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Energy easement — selected issues

Abstract

Transmission easement is an institution introduced of legal transactions in 2008 and has raised many reservations since the beginning of operations. Its particular variation, due to the object, is the easement of energy transmission. The presented work does not dispel the doubts that arose around this kind of easement, but only indicates the specific features of this institution. The content of the article is limited only to the definition of energy easement and its content. The intention of the authors is to present this type of easement and its specificity to recipients who do not always know the intricacies of civil law and want to know or broaden their knowledge about the easement of electricity transmission.

Keywords: easement, easement of transmission, content of energy easement.

1. Introduction

The economic development of the country, the functioning of the administration or every day, ordinary life of the citizen depends on the possibility of using various technical and nature benefits, such as water, gas, mobile telephony or electricity. This however requires the creation, operation and maintenance of a huge infrastructure, a large number of different objects, transmission devices that usually do not belong to the owners of the land on which they are founded, above which they run. Their location, especially the route of power lines, is perceived by property owners, where such devices are located, as a significant difficulty, an inconvenience that causes problems with the use of real estate and the inconvenience affecting the value of the property. Change of the political system, basing the economy on the so-called “Free market economy” influenced the change of property owners’ approach to the problem of using real estate, making it available for development in exchange for remuneration. The large number of disputes between property owners and enterprises (so-called transmission companies), the multiplicity of claims filed, translating into an increase in the number of court proceedings, exposed the imperfection of existing legal regulations, became one of the premises of the amendment to Art. 49 of the Civil Code (Civil Code of 23 April 1964, Journal of Laws of 2018 item 1025 with later d.).

These disputes, in a situation of return to the “controlled” economy, may take on a different shape.

Amended in 2008 (the Act of 30 May 2008 amending the Civil Code and some other acts, Journal of Laws of 2018 No. 116 item 731) article 49 with the added articles

3051–3054 is now the basis for the operation of transmission easement — a new type of easement.

Of course, these are not the only legal regulations constituting the rules for the functioning of this institution, they act in the legal transactions also acts of EU law, however, at this stage of introducing the question of easement of electricity transmission, only one of them will be referred to.

2. Transmission easement — general thoughts

According to the wording of art. 305 Civil Code property may be charged to the trader who intends to construct or owns facilities, referred to in art. 49 § 1, the law which consists in the fact that a trader can use within a given range of the servant estate, in accordance with the intended purpose of these devices (transmission easement).

Limited — due to editorial requirements — to the necessary minimum, the analysis of this institution should begin with indicating the legal character of this easement.

The prevailing view is that transmission easement is a new, third (alongside personal easements and easements) a kind of easement. Proponents of this concept (Jankowska, 2017; Gudowski ed., 2016) emphasize that such a legal qualification is mainly determined by:

- a) internal systematic of the legal act — the location of this institution in the new chapter III of the Civil Code, entitled “easement of transmission”;
- b) the content of the new easement — which is usually limited only to determining the possibility of using the property only to the extent that it ensures the proper functioning of transmission devices;
- c) existing in art. 3054 Civil Code, reference to the legal regime of land easements;
- d) the possibility of establishing it for the benefit of an entrepreneur who is not the owner of another property.

Additionally, to underline this thesis, it is indicated that this easement (...) is not inseparably connected with the person entitled (...) (Gudowski ed., 2016) and that from the two types of easements known to date, it differs (...) the scope of the freedom of regulation and its content by the parties of the legal relationship (Jankowska, 2018).

Separation of this third type of easement is not universally accepted — however, the arguments presented above do not convince everyone (Katner, 2013).

Even now, in a situation where the legislator created a legal definition of transmission easement, some studies emphasize that before 2008 there was an equivalent of this type of institution — land easement, which largely corresponded to the “easement of transmission”. However, it should be stipulated that on the basis of current regulations, the problem of comparing or replacing one easement with the other, there is no reasonable justification at the moment, because although both types of easement may have similar content, they may have similar function, they cannot be identified with each other.

Without a doubt, it must be noted that the transmission easement is a limited property right that allows interference in the property of others.

3. Electricity transmission easement

Establishment of transmission easement includes devices used to supply or discharge liquids, steam, gas, electricity and other similar devices — art. 49 § 1 Civil Code. The essence of the definition of energy easement is the precise determination of these devices that supply electricity. Definitions or other formulations included mainly in the Energy Law Act (the Act of 10 April 1997 Energy Law, Journal of Laws of 2018 item 757 with later d., therefore EL) may be helpful in this respect. In the extended article 3 of this legal act, however, there are a lot of definitions that can affect the shape, and especially the scope of the definition of “energy easement”. However, before we move on to exchanging these devices, we need to clarify the subject scope of the easement of electricity transmission.

