

Transmission easement: overview of subject matter and methods of establishing encumbrance – Polish case

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Abstract: Backlogs of transmission facilities (pipelines, power lines, media networks) on third – party property require regulation. This applies to both existing infrastructure and that which remains in the design phase. Drawing on literature, legislation, and practical knowledge, the article’s authors combined statutory definitions and court interpretations with industry guidelines. The transmission easement term was introduced to the Polish law the Civil Code (*Act of 2008*). The issue of transmission easement, and especially the rules for defining the scope of encumbrances, areas of influence the facilities have on the real estate, and the remuneration related to that, are complex issues that are worthy of being analysed more closely. The analysis of judicial decisions and practical vocational experience have allowed for determining the scope of rights and obligations related to the easement laws. It is the intent of the authors of this article for its contents to clarify the transmission easement term and to draw attention to associated issues. We focus on showcasing the transmission easement issue law-wise, with aid of e.g. rulings of Polish common courts, by highlighting the defectiveness and incompleteness of regulations. It is meant as a basis for initiating detailed studies aimed at determining solutions to specific problems.

Keywords: transmission easement, restrictions on property rights, encumbrance of property, burdened real estate, compensation for the easement

1. Introduction

The first half of the 1990s in Poland is, among other things, a period of political transformation and the beginnings of a free market economy. In that period, new economic standards and systemic norms were elaborated. Respecting of property rights took on



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a new meaning, and asserting one's civil rights became a permanent addition to the legal system. Unregulated remains of the centrally planned economy awaited the legal and technical standardization related to the field work (Bryś and Przewięźlikowska, 2018). One of such remains were definitely the utility networks built by state-owned companies on land remaining the perpetual property or usufruct of natural persons and legal entities. Such cases are numerous and (potentially) each of them requires regulation.

The political transformation period is also marked by the development of investments with use of new standards. Their financing has become a much more transparent process. The property right cannot be ignored, and accomplishing each task requires meeting set deadlines (Bryś and Przewięźlikowska, 2020).

These legal conditions necessitate making specific arrangements already at the project design stage. The determination of easements, their scope and of the financial compensations takes place during the preparatory work phase of each investment. For the whole process to go harmoniously and smoothly, this task should be given to people well-versed in it. It is also necessary to work out such rules of conduct so as to make them acceptable by both parties: the owner of the encumbered real estate, and the easement company or the investor (Przewięźlikowska, 2017). To gain a deeper understanding of the topic, were also used information from the following publications Kowalczyk et al. (2014), and Preweda and Butryn (2019).

For this purpose, the article will make a detailed analysis of the court case law, which, together with practical experience, will allow to determine the scope of rights and obligations associated with the right of easement.

2. Legal regulations

The regulation of old contracts and the necessity of the rationalization of investment processes both led to the formulation of new legal regulations. The creation of a new limited property law became essential. The transmission easement term was introduced to the Polish law in 3 August 2008 pursuant to the Act on the amendment of the Civil Code Act of 30 May 2008 (*Act of 2008*).

In that amendment, Article 305 appeared in section III of Civil Code – chapter III – Transmission Easement. This article clearly states that the easement is attributed to the entrepreneur and their proprietary facilities.

Identifying the entrepreneur is usually not a problem. This term has been defined in article 43 of Civil Code and pertains to a natural person or a legal entity conducting business or professional activity on its own behalf. The definition of the business activity itself stems from, among others, the Act on Freedom of Business Activity (*Act of 2004*). According to the Article 2 of that act, a business activity is: profit-making activity related to manufacturing, construction, trading, provision of services and prospecting, identification and extraction of minerals, as well as professional activity conducted in an organized and continuous fashion.

In practice, indicating the entrepreneur in issues related to transmission easement poses little problem. Usually, the entitled party (the facility owner) is private limited

company engaged in a business activity, or a commune. It is often treated as a fact requiring no further proof.

The simplest method of defining a transmission entrepreneur is determining whether a given facility remains the property of indicated entity and on what grounds it became its property. It is not uncommon for the legal title for a given facility to be acquired through ownership changes, in-kind contribution, or company takeover. It is important for the current owner of the facility to have the documents confirming the legal title of the infrastructure at their disposal. Investigating this involves analyzing accounting records, especially the fixed asset register of the entrepreneur in question. It is the fixed asset register which defines company's assets. Accurate record-keeping of material assets with net present value higher than the law-defined one, and with service life of more than one year, allows for conducting the necessary verification.

Transmission facilities (such as pipelines, cables, utility poles, masts and towers) certainly count as fixed assets and are listed in records as a specific KŚT number (Klasyfikacja Środków Trwałych, ang. Classification of Fixed Assets) (Regulation, 2016). This record set is useful for assigning a facility located on or below the surface in an area belonging to a third party to a specific entrepreneur. Other instances of matching facilities to entrepreneurs (or their legal successors) require detailed analyses, usually conducted by people authorized to audit a given company. This aspect is not considered in this article. We assume that the planned transmission easement has a defined and unequivocal entity owner.

