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Installing Devices for Sending Liquids, Steam, Gas and Electric Power through Someone Else's Real Estates**

1. Introduction

The investments connected with building energy lines, water supply or gas pipelines cause many conflicts between suppliers and the owners of real estates, crossed by these ducts. If there is no agreement between the parties, the owners often demand from the suppliers the removal of cables. This situation is supposed to be normalized by new regulations (introduced by the *Law of 30th May 2008 on changing the Civil Law and some other Laws* [6]) referring to the supply lines. The regulations came to power on 3rd August 2008. It was especially important to introduce a new kind of easement – easement of transfer (art. 305¹ – 305⁴ of the *Civil Law*).

2. Legal Status of Transfer Devices

A legal status of transfer devices is regulated by art. 49 of the *Civil Law*. According to the content of this regulation “devices designed to bring in or take out liquids, steam, gas, electric power and other similar devices do not belong to the elements of real estates, if they belong to an enterprise”. The enterprise is meant as a subject, in the meaning of art. 55¹ of the *Civil Law*. This regulation sets the exception of the rule written in art. 191 of the *Civil Law*, according to which the property of real estates, extends to movable properties connected with real estates in such a way that it became an integral part of it.

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** The work has been made within scientific University program no 11.11.150.005

Thus, according to the regulation, if such devices are not a part of an enterprise, then they make an integral part of the ground, and consequently, the subject of the ownership of the owner of the real estate. Integral parts of the ground will be e.g. pipelines bringing water to the building from a well built in the area of the ground real estate.

In every case, joining the devices mentioned in art. 49 of the *Civil Law*, with the devices of a supply enterprise, these devices lose the character of integral parts of the ground they are crossing, becoming an integral part of the enterprise they were connected with (TK of 4.12. 1991, OTK 1991/22). The company running the enterprise gets the ownership of these devices, regardless who built them and who paid for them, so even if the devices were installed by the ground owner.

However a person, who paid for building the devices and became their owner, can demand from the enterpriser who attached the devices to their network, the payment for the ownership, unless the agreement stated differently. The ownership transfer of these devices can also be demanded by the enterprise (art. 49 § 2 of the *Civil Law*).

3. Easement of the Transfer

On 3rd August 2008 [6] into the *Civil Law* a new restriction to the property law was introduced – easement of the transfer. This means that the real estate can be charged by the enterprise intending to build transferring devices or the transferring devices make the property of the owner. Thus the enterpriser can, to limited extent make use of the real estate, in compliance with the character of these devices (art. 305 of the *Civil Law*).

From this regulation it can be concluded that the principle of the transfer of easement can be applied not only to such situations when transfer devices already exist, but also when an enterprise just intend to build the devices. This allows applying the new regulation both to so-called a *posteriori* situation i.e. already built devices making a cause of the conflict, as well as securing the legal interest of the enterpriser in the phase of the investment planning. Owing to this legal regulation, the enterpriser shall get the right to use the real estate to build the devices, which is necessary for the application for the construction permit. According to art. 33 passage 2 pt. 2 of the *Law of 7th July 1994 – Construction Law*, to the application for the construction permit, a statement should be enclosed that the applicant has the right to use their real estate for building purposes. The right to use the real estate for building purposes means the legal title resulting from the ownership, perpetual usufruct, administrating, limited property right or the legal obligation to carry out construction work. In the agreement on establishing the transfer of

easement it should be formulated what the easement of transfer means. Usually it would be the permit to install devices and providing access to them to enable future maintenance.

The easement of transfer should facilitate regulating of very many unclear or even contradict transfer installation settings on private grounds.

In contrast to typical ground easement there is no division into benefited property and property with mortgage. Here we have real estate with mortgage and an enterprise, entitled by the transfer of easement and intending to build the devices mentioned in art. 49 of the *Civil Law*, or is the owner of these devices. In case of the lack of agreement, both the owner of the real estate as well as the transfer enterprise can demand legal establishment of the easement by the court, with a suitable payment.

In case of so-called a posteriori situations when the devices have already been installed, the enterpriser can go to the court to establish the transfer of easement (if the owner refuses the establishment of easement by an agreement). For this property claim, according to art. 118 of the *Civil Law* the limitation period is 10 years. However, the term of limitation is counted from 3rd August 2008, because only since then the regulation enabling the establishment of transfer of easement has been in power.

According to art. 305³ of the *Civil Law* transfer of easement passes into the purchaser of the enterprise or the purchaser of the devices mentioned in art. 49 of the *Civil Law*, transfer of easement expires the latest with the liquidation of the enterprise. After the expiration of the transfer of easement, the enterpriser is obliged to remove the devices disturbing in the use of the real estate. If this is too difficult or too expensive, the enterpriser is obliged to repair the damage.