The basic concept affecting the final wording of this easement is the definition of “energy” or energy processed in any form — art. 3 point 1 EL. The EL Act does not contain the definition of electricity, although this wording is used in the law (in various forms) more than 600 times. It can therefore be assumed that the legislator’s scope is very broad. In addition to the types of energy specified in the act itself, such as heat energy in hot water, steam, chemical energy, cogeneration energy or nuclear energy, from which electricity can “come”, it can be obtained, for example, from a wind farm (see more in the Judgment of the Provincial Administrative Court in Kielce of 22 April 2010, II SA/Ke 165/10). Such legal regulation undoubtedly affects both the subject and subjective scope of the “easement of electricity transmission”.

The second important and basic for the discussed issue is the definition of an energy company, which according to the wording of art. 3 point 12 of the EL, is an entity conducting economic activity in the scope of: generation, processing, storage, transmission, distribution or marketing of fuels or energy (...).

It is also worth mentioning that the definition of an “energy company” is included in EU law. According to the wording of art. 2 point 35 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (EU Law L 211/55) — “Energy company” means any natural or legal person who carries out at least one of the following activities: a manufacturing activity, a transmission activity, a distribution activity, a supply activity or in the purchase of electricity, and which is responsible for commercial, technical or in the scope of maintenance regarding these activities, excluding final customers.

In the course of further deliberations regarding the subject for which the property may be charged with the easement of electricity transmission, we will remain with the simplified definition of the energy company formulated in the EL.

The considerations concerning the essence of the definition of “entrepreneur” will also be omitted, but it is worth mentioning that currently this institution finds its legal bases both in the third section of the Civil Code (art. 431) and in art. 4 points 1 and 2 of the Act of 6 March 2018 Entrepreneurs’ Law (Journal of Laws item 646). There is no doubt that in the current economic and political situation, despite quite general wording regarding the “energy enterprise”, the scope of entities for which electricity transmission easement may be established is limited.

The subject range looks different, and thus the occurrence of various types of equipment, the construction of which may be the basis for charging the real estate. As mentioned above, the basis for establishing transmission easement is art. 3051 Civil Code, in which there is talk about devices mentioned in art. 49 § 1 Civil Code — that is, devices used to “supply or discharge (...) electricity, and other devices (...)”. The Civil Code does not define the term “device” and the editorial of the text of the articles suggests the need to use the regulations contained in the Energy Law, and those regarding “devices” in this act There is quite a lot of legal rights.

It is advisable to start a short review of such devices from the definition of an energy process, i.e. technical processes in the field of generation, processing, transmission, storage, distribution and use (...) of energy (art. 3 point 7 EL). Their essential and indispensable element are technical devices used in energy processes (art. 3 point 9 EL).

None of the Energy Law articles contains specification of these devices used in energy processes, however, from the content of the provisions and above all, based on the case law, an attempt, even a very sketchy one, to calculate them can be made. The catalogue of such devices translates into the subject matter of the easement of transmission, since any device will be used for activities listed in art. 49 § 1 Civil Code, then their construction and then the use of them may constitute the content of easement of transmission.

It should also be mentioned that the definition of “device” or “energy process” — it can be understood by representatives of technical sciences, however, from a juridical point of view, it is not free from defects, from logical errors. Therefore, the attempt to inventories devices important for the energy process may be non-exhaustive but may also become a premise of discourse, polemics.

Article 3 of the EL contains so-called glossary of the terms used in the Act, and in the definitions it contains, lists, among others:

- electricity transmission networks (§ 4 and 11a);
- electricity distribution networks (points 5 and 11b);
- networks or installations connected and cooperating with each other for the transmission or distribution of energy, belonging to an energy company (point 11);
- installations, i.e. devices with interconnection systems between them (point 10);
- coordinated 110 kV network as part of the 110 kV distribution grid (point 11g);
- storage installations owned or operated by the energy company (point 10a);
- energy storage — installation for storing energy, connected to the network, having the ability to supply electricity to the grid (point 10k);
- a direct line as a power line connecting a separate electricity generation unit (point 11f);
- devices related to renewable energy sources, including micro-installation and small installation (§ 20b and 20c, in connection with the regulations contained in Article 2 of the Act of 20 February 2015 on renewable energy sources, Journal of Laws of 2018 item 1269);
- generating unit — a separate set of devices belonging to an energy company, used for generating energy and outputting power (§ 43).

The list of devices containing only technical formulations defining their functions is therefore long and contains only basic types without dividing, for example, power transmission networks depending on the type of voltage (high, medium and low). It is also worth emphasizing that these are devices or external installations, devices forming internal installations are in fact parts of the real estate (similarly Bieniek, 2008).