It should be stressed the transmission entrepreneur term itself is not defined in law. This omission needs to be corrected during the formulation of implementing rules pertaining to transmission easement.

In the definition of the transmission easement, Art. 305 (Act of 2008), there is a sentence indicating the necessity for the facility, whose definition has been clarified in Art. 49 §1 (Act of 2008) to be present. The transmission facilities term was introduced to the law under the amendment to the Civil Code (Act of 2008), together with the introduction of transmission easement. The word "transmission" itself is rather contentious, though, as it has not been unequivocally defined in the Civil Code. An indirect definition has to be retrieved from individual acts, such as Energy Law (Act of 1997a; Act of 2001) on Collective Supply of Water and Collective Waste Disposal. The lack of an unambiguous definition may suggest that the legislator has deliberately left the transmission facility catalogue open-ended. The Article 49 §1 (Act of 2008) is thus of general character and should be applied to various facilities assigned to specific functions – which are the supply or discharge of liquids, steam, gas, electricity, or similar functions (Buśko and Przewięźlikowska, 2010).

It needs to be highlighted that the facilities for media distribution in the buildings (such as terraced houses or multi-family buildings connected to a single external network) are not included in the aforementioned definition, as they are facilities for media distribution within the building and thus are a part of the receiving installation (Buśko and Przewięźlikowska, 2011). Such installation is a component part of the building – that is, a component part of the shared real estate with self-contained residential units and/or

business premises defined by laws pertaining to ownership of premises. An exception to these circumstances is a transmission facility that is not a component part but (for some reason) merely goes through the rooms of the building, e.g. through the basements. In such case, the facility keeps the features of a transmission facility. The transmission easement is likewise established for such networks. This interpretation has been expressed in the Polish Supreme Court order dated 14 December 2004 (Case No. II CK 255/04).

A transmission facility can also be a building, although it has to be functionally connected to a given network or be its inseparable component (e.g. a transformer substation building, a water-pumping room, a pumping station, a surface heating substation). Such situation is quite common, and including the area occupied by a given building as the area designated for encumbrance only requires taking relevant measurements. The same applies to other facilities, without which a given network cannot function; for example: a reinforced concrete heat duct, supports and masts of overhead facilities, water and heating chambers and wells. All these facilities are considered a part of the area designated to be burdened by the easement.

In contentious cases, if we are unable to prove that a given element is required for the correct use of the facility, or that it is functionally connected to it, it is then necessary to acquire specialized information or an expert opinion. Such course of action is desired and accepted by the parties of the proceedings.

As stems from the quoted definition of a facility (a transmission one), variants: supply and discharge of liquids, steam, gas, electricity – are quite heavily restricted (Dąbek et al., 2015). Taking continuous technological and IT advancements into consideration – the definition of a transmission facility and the catalogue of activities performed using a given facility, ought to be expanded. Other (new) networks and facilities for the transmission of signals from control systems, fuel pipelines, or other teletechnical solutions (including fiber optics), should be included in it. Without such clauses, it will be difficult to build control systems for vehicular, railway, tram, and other public transport traffic, not to mention mobile networks, the Internet, cable TV, etc. In the specialist legislation (regulating the transmission easement) on which work has continued for the past few years, such clauses should be included. The necessity of it stems from new investment processes and the functioning of already-existing installations. Respecting the property rights and settlements with the owners of encumbered real estates, is as important as technological growth and progress.

3. Not-in-use and out-of-service facilities

It is worth considering the issues caused by facilities not in use or out of service. The transmission easement stops in the following cases:

- Art. 3053 §2 ([Act of 2008](#)) – the transmission easement expires at the latest when the enterprise liquidation ends;
- Art. 293 §1 ([Act of 2008](#)) – easement appurtenant expires due to not exercising it for ten years;

- Art. 3053 §3 ([Act of 2008](#)) – defines the obligations to be fulfilled by an entrepreneur once the transmission easement expires. They are obliged to remove the facilities obstructing the use of the real estate, which are mentioned in Art. 49 §1. If the facility removal would lead to excessive difficulties or costs, the entrepreneur is obliged to remunerate the damage caused by it.

The situation is less clear in case of not-in-use facilities that are not covered by transmission easement. It is assumed that for facilities temporarily out of service but maintaining physical (still being connected to the whole infrastructure) and functional integrity, they are still considered transmission facilities. In other words: the facilities undergoing maintenance, upgrades or replacement are counted towards the technical infrastructure of the enterprise. In such cases they are treated the same way as active facilities ([Dąbek et al., 2015](#)).

In case of installations that were permanently disconnected from the network and lost their functional usefulness (not covered by transmission easement), it should be assumed that they are component parts of the land (real estate) where they reside. Based on Art. 222 §2 of Civil Code ([Act of 2008](#)), the owner of the real estate is still eligible to the claim for their removal in order to restore the original state of the real estate and cease its use. In this regard, the legislator is unequivocal, and the removal of the facility not in use should not pose any problems. However, the key aspect is determining the owner of a given facility beforehand, and getting a confirmation on it being out of service – as such document attests for the possibility of making the relevant claim.

