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## TRANSMISSION LINE EASEMENT

### Abstract

Transmission line easement was enforced into Polish law in 2008. It is a limited property right, consisting of the fact that an entrepreneur may use an encumbered real estate in the designated scope. The parties in transmission line easement are the transmission operator and the property owner. Transmission line easement is established for the benefit of a transmission operator who owns transmission devices located on someone else's land, or is intending to install such devices on someone else's property.

### Key words

easement, transmission, devices, civil code

### Introduction

In view of the numerous problems for transmission operators in obtaining legal title to someone else's real estate in 2008, the easement catalog was extended with a new solution known as transmission line easement, which encumbers the real estate on behalf of an entrepreneur who intends to build or who owns devices specified in art. 49 of the Civil Code, i.e. equipment for the supply or discharge of water, vapor, gas, electricity and other similar devices. This article discusses only the general issues and structure of easement.

### Content of transmission line easement

In the current legal status, in accordance with art. 305<sup>1</sup> of the Civil Code, which constitutes the legal definition of an institution, "real estate may be encumbered on behalf of a business entity which intends to build or who is the owner of the devices referred to in art. 49 § 1, with the right that the business entity may use the encumbered real estate, in accordance with the purpose for which the equipment is designated." [8]. Transmission line easement is effective against the owner of any encumbered property, as a result of the nature of the limited property rights. As with other easements, transmission line easement encumbers the indicated property. G. Bieniek comments that "the introduction of the principle that transmission line easements can be applied not only to actual states in which transmission devices already exist, but also to those in which the entrepreneur intends to build in the future will allow coverage of so-called entries by legal regulation, i.e. cases of transmission entrepreneurs using the real estate of third parties without legal title, and it will provide the possibility of using it to protect the legal interest of the entrepreneur already at the investment planning phase" [5]. Firstly it should be noted, however, that we are not dealing with real estate that is a dominant and encumbered property, in contrast with the classic model of land easement. The place of dominant real estate was replaced by a transmission line easement beneficiary - an entrepreneur who intends to build or whose property is owned by transmission facilities. Transmission line easement is therefore established for the benefit of an entrepreneur within the meaning of art. 43<sup>1</sup> of the Civil Code. These are civil law entities conducting business activity. This easement is meant to allow entrepreneurs to carry out their activities in the broadly defined supply of utilities. According to E. Gniewek, "in current economic practice, transmission line easement will be established primarily for the benefit of entrepreneurs who intend to build facilities located on someone else's property; often this is an entire line of transmission equipment running through a series of properties owned by third parties. Transmission line easement currently established by the legislator, already established at the stage of the entrepreneur's investment plans, may well be used to shape lucrative relations between entrepreneurs and property owners" [2]. On the other hand, the new institution will allow entrepreneurs to regulate the legal status of access to previously built facilities, but it is worthwhile stating that the location of transmission facilities should be neutral for the establishment of transmission line easement. Therefore, it should not matter whether they are aboveground or underground. The content of the new easement is to encumber the property to the benefit of the entrepreneur by a law that consists of "the entrepreneur being able to use the encumbered property in the designated scope, according to the intended use of the equipment." [8] There is no doubt that the legislator meant using an encumbered real estate in a designated scope,

additionally limited by a clause on use according to the intended use of transmission equipment. When assessing the solution proposed by the legislator, it can be concluded that easement established before the investment starts entitles the entrepreneur to seize part of the real estate during the construction of the facilities referred to in art. 49 of the Civil Code to the extent necessary to implement the investment. However, once the facilities have already been located on the land, the owner of the real estate should, after the establishment of easement, only tolerate the existence of the facilities. It must also take into account the entrepreneur's right of access to the land subject to the encumbered property in order to perform operations related to the operation, maintenance, modernization and removal of failures of equipment used to supply or dissipate water, steam, gas, electricity or similar equipment. The service should also be provided in such a way as to make sure that the use of the encumbered property causes as little inconvenience as possible. Therefore, the entrepreneur cannot perform easements according to his own convenience, but should try to minimize the inconvenience of the owner of the encumbered real estate. The legislator leaves the details of the content of the transmission easement to the parties within the framework of the concluded contract or to the courts of the adjudicating court. Given the variety of transmission facilities, the type and function of the equipment should be defined in the contract, since only then will the clause of using the encumbered property according to the intended use of the equipment located on it be sufficiently developed and the scope of the property's load properly defined. The willingness of the parties concluding an agreement on the establishment of a transmission line easement has also been left to the legislator to determine whether it is to be paid for or unpaid.