Transfer of easement can be made in the form of: agreement as a w notary act, court decision, court agreement or usucaption.

The change in the *Civil Law* through the introduction of transfer of easement did not breach its existing regulations in prescriptive easement. This, however, requires certain conditions, i.e.:

- long enough period of time (30 years of the easement autonomous possession in bad faith, 20 years in good faith),
- existence of permanent and visible devices (art. 292 of the *Civil Law*)

In acquiring the easement by usucaption, it is important that permanent and visible devices have been made by the possessor of the easement, and not by the owner of the real estate, the possessor is using.

In case of the real estate belonging to the State Treasury and the territorial self-government units, one should regard the circumstances that in the period from 1st January 1965 to 1st October 1990, real estates belonging to the State

Treasury were excluded from usucaption. In the decision of 10th April 2008 (IV CSK 21/08) The Supreme Court decided that “according to properly applied art. 172 of the *Civil Law*, the regulations on acquiring the ground easement by usucaption were not applicable if the real estate was in the ownership of the State”. Also in the Resolution of 13th April 2007, the Supreme Court decided that “If the use of permanent and visible devices was before 27 May 1990, the duration of time for the usucaption of the ground easement referring to real estates that were on that day in the possession of the state ownership and from that day, by the power of law became the municipal property, starts from May 27 1990”. In both cases, according to art. 10 of the *Law of 28th July 1990 on the change of the Civil Law*, the usucaption time became shorten by the time when the real estate had a status of state property, but not more than by the half. Thus the condition referring to the required time of the possession of a real estate leading to the easement by usucaption, in many cases would not be fulfilled by the enterprisers.

Additional problems can arise when the enterpriser looking for the usucaption of transfer of easement is a legal successor of the state enterprise. Until 1st February 1989 year (i.e. the coming in power of the *Law of 31st January 1989 on changing the Civil Law*), art. 128 of the *Civil Law* was in power. It expressed the rule of the uniform fund of the state ownership. Until that date, state enterprises administering the state property did that in the behalf of the State Treasury. Only when the changes in the *Civil Law* were introduced, i.e. from the day of 1st February 1989 the possibility appeared to acquire the ownership of real estates and other property rights by state corporations (including state enterprises). Thus, since that date they could possess real estates in the scope leading to usucaption. This was confirmed by the jurisdiction of the Supreme Court (decision of 25th January 2006 and CSK 11/05, verdict of 31st May 2006, IV CSK 149/05). Like in the verdict of 10th July 2008 (III CSK 73/08) the Supreme Court stated that the possession by a state-owned enterprise of real estate, as well as easement, before 1st February 1989 was not autonomous. Thus this period is not taken into account when usucaption is counted.

Due to the above – it will not be easy for the enterprise to acquire the transfer of easement by usucaption.

Both the agreement as well as the decision of the court to establish transfer of easement make base for writing a limited property right into the land registration. The guarantee of the public good faith in the land registration does not act against e.g. transfer of easement, which results from the amended *Law of 6th July 1982 on land registration and hypothec*.

It should be added that to obtain the right to put transfer devices, it is also possible to make other agreements e.g. rent, usufruct.

4. Administrative Way of Obtaining Permission to Conduct Transfer Devices

Obtaining permission for having transfer devices conducted is also possible in an administrative way based on art. 124 of the *Law of 21st August 1998 on the management of real estates* [5]. It is a kind of expropriation from a real estate, meaning the restriction of the ownership, the right to perpetual usufruct or any other property-related law referring to the real estate.

According to this regulation, the head of the county (*starosta*) can, performing the task of the central administration, put restrictions on the way of using the real estate, by giving permission to establish and conduct on the real estate drainage pipes, cables and devices used to send liquids, steam, gas and electric energy and devices for public communication and signalization, as well as also other underground, on-ground or above-ground objects and devices necessary to enable to use these cables and devices. This limitation occurs according to the local plan and – in case of the lack of it – according to the decision on establishing the localization of the public purpose investment.

Issuing a decision limiting the way of using the real estate is possible only when its owner or person having a perpetual usufruct does not agree for such limitations. Thus issuing a permit should be preceded by negotiations with the owner or person having a perpetual usufruct of the real estate, asking them to allow the works being carried out. The negotiations are carried out by a person or organization intending to apply for the permission. With the application the documents from the carried out negotiations should be enclosed. The presentation of the results of negotiations with the application is necessary, because failing to carry out negotiations makes the expropriation procedure impossible. Starting the expropriation procedure without negotiations would mean making decision in the procedure, which is affected by a defect influencing the content of the decision. The duty to carry out negotiations is fulfilled by making a statement of will as understood by the civil, as an invitation to conduct negotiations to reach an agreement.