As can be seen in the above summary, the key aspect is ascertaining whether a given facility has been permanently disconnected from the whole network of a given enterprise. In practice, it is achieved by issuing a query to the network administrator in form of a trade-specific agreement. It is important to precisely indicate the target of such an inquiry, as the received reply will be binding and will be used to initiate relevant proceedings and to implement the correct procedures.

4. Restrictions on administering of property rights of burdened real estate

Looking back at historical overview, it need to be pointed out that both in the nineties and earlier than that (i.e. in the period of centrally planned economy), the right to use real estate for construction of utility network was more or less standardized. While permissions from respective owners to enter their property and build the network were acquired, very often such agreements did not settle the issue of subsequent use of the occupied area, let alone financial compensation payments.

As has been emphasized at the beginning of this article, the transmission easement was regulated for the first time in 2008. Before then, there existed no impediments to concluding civil law contracts that regulated facilities located in areas belonging to a third party. However, those contracts were a rare occurrence. As a result, there are numerous disputes that end up in court.

Currently, easement companies make relevant agreements with the owners at the phase of designing new networks. Instead, new issues emerge from the definition of

transmission easement, specifically pertaining to determining the scope of use of burdened real estate.

The grounds for indicating the rights and obligations of an entrepreneur (as a network owner) is the rule of maintaining such a catalogue of activities that is in compliance with the intended use of the transmission facility. Therefore, the obligations of the owner of the burdened real estate stem from the needs of the entrepreneur. Generally, the burdened party has to accept all the restrictions imposed by the network owner. Thus, indicating the rights of the beneficiary party is essential for determining the actual scale of nuisances stemming from the encumbrance that is being established.

Unfortunately, the situation where the demands of the network administrator are unnecessarily expanded upon is common. In reviewed legal proceedings, the most common scope of authority of the beneficiary party pertains to: the utilization, supervision, monitoring, renovations, repair, maintenance, modernization, replacement of parts, rebuilding, troubleshooting.

Clauses can be found from which stems that after closing a relevant deal, the beneficiary party wants to acquire, among others:

- the right to construct/reconstruct, lay through the burdened real estate the technical networks, together with all the infrastructure necessary for their utilization in marked easement bands;
- the right to enter and use the burdened band of land – in justified cases;
- the right to enforce the obligation for the current owner of the burdened real estate to accept the limitations stemming from the establishment of the easement band.

Simultaneously, in the easement band:

- the owner or the perpetual usufructuary of the property in question will use it in a restricted manner, as it will be prohibited from erecting buildings and permanent constructions in the protected zone of the facility;
- the owner or the perpetual usufructuary will be able to use and invest into the burdened land if the changes made will be possible to remove in order to gain access to the facility.

There also exist clauses stating that:

- the easement band may be used as green areas but with prohibition of planting trees;
- the burdened area may be used as a car park, a goods yard, or as an internal road; however, it will require making necessary agreements with the network owner;
- technical services will have access to the burdened band of land for the purpose of maintenance and malfunction repairs, which may inconvenience the real estate owner.

Within the band burdened with easement, the owner of the real estate usually is required to refrain from:

- establishing permanent dumps;
- conducting earthworks without supervision by a representative of the transmission enterprise;
- permanent changes to the shape of the terrain surface and topography.

Additionally, technological conditions related to the scope of authority of the beneficiary party should be considered. It is necessary to compare the demands of the entrepreneur with the intended use of the transmission facility.

Among other things, the following questions have to be answered:

- is the given scope of encumbrance essential to fulfilling the demands arising from the activities of the easement company?
- is the geometrical shape of the transmission easement band, and especially its width, big enough to perform all activities related to the maintenance of the network?
- are additional rights of the entrepreneur compatible with the proposed band width?
- are earthworks relating to the maintaining of the functionality of the facility possible to perform on the burdened area?
- does the range of activities, from which the owner of the real estate will refrain, stem strictly from the type of a given facility?

The authors of this article think that the scope of authority of the beneficiary party ought to be limited to the minimum necessary, and the geometry of the easement band ought to be assessed in a way allowing for performing of the activities relating to the contents of the easement. The positions of respective parties cannot be accepted uncritically, as they are often influenced by the desire to acquire excessive benefits. It especially concerns the beneficiary party, whose goal is to establish the encumbrance to the maximum legal scope and with the minimum spatial area, as evidenced by the conducted research and analyses of the reviewed cases. Such approach entails appropriate financial consequences, related to amends and remuneration payments.

Assessing the minimum size of the easement band is more than sufficient for: the utilization, supervision and monitoring of the facility. Depending on the type of the network and the available technology, the minimum width is also sufficient for performing renovations, repairs, maintenance, modernization, and part replacement. Such statement is justified when performing the aforementioned activities is possible without earthworks. It usually pertains to power grids and teletechnical networks encased in protective pipes. Sometimes, such an approach can be applied to sewerage systems, where the work does not require earthworks (technology of placing a felt sleeve soaked in polyester resin).