#### **The establishment of transmission line easement by contract.**

The issue of establishing transmission line easement is of great practical significance, since only certain legal events have the effect of creating transmission line easement. The basic way to establish transmission line easement is a contract between the property owner and the entrepreneur. However, the elements that a contract on the establishment of transmission line easement should contain have not been indicated. By referring to E. Gniewek's opinion on the contract for establishing limited property law, which is undoubtedly also transmission line easement, we find guidelines according to which the contract "defines the type and content of the enacted law." The only code of conduct is art. 305<sup>1</sup> of the Civil Code, specifying the essence of transmission line easement, which is the entrepreneur's use of the encumbered real estate within the specified scope, according to the purpose of the equipment located on it. Therefore, defining how and to what extent the entrepreneur can use the encumbered property on which the devices referred to in art. 49 § 1 of the Civil Code are situated, should be regarded as the first important element of the contract on establishing transmission line easement. The legislator deliberately did not include what the use of the property should entail, which should be regarded as a justified action, because the precise determination of these circumstances should be made on a case-by-case basis. The universal criteria deserve approval also because it is not possible to apply one property rule to all transmission facilities, as solutions adopted for gas supply and discharge devices will not apply to equipment for the supply and discharge of electricity. Therefore, detailed specification of the right to use the encumbered property has been left to the parties to the contract. It is worth noting here that transmission line easement consists of the fact that the entrepreneur can use the encumbered property only in accordance with the intended use of the devices, which will be covered by the easement. So, in the contract on establishing transmission line easement, the parties should clarify the scope of the encumbrance on the property, so as to provide the entrepreneur with the possibility of placing the devices on someone else's property and then having unrestricted access to them in the event of a breakdown, replacement, maintenance or other activities to ensure the proper functioning of the devices. The need to execute transmission line easement in a way that inconveniences use of the encumbered property as little as possible should be considered as the general rule, indicated in art. 288 of the Civil Code. Accordingly, it must not be forgotten that any encumbrance on the property with transmission line easement is a restriction of the owner's rights, at the same time reducing the usefulness of the encumbered property, therefore caution is always advised when determining the extent of the easement and how it is performed.

The legislator also left establishing whether transmission line easement should be paid or unpaid to the will of the parties concluding the contract. Of course, the rule will be to pay, while the parties themselves can decide whether it will be a one-time or periodic remuneration. The amounts are also determined according to their own arrangements, because the legislator does not indicate any form or measure of remuneration. It is worth adding that they most often reach a monetary form of benefit. According to E. Gniewek, "the use of the appropriate remuneration clause casts the burden of the judgment on the adjudicating courts" [4] if the parties fail to reach a consensus on this subject. It is also appropriate to reject the request of transmission moguls to apply

an official remuneration package. This will allow the parties to take into account the various circumstances and adjust compensation for each individual case. E. Gniewek rightly points out that “analogy cannot be used here to the provisions of art. 224-225 of the Civil Code that regulate remuneration for the unlawful use of anyone else’s property. This time, it is about regulating in the future the legitimate use of someone else’s real estate by transmission entities with proper remuneration” [4]. There is no doubt that the amount of remuneration owed to the owner of the encumbered property depends on the extent of the restrictions on ownership of the property, including, but not limited to, the property affected by the restrictions and the degree of nuisance to the owner due to the properties and manner of exploitation of the devices. It should also take into account the decrease in the value of the property as a result of locating devices on it.