These general wordings, not very useful from the point of view of civil law, require interpretation or other attempts to specify them. The decisions of the courts are irreplaceable in such a situation. The illustration of this thesis are selected judgments, from which it follows that energy devices or energy infrastructure include:

- a) free-standing wind farms — e.g. the Judgment of the Provincial Administrative Court of 29 January 2016, II SA/GI 230/15 and the Judgment of the Supreme Administrative Court of 27 September 2017, II OSK 987/16;
- b) cables or technical devices used for generation, processing, transmission, storage, distribution and use of electricity — e.g. the Judgment of the Supreme Administrative Court of 27 September 2017, II OSK 987/16;
- c) a solar farm — e.g. the Judgment of the Provincial Administrative Court in Białystok of 6 April 2017, II SA/Bk 155/17;
- d) wind power plants — among others the Judgment of the Provincial Administrative Court in Łódź of 24 October 2016, II SA/Łd 630/16;
- e) power connection, cable and measuring connector Zk-15kV and transformer station;
- f) photovoltaic panels — e.g. the Judgment of the Provincial Administrative Court in Poznań of 19 March 2015, II SA 1236/14.

4. Content of energy easement

From the rudimentary, for easement of transmission, art. 3051 Civil Code, it follows that the content of this law is only the use in the designated scope (...) in accordance with the purpose of these devices. This is an overly enigmatic formulation, as emphasized in the subject literature (Gniewek, Machnikowski eds., 2017) unfortunately also requires additional interpretation. The fundamental significance for determining the content of energy easement is in this situation both the case-law regarding the referenced article and the reference to the provisions on land easements (art. 3054 Civil Code).

The reference to easement allows for extending the content of energy easement (except for use) to:

- a restriction in the ability of certain property owners to take certain actions against it, and
- lack of the property owner's ability to exercise specific rights that may be vested in him on the basis of the provisions on the content and exercise of property (art. 285 Civil Code).

The “use in the designated scope” and “as intended (...)” is interpreted ambiguously by the case law. In one of the judgments, the Supreme Court states, for example, that these concepts, although they are normative, are so general that in any case require the courts to comply with individual content, including its so-called active character (the Judgment of the Supreme Court of 18 April 2012, V CSK 190/11). In the further content of the said order, the court states that the detailing should be appropriate

for the specificity of the company, the type and location of transmission equipment (...). In particular, it is advisable to indicate that the load includes access, use through ongoing operation, making inspections, inspections, maintenance, modernization, repairs, removal of failures, replacement of devices (...).

This wide range of the use of real estate encumbered, in the same provision, was restricted territorially. The court stated that (...) these returns determine the material scope of the encumbrances, including not only the type and size of the entrepreneur's rights, but also the obligation to mark the area on which they will be implemented.

Thus, it is important for easement of transmission, including energy easement, to determine the scope of the load in question, but also to indicate the territorial scope.

In the case of energy easements, its content should correspond to specific requirements related to the operation — foundation and maintenance — of energy devices, including the devices mentioned above. The content of such easement must, therefore, include type of device and adjust to it, for example, the width of the strip of land designated “for” energy network. However, regardless of the so-called vertical projection considering the width of poles on which the ducts are mounted, the easement should additionally include the area of the operating belt, whose width on the one hand corresponds to technical and operational requirements taking into account the basic purpose of such easement, i.e. effective and safe performance of the transmission company's rights.

On the other hand, it must take into account the security rules and at the same time it must be done in such a way as to make least difficult the use of the encumbered property. Of course, the content of the easement of transmission must include the ability to perform all activities related to both the maintenance of transmission equipment, removal of breakdowns, modernization, reconstruction, reconstruction or replacement.

Depending on the manner of establishing the transmission easement (contract, court order, administrative decision), as mentioned above, the content of the established easement should be determined in a manner corresponding to the type of easement, taking into account quite numerous implementing rules laying down technical conditions that should be met by particular types of equipment, e.g. possibility of felling trees, height of fences, the right of free access to buildings (warehouses), etc.

Final statements

The transmission easement, including the easement of electricity transmission, is a fairly complicated institution, not free from defects and, unfortunately, very often abused by transmission companies that often use their monopoly position.

It is worth recalling that every easement (including energy) is a kind of limitation of the right to property subject to constitutional protection. Any limitation of the right, including property rights, should be duly justified and the restriction shall be specified in detail, precisely indicated. This remark also concerns the rights that may be granted to the entity, the entrepreneur for whom the property was encumbered.

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