The introduction of the scope of burden of reconstruction and malfunction repair activities to the catalogue needs to be analyzed separately. In this case, the key issue are the factors causing these actions.

They can stem from:

- a malfunction occurring due to natural or technical deterioration of a part (internal factor – surroundings-independent);
- a malfunction caused by an external action (not related to the functioning of the facility).

In the first case, it should be assumed that the repair of the facility malfunctioning due to technical deterioration consists of the network administrator performing the same actions as in case of a standard maintenance work. It should be assumed that if they are able to reconstruct the facility or repair the malfunction without earthworks, then the minimum width of the easement band is justified.

The second case pertains to the network malfunction due to physical damage of the facility (e.g. denting of the protection pipes, network interruption due to earthworks, etc.). External interference is independent from the transmission entrepreneur or network functionality. It is a random and hard-to-predict occurrence. However, negligence by the owner or the administrator of the burdened real estate is assumed. The burdened party (keeping in mind the existence of the facility on their land) is obliged to refrain from actions that may lead to damaging of the facility. We rule out the interference of third parties in and do not analyze that case in this article.

Thus, the reconstruction and the repair of a malfunction caused by an external factor stems exclusively from non-compliance with the rights of the beneficiary party by the burdened party. We assume that the facility malfunction is the result of an unintended interference by the land owner and, as a random event, it should not be a rationale for the expansion of the width of the easement band. Resolving such cases (treated as accidental) should result from mutual agreements, preceded by troubleshooting the cause of the malfunction.

5. Compensation for the established easement – legal conditions

After explaining terms pertaining to transmission easement, let us take a look at the legal definition of financial compensation assigned to the establishment of easement. In this regard, the legislator provides only the Art. 305, according to which the remuneration for the establishment of the easement, in case an agreement cannot be reached, ought to be appropriate. Such a curt wording pertaining to the amount of the compensation was the cause of many interpretations and led to the necessity of involving the Supreme Court in the jurisprudence. As a result of this, legislations such as the following ones were created:

- Supreme Court order dated 20 September 2012, Case No. IV CSK 56/12 – the Supreme Court emphasized the following in the reasoning:
 - the court assesses appropriate remuneration based on specific circumstances of the case, including criteria developed in jurisprudence and judicial writs;
 - appropriate remuneration is assessed under Art. 145 §1 ([Act of 2008](#)), that is to say the remuneration for the establishment of easement (of necessity) has to include limited control of the real estate (it must be taken into consideration that the beneficiary party only partially utilizes the real estate, i.e. in a limited manner);
 - the remuneration should basically be one-time only (sometimes it can be paid periodically, as stems from the Supreme Court order dated 17 January 1969) – of importance is for the remuneration to be assessed once: either as one-time or periodic, without possibility for mixing or combining the two. It must be assessed taking into consideration all factors influencing its amount and also has to fully even out the consequences of permanent burdening of the real estate.

In accordance with the above-mentioned court order, the Supreme Court also points at elements to be considered when deciding on the scope of the restrictions on ownership.

Those elements are:

- the size and the intended use of the real estate;
- the type, placement, and way of using the transmission facilities;
- the degree of interference into property law.

Additionally, it needs to be remembered that the remuneration is independent from the damage suffered. If the owner suffered such damage, they should show evidence of it, and only then the financial loss will have to be taken into consideration for the assessment of appropriate remuneration (potential compensation component is thus paid as a part of the compensation for the established easement)

- Supreme Court order dated 8 February 2013, Case No. IV CSK 317/12 – the Supreme Court emphasized the following in the reasoning:
 - there exist no unequivocal guidelines for assessing appropriate remuneration;
 - one can search for similarities in the remunerations used in easements of necessities;
 - the remuneration ought to be paid one-time only (which does not exclude periodic payments – as has been described above);
 - all circumstances of the case, the interests of parties, socioeconomic aspect of the easement and the socioeconomic aspect of the compensation owed to the owner of the burdened real estate, need to be taken into consideration;
 - appropriate remuneration will be equivalent to all benefits the real estate owner will be deprived of as a result of its easement.

In the reasoning of the court order, there is also a mention that the individualized assessment method of a particular case should account for on the owner side:

- nature and type of the real estate;
- location;
- size and shape;
- its intended use, as described in the local spatial development plan or in the study of the conditions and directions of land use, and in case of there not being any – the terrain properties and the method of use of neighbouring real estate;
- loss of benefits;
- the scope of limitations to the right to dispose of, freely decide on the intended use of the real estate, and on its development;
- scope and methods of interference by the entrepreneur;
- loss of control over the real estate;
- facility layout;
- long-term durability and irreversibility of the easement;
- legislation nuisance;

On the entrepreneur side the following should be considered:

- the fact that through the facilities the entrepreneur accomplishes social goals regarding supplying of electricity, water or fuels, including to the owner of the burdened real estate;
- the supplying of these media to thousands of people must be carried out through the networks (installations and facilities) that have to be placed on land belonging to many third parties;

- the influence on the value of the enterprise and the possibility of conducting business activities;
- the fact that the use of electricity and fuel influences the socio-economic development and better utilization of the real estate.

