the prohibitions listed above, but after consulting the transmission undertaking whose equipment will be located in the transmission corridor (article 43, paragraph 2). Moreover, the legislature established the necessity to obtain a decision on the determination of the transmission corridor for transmission facilities which were built in the period before the entry into force of the Act, and for which there is no legal title to the land on which these facilities were built (art. 66).

Summary

Transmission easement is a right to the things of others, and in that sense it is a limited right in rem. It should be noted that the transmission easement may apply to infrastructure which does not have to be related to the energy sector as stated in art. 49 of the Civil Code (as well as the expected entries in the Government's draft amendments of the Civil Code of 2011) and the proposed provisions in the bill on transmission corridors of 2012.

The existing provisions in civil law gave great opportunities to determine what can be classified as transmission facilities and what cannot. The proposed changes in the civil law do not change

the wide range of interpretation of the "transmission device", they rather adopt an even wider classification formula.

The solutions in the bill on transmission corridors will be the *lex specialis,* which will result from the need for implementation by the state and local authorities of the function to ensure public services or services of economic interest. We should also stress the need to ensure energy security by the state, which is associated with the guarantee of supply and operation of the transmission grid. Poland awaits the need to prepare the network for increased energy demand and changes in the structure of energy (nuclear power and renewable energy sources).

The text presents some problems with the transmission easement based on civil law (including the draft of amendments to Civil Code) and administrative law (the bill on transmission corridors). The text does not discuss in details the issues of compensation, which is provided by legal solutions on the basis of administrative law and civil law. The main issues which were analyzed in this work are: (1) an overview of the institution of transmission, (2) the scope of restrictions on transmission easement, (3) the term "transmission equipment" especially on the basis of article 49 CC, (4) how to interpret the qualifications of equipment as "transmission equipment", (5) transmission corridors, (6) the effects of establishing transmission easement in transmission corridors.

Legal changes prepared at the turn of 2011/2012 on the basis of the Civil Code and administrative law are the result of low efficiency of the existing regulations. In the case of the prepared changes to the Civil Code the privileged legal position of transmission undertakings should be pointed out. However, the new regulations developed under the bill on transmission corridors stem from the need to ensure by the state and local authorities the effective implementation of the security functions of public services or services of economic interest. Additional factors which contributed to the regulation of transmission easement on the basis of administrative law are affected by the obligations of the Polish state in the diversification of the energy structure – especially the question of increase in the share of RES in the obtained electricity. Moreover, Poland is facing a growing demand for energy and the problem of not very good infrastructure.

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This paper analyzes the transmission easement institution based both on Polish civil law and legal solutions prepared on the basis of Polish administrative law. In the first case the analyzed solutions contained in the Civil Code (together with the prepared amendments to the regulations on transmission easement). In the second case there was discussed the analysis of selected transmission easement regulations, which are contained in the bill on transmission corridors.

The paper presents an analysis of the following issues: (1) the institution of transmission easement, (2) the constraints on transmission easement, (3) the term "transmission facilities" – both on the Civil Code and the bill on transmission corridors, (5) transmission corridors and effects of setting in their area transmission easement. However, the issue of compensation related to the establishment of easements on the basis of civil law and administrative law has not been further discussed here.