As far as subjects that can obtain the permission to establish and conduct lines are concerned, the predominant view in judgement is that these subjects, apart from territorial self-government units can be also the enterprises and public use organizations aimed at meeting the collective needs of residents, by public services. The person or organizational unit asking for permit has a duty to restore the real estate to the previous state, immediately after establishing cables and devices. If bringing back a real estate to the previous state is impossible or causes great difficulties or costs, a suitable compensation is paid.

The decision on compensation is issued by the head of the county (*starosta*) performing the tasks of the governmental administration. The duty of paying compensation for the damage or decrease of the value of the real estate is to be paid by the person or organizational unit that received the permission to establish technical infrastructure. The owner or person exercising a perpetual usufruct of the real estate is obliged to make the estate available to allow the activities connected with the maintenance and repairing of cables and devices. The duty to make the real estate available can be executed in an administrative way.

The final decision makes base to writing into the land register. The registration is made on the request of the head of the county (*starosta*) performing the tasks of the governmental administration, or the executive organ of the unit of territorial self-government, if the permission was issued on the request of this unit.

Thus we deal with a particular case of expropriation in the form of limiting the right of ownership or perpetual usufruct. However, this procedure can only be applied to planned investments in case of devices, while it cannot be applied – unlike in transfer of easement – in legalizing the *a posteriori* situation, when the devices have already been built. Moreover, issuing the decision limiting the right to ownership or perpetual usufruct to put industrial devices is not always possible. First of all, it is because the local plan is required, where the implementation of the public purpose on the real estate is included, and in case of the lack of such a plan (which is quite common) issuing a decision establishing the localization of the investment for the public purpose.

Taking into account a complicated administrative procedure and very large probability that the owners would appeal against this decision, because they did not agree for the limitation of the property right – one should take into account a long lasting procedure, which has often been the case in practice.

5. Surveying at the Establishment of the Easement Transfer

The scope of surveying activities can be differentiated, depending on the fact whether the establishment of easement transfer means regulating *a posteriori* situations, or refers to planned localization of industrial devices. Due to the above, surveying and legal and technical activities can be divided into stages the range of which would be slightly modified, according to the kind of task.

- 1) Examining the legal state of a real estate being a subject of the easement based on the data revealed in the land register and the inventory of grounds and buildings, as well as the documents provided by the parties or available in respective archives.

- 2) Making the surveying and legal documentation (including the inventory of changes in the grounds, synchronizing lists, etc.) to reveal in the land register up-to-date markings of real estates, according to the data of grounds and buildings inventory, reveal the divisions of real estates.
- 3) Carrying out the procedures establishing the course of the transfer of easement:
 - analysis of data referring to the situation of devices based on information found in the centre of surveying and cartographic documentation;
 - field interview, possible surveying of the situation of devices;
 - checking the borders of the real estate, possible renewal of the borders – in case of the conflict about the borders – the procedure in case of the easement should be preceded by an administrative or court settlement in case of the borders;
 - making a map presenting the course of the easement (referring to already existing industrial devices based on the content of the basic map, inventory map, or possibly the results of field surveying, surveying and cartographic documentation arising during the establishment and updating of surveying inventory of the network of enforcement); for establishing the transfer of easement – the surveyor should mark on the photocopy of the main map and inventory map (where the compliance with the original is confirmed) the proposed course of easement; this map will make an enclosure to the agreement or the decision establishing the transfer of easement; in case of planned localization of devices, making a map presenting the course of the easement should be preceded by getting from the enterpriser the data on the planned investment, referring to the localization of devices, together with the planning documentation i.e. the decision on the conditions of development, decision on the localization of the public investment, abstract of the local space management plan, design of the location of network, building design, etc.;
 - the surveyor should present to the parties the course of the easement and make a protocol of this, containing the sketch of the course of easement, signatures of the owners and persons representing the enterprise;
 - the geodetic and legal documentation to establish a transfer of easement should order the way and purpose of the procedure; it should consist of: the map made according to the principles for the maps for legal purposes, with the range of easement marked, copies of the documents showing the legal status of the real estate, other documents necessary e.g. to reveal in the land register the marking of the real estate according to the data of the ground and buildings inventory; the documentation should consider the regulations in the ground and buildings inventory, geodetic and cartographic documentation and the borders of the real estate.

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