Additionally, the Supreme Court points out that due to the factual inability of assessing the remuneration according to the benefits acquired by the entrepreneur, it has to be assessed from the angle of economic interests of the owner of the real estate.

- Supreme Court order dated 27 February 2013, Case No. IV CSK 440/12 – defines separation of remuneration from amends:
 - amends mean equalizing the loss in pecuniary interests protected by law, Art. 361 ([Act of 2008](#));
 - remuneration is a compensation for the use of a legal title or a property belonging to another person, also in relation to an established easement.

In Polish law, the term remuneration is broader in meaning than the term amends. It should be equivalent to the value of the service provided to the party obliged to pay for it, or to the value of the benefit obtained by it. In regard to the easement, the remuneration should be the payment for the use of real estate not belonging to them.

The lack of criteria of assessing the value of the remuneration in Art. 3052 §2 ([Act of 2008](#)) means that the legislator gave the court freedom in the individualization of assessments in that regard, which are formulated based on specific actual state, and which can also stem from general rules of legal system. To assess the amount of the remuneration, Art. 322 ([Act of 1964](#)) can also be used. This regulation is of exceptional nature and should not be subject to extensive interpretation, but it needs to be highlighted that the nature of the remuneration in question is similar to the claim for restitution of unjust enrichment.

Finally, let us analyze the influence of legal location of the facility on the real estate in question. In case of negative consequences of the planning clauses resulting from local spatial development plan (e.g. applying to local spatial development plan maps the facility influence bands), the ruling on land use and development conditions, the ruling on location of a residential investment or the ruling on location of public purpose investment (road, railway, aviation, utility network, etc.) – the amends cannot be related to the remuneration for the encumbrance of the real estate with the transmission easement. The loss of value resulting from the above-mentioned local law regulations or administrative rulings has to be claimed through other regulations. It does not mean that this factor (the amends) is not considered for the assessment of the remuneration. Assessing of the amends for the legal location of the facility is required for the assessment of the correct value of the remuneration, which stems from methodological principles. This topic will be the focus of future articles.

Based on the Civil Code ([Act of 2008](#)) and numerous court orders, the Standards Committee of the Polish Federation of Valuers' Associations (PFSRM) has formulated the National Specialist Valuation Standard "Assessing the value of transmission easement and the remuneration for its establishment and for the non-contractual use of the real estate by transmission entrepreneurs", which became the only practical

methodological premise, applied to a greater or lesser degree by the real estate valuers (<https://pfsrm.pl/aktualnosci/item/14-standardy-do-pobrania>). Selective application of the proposed methodology by the authors of the standard stems from said document being non-obligatory. Every valuer bears personal liability for their own elaboration, and the application of own calculation methods is permitted by Art. 154 §1 of the Real Estate Management ([Act of 1997b](#)).

6. Methods of establishment of transmission easement

Having explained the transmission easement term, and knowing the factors shaping appropriate remuneration for its establishment, we will now discuss methods of establishing this encumbrance.

6.1. Civil law contracts

The simplest, and simultaneously the cheapest and the quickest-to-execute method is concluding a civil law contract. Parties involved unanimously decide on its provisions, and through negotiations define appropriate terms and clauses. It is important for this to be supervised by relevant experts, that is a land surveyor, and possibly a real estate valuer. Clauses of such contract should be consulted by a legal counsel, as certain agreements cannot be omitted. Particularly, the scope of rights and obligations of both parties needs to be precisely defined, as has been mentioned above. It is because the catalogue of rights of the beneficiary party has a tangible influence of the final shape of the burdened land and the amount of financial compensation.

The graphic attachments to the civil law contract have to be provided by a land surveyor with a necessary scope of authority No. 2, who will prepare them by means of appropriate administrative actions (reporting of a geodetic work, formulating a technical report, legal purposes maps together with obtaining a positive verification protocol of the provided materials). For state-owned companies and real estate that are public property (e.g. of a commune), it is necessary to appoint a valuer who will prepare an appropriate property valuation that will assess the appropriate amount of remuneration ([Act of 1997b](#)) and ([Act of 2016](#)). For private property, the amount of the remuneration can be agreed upon via negotiations.

The following activities should be prepared precisely and unequivocally:

- negotiations regarding the size of the area considered for the encumbrance;
- defining the rights and obligations relating to the encumbrance;
- describing the rights of the beneficiary party;
- assessing the duration of the easement;
- assessing the financial compensation;
- preparation of graphic attachments.

These activities will be the grounds for the preparation of the notarial deed and the introduction of appropriate clauses in section III of the land and mortgage register.

The lack of any of the above elements may lead to the notary refusing to prepare the contract and the easement may not be established. Therefore, the legal aid in that regard seems to be indispensable.

In the process of concluding a civil law contract, the basic principle should be the reciprocal treatment of parties intending to achieve a successful legal regulation, with no hidden desire to take advantage of the other party. In practice, concluding such contracts is quite common. Unfortunately, we can encounter the lowering of financial compensations proposed by the companies, which sometimes may not correspond to the scope of encumbrances that was agreed upon. The discrepancy in the financial expectations of both parties then becomes an impediment to the establishment of the transmission easement through judicial regulations.

The case of newly-designed networks deserves special attention. In this case the regulation of transmission easement has two faces:

- main networks not being a public purpose investment (connecting to which is not possible) – for such facilities, at the planning phase the fair rates are used, often exceeding the average values. It seems from the necessity of conducting proceedings relatively quick, as allowing for disagreements would negatively impact the whole undertaking;
- networks being typical utility ones (with a possibility of connecting to media) – for such installations, average or understated values of remunerations are used; sometimes the establishment of the transmission easement is conditioned in exchange for the possibility of connecting to the network.

Thus, the type of the designed network has key influence on the method of conducting negotiations between the investor and the owner of the real estate considered for the encumbrance.

A completely different matter is of public purpose investments. Transmission facilities designed that way are subject to the provisions of the Real Estate Management Act, which will be discussed in the later part of this article.

6.2. Final court decision

The lack of consensus between the beneficiary party and the encumbered party leads to the case ending up in court, which most often means very long proceedings and substantial proceeding costs.

In case of the facilities already present in the ground (an existing situation, but of unregulated legal status), the situation is beneficial for the company, as the use of the real estate not belonging to them is possible throughout the whole proceeding. The transmission of media is uninterrupted, the conducting of business by the company is likewise undisturbed, and the costs of the remuneration for a long time stay unassessed and unpaid. The whole proceeding is related to work of the court, the lawyers and the experts. It can be easily delayed via presenting of new evidence, objections, comments, appeals and complaints. Unfortunately, such practice is relatively common, which additionally negatively affects the opinions on court efficiency, even though it is often beyond control

of this organ. A large amount of proceedings being currently conducted, lodging of complaints and submitting comments to opinions leads to increasing the delays in work of respective experts involved in legal proceedings.

It should be noted here that the people providing expertise in proceedings related to the transmission easement are: a geodesy and cartography expert, a valuer, and sometimes an industry specialist assigned to a particular type of a facility. Each of them provides expertise which may potentially be subjected to a negative verification. The reply to specific objections that takes shape of an additional opinion, and oral explanations during court hearings, prolongs the proceedings on each stage of work of respective experts.

Unfortunately, often there exists no method of establishing appropriate easement other than the prolonged proceeding in a district court. This procedure often ends with a final court order, which then is forwarded to the land-and-mortgage-register court, which makes an entry to the section III of the land and mortgage register for the burdened real estate.

6.3. Administrative decision

Another method for establishing the transmission easement is an administrative decision. This solution, albeit rare, is possible under Art. 120 of Real State Management ([Act of 1997b](#)).

Additionally, clauses of Art. 124 §1 of the Act state that:

“The Staroste carrying out government administration activities may limit, by means of a decision, the intended way of use of a real estate by issuing a permission to install and lay out on the real estate the drainage lines, pipes and facilities for the supply and distribution of liquids, steam, gas, electricity, as well as public communication and signal system facilities, along with other underground, surface or overhead objects and facilities necessary for utilization of these pipes and facilities, if the owner or perpetual usufructuary of the real estate refuses to give consent for it. The limitation occurs in accordance with the local plan, and in case of there not being any, in accordance with the decision on determining the location of public purpose investments.”

For the administrative decision to be issued, the following conditions need to be met:

- facilities of a technical infrastructure must be of a public purpose character regardless of who is the investor (it is related to Art. 112 §1 and §3 of Real Estate Management ([Act of 1997b](#)), as in jurisprudence a substantive decision is equivalent to an expropriate decision);
- public purpose character should stem from the clauses of the applicable local spatial development plan or from a decision of determining the location of the public purpose investment (take notice: the infrastructure the location of which stems from the decision on land use and development conditions, is not of public purpose character, based on Art. 4 §2 pkt. 1 in relation to Art. 2 §5 of Spatial Planning and Development ([Act of 2003](#)), and in relation to Art. 6 §2 of Real Estate Management ([Act of 1997b](#));

- the lack of permission of the owner, the perpetual usufructuary or one of co-owners or perpetual co-usufructuaries for a temporary seizure of their real estate and for the underground, surface, or overhead infrastructure to remain within the boundaries of the real estate (the lack of contract, the lack of a positive result of negotiations);
- facilities are to count as infrastructure planned for construction (in accordance with the Supreme Administrative Court order dated 18 March 2005, Case No. OSK 1216/04, issuing a decision on temporary seizure of a real estate for the purpose of an already started or finished investment, is impermissible in accordance with the Art. 124 of Real Estate Management ([Act of 1997b](#))).

Keep in mind that the decision on the permission for a temporary seizure of a real estate is not an infrastructure building permit, but merely a permission for a temporary seizure of the real estate for the duration of the construction of facilities, and for leaving of the facilities within the boundaries of the real estate. It is so because those facilities (after the construction and inclusion of them into the company) remain a property separate from the land (in accordance with the Art. 49 §1 ([Act of 2008](#))), and in order to construct the infrastructure, the investor is obliged to obtain all necessary permissions and decisions required under the construction law, including the building permit.

The decision on the permission for a temporary seizure of a real estate may be issued *ex officio* or upon request of an entity, and should define:

- the subject of the temporary seizure and its territorial coverage, shown on a map;
- the subject or the entity who receives the permission for a temporary seizure of the real estate;
- the type of the investment;
- the layout of the infrastructure (with special attention to the minimum nuisance for the owner/perpetual usufructuary of the real estate);
- the assessment of a specific target or public interest, taking into account that the target is so important that it requires limiting the individual rights of the citizen;
- the duration for which the permission is issued ([Dąbek et al., 2015](#)).

When the decision becomes final, a reason arises for adding an entry to the land and mortgage register, in order to avoid potential demands of a future purchaser of the real estate. It concerns cases where the real estate is sold after the decision is issued, but before its expiration date. The potential purchaser will therefore not be able to plead ignorance of the temporary seizure of the real estate, or of the facilities remaining within the boundaries of the subject real estate.

Once the investment is finalized, in accordance with Art. 124 §4 of Real Estate Management ([Act of 1997b](#)), the entity obtaining a permission for a temporary seizure of a real estate is obliged to restore the original state of the real estate. By contrast, if due to the investment the owner or the perpetual usufructuary is not able to use the real estate in the same way as before or with its intended use in accordance with its planned purpose, they are entitled to request the Staroste or another applicant for the permission for the temporary seizure of said real estate to purchase it in name of State Treasury (Art. 124 §5 of Real Estate Management ([Act of 1997b](#))). Of importance is that the statute of limitations of this request is ten years, starting from the day after the expiration date of the permission for the temporary seizure of the real estate. Additionally, keeping other

provisions in mind, the request may also be limited only to the part of the real estate occupied by the infrastructure. After the construction of the infrastructure is over, the owner or the perpetual usufructuary of the real estate is obliged to provide access to the real estate for the purpose of malfunction repair and maintenance works (Art. 124 §6 of Real Estate Management (*Act of 1997b*)). It is however not applicable to activities related to reconstruction, upgrading, or replacing of the facility. In order to conduct these activities, the company should reapply for the permission for the temporary seizure of the real estate, or alternatively formalize the necessary range of activities based on separate provisions by establishing transmission easement, or through consecutive contracts with the owner/perpetual usufructuary permitting access to the real estate in order to conduct specific activities for each instance the need for them arises. The right for the transmission enterprise to use a real estate not belonging to it after the facilities are constructed may also come from (based on separate provisions) from media supply contracts, if after the construction of the facility the owner or the perpetual usufructuary has also been connected to that facility (Dąbek et al., 2015).

6.4. Usucaption

The last method of establishing the transmission easement is through its usucaption. The legal basis for the usucaption of the transmission easement is Art. 292 of Civil Code Act of 23 April 1964 (*Act of 2008*), according to which:

“An easement appurtenant may be acquired by way of usucaption only when it concerns the use of a permanent and visible facility. The regulations on the acquisition of the real estate by way of usucaption shall apply mutatis mutandis”.

In order to declare the usucaption of the transmission easement, the following conditions have to be fulfilled:

- the entrepreneur uses a real estate not belonging to them for the duration prescribed by law, i.e. twenty years (in good faith) or thirty years (in bad faith);
- the owner of the real estate was aware of the technical infrastructure being present within the boundaries of the real estate and it being in use by the transmission enterprise;
- the owner of the real estate, for the entirety of the above-mentioned duration, has not submitted an objection, i.e. has not brought proceedings, or made a claim in a not-litigious or conciliation proceeding.

Good faith is most often understood as the belief of the owner in their right to transmission easement, which in given circumstances is considered justified. Moreover, Art. 7 (*Act of 2008*) states that: “If statutory law makes legal effect dependent upon good or bad faith, good faith shall be presumed”.

This provision results in the burden of proving in court by the owner of the real estate that the entrepreneur knew of absence of right, which carries risk of inability to prove bad faith of the company (Supreme Court order dated 4 December 2009, Case No. III CSK 79/09). Whereas on the entrepreneur rests the burden of proving the date the use of the real estate in good faith started (Dąbek et al., 2015).

The analysis of specialist literature and the jurisprudence pertaining to circumstances confirming good faith points at the questionability of this presumption. As it turns out, prone to conflicting interpretations is even the definition of good faith itself. Thus, it opens way to expanding the catalogue of circumstances that may determine good faith. The jurisprudence on this subject is still non-uniform and often controversial, as usucaption requires (on a case by case basis) numerous analyses, including:

- an analysis of the contents of the obligatory agreement between the owner of the real estate and the transmission enterprise;
- an analysis of the type of economic and ownership circumstances at the time of the seizure of the real estate;
- determining whether the usucaption started or ended on the land of the current owner or his legal predecessor;
- a verification of the whole string of subjective transformations from the start of the investment till the start of utilization, including naming of the entity administrated the network;
- an analysis of legal basis (acts, ordinances, decisions) that allow for the construction of the facilities;
- conducting research on whether the network was in the meantime modified in a way that changed its layout, which directly influences the date when the limitation period for the usucaption starts.

Additionally, it needs to be determined whether the owner of the real estate knew or could have learnt of the existence of the infrastructure, how would they learn of it, and whether the infrastructure was visible. Note, the visibility is understood as not only the existence of physical surface and overhead parts of the transmission network within the boundaries and surrounding the real estate (such as sewers, lids, poles and cables), but also the possibility of observing phenomena such as melting of snow or withering of grass within a given band. At the same time, it needs to be emphasized that a network being present on base maps is not considered an evidence of the visibility of a given facility, as not everyone is obliged to possess map-reading skills.

In jurisprudence there exist rulings that constitute a “reference” to be used in analyses of easement usucaption. As an example, in accordance with the resolution of the seven Supreme Court judges dated 8 April 2014 (file ref. no. III CZP 87/13), the decision on expropriation rules out the possibility of ownership in good faith, so it cannot be used as the grounds for proving good faith of the transmission enterprise. Therefore, the enterprise of whose network was constructed pursuant to the expropriation decision is not allowed to claim usucaption for this infrastructure.

A similar interpretation can be observed in case of Supreme Court orders stating that the usucaption of the transmission easement is effected on the behalf of the transmission enterprise without indicating the benefit property.

It is also not insignificant that the usucaption is done free of charge, which is reflected, for instance, in the rulings of Appeal Courts and the Supreme Court, which dismiss claims for remuneration due to non-contractual use of real estate if the enterprise has successfully usucaptured the land. The remaining task in this case is for an authorized

geodesist to indicate the layout and the boundaries of such easement on maps used for legal purposes (Dąbek et al., 2015).

7. Summary

The issue of transmission easement, and especially the rules for defining the scope of encumbrances, areas of influence the facilities have on the real estate, and the remuneration related to that, are complex issues that are worthy of being analyzed more closely. The analysis of judicial decisions and practical vocational experience have allowed for determining the scope of rights and obligations related to the easement laws. It is the intent of the authors of this article for its contents to clarify the transmission easement term and to draw attention to associated issues.

We focus on showcasing the transmission easement issue law-wise, with aid of e.g. rulings of Polish common courts, by highlighting the defectiveness and incompleteness of regulations. It is meant as a basis for initiating detailed studies aimed at determining solutions to specific problems.

The lack of unambiguous legal basis and a specialist legislation hinders progressing with both legal and technical actions related to establishing the transmission easement. The base methodology devised in KSW (National Specialist Valuation Standard) may cause interpretative confusion, for instance because of no requirements of using a standard.

Therefore, the following can be deduced:

- the conclusion of work on the specialist legislation pertaining to the transmission corridors should indicate the default approaches to solving this issue. With the current legal status (no such legislation), it is necessary to clarify the technical matters to people involved with the process of establishing a transmission easement;
- past experience indicates difficulties in understanding the issue, which leads to erroneous demands and court filings, and additionally leads to defects in the documents and calculations being made.

The following activities become problematic and require additional clarifications;

- specifying persons and scope of activities undertaken by them in relation to establishing the encumbrance;
- identifying the component parts of transmission easement;
- specifying technical activities undertaken during the establishment of the encumbrance,
- unequivocal defining of the areas of the real estate that are subjected to negative side-effects of the encumbrance;
- defining common widths of transmission bands assigned to different types of transmission facilities which should be preceded by conducting research in relevant Polish companies;
- clarifying the differences between compensation and a remuneration for the establishment of the easement;

- determining possible factors affecting the amount of the amends and the remuneration due to a facility occupying the estate;
- developing the base methodology allowing for the calculation of the financial compensation of the transmission easement.

Clarifying the scope and the methodology of the above activities would improve the work of persons involved with the process of establishing the easement. Simultaneously, it would lead to higher work efficiency of public courts, as the standardization of conducted activities would lead to transparency of their proceedings.

At the same time, it has to be kept in mind that each real estate intended for the encumbrance requires individual approach; each single easement is unique and requires undertaking specific evidentiary processes and analyses. The article may be used as auxiliary material in work related to dispute resolution or establishing transmission easement.

Author contributions

Conceptualization: B.B., A.B.; Collection and assembly of data: B.B.; Data analysis and interpretation: B.B., A.P.; Writing article: B.B., A.B., A.P.; Critical revision: A.B., A.P.; Final approval of the article: A.B., A.P.

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