The legislator also does not specify the form in which the contract between the owner of the encumbered property and the transmission company should be concluded. In this regard, he refers us to the proper application of the provisions on land easements. Art. 245 states that “subject to exceptions in the law envisaged, the provisions on transfer of ownership shall apply directly to the establishment of a limited property right (...) However, the provisions on the inadmissibility of a condition or term shall not apply to the establishment of a limited property right. The form of a notarial deed is needed only for the declaration of the owner, who has the right to establish.” [8] This provision, despite the referral to the ownership transfer regulations, makes two modifications. The first of them restricts the scope of the form of a notarial deed only to the statement of will of the owner of the easement property. However, it should be noted that, according to the judgment of the Supreme Court of 12 May 2000, [11] a statement by the property owner about the obligation to establish a limited property right on the real estate, and therefore also transmission line easement, should also be submitted in the form of a notarial deed. Therefore, for the validity of the agreement on the establishment of transmission line easement, the form of notarial deed is not required for declarations of both parties, since the declaration of the other party, i.e. the transmission operator, may be submitted in any form, “also by conciliatory activities” [1], as noted in B. Rakoczy’s study. This imbalance seems to be understandable, since the conclusion of such a contract limits the rights of the property owner and the form of a notarial deed is intended to protect him from making improper decisions regarding the establishment of transmission line easement. On the other hand, there is no need for excessive attention to the interests of the entrepreneur, since easement is established in his interest. The legislator expects the professional body to take greater care of its own interests. Let us add that transmission line easement is established in favor of the designated entrepreneur to be indicated in the notarized act of establishing transmission line easement. However, I consider the evident suggestion put forward by E. Gniewek, who considers that “the objection must be made that easement will also be entitled to his legal successors” [4], in connection with the regulation contained in art. 305 § 1 of the Civil Code, regarding the possibility of transfer of easement to the purchaser of the enterprise or the purchaser of the devices referred to in art. 49 of the Civil Code. We should also not forget to include in the act the perpetual usufruct application, in order to disclose the establishment of easement in section III of the land and mortgage register of the encumbered real estate. This easement arises when the contract is concluded or a declaration is made, therefore its entry in the land and mortgage register will be of a declarative nature.

The second, quite significant, modification to the provisions on the transfer of ownership is the admissibility of a time limit or condition. The transmission easement agreement may be concluded for a fixed or indefinite period of time. The duration of the contract, as well as the remuneration of the legislator, was left to the discretion of the parties. The parties may also include provisions on the obligation to maintain transmission devices. Considering the reference contained in art. 305<sup>4</sup> of the Civil Code, it seems reasonable to apply art. 289 of the Civil Code for transmission line easement, according to which “in the absence of a different contract, the obligation to maintain the devices needed to perform the land easement is encumbered by the owner of the dominant property. (...) If the obligation to maintain such equipment has been imposed on the owner of the encumbered real estate, then the owner is also personally responsible for the performance of this obligation” [8], because the legislature did not adopt any separate regulations for said easement. Instead of the dominant real estate owner, there will be a transmission entrepreneur in this case. It is true that this provision will apply only if the parties have not made any arrangements for the maintenance of the devices. However, it is the owner of the encumbered property that has an interest in assigning these obligations to the entrepreneur, since the maintenance of such devices could exceed his technical capabilities, and above all financial.

#### **Establishment of transmission line easement based on court ruling easement**

Establishing transmission line easement may also take place by way of a judicial decision. As is clear from art. 305<sup>2</sup> of the Civil Code, transmission line easement can be established both at the request of the owner of the

property on which the devices are located and at the request of the transmission operator. B. Rakoczy explains that “the legislator (...) wanted to reconcile contradictory interests in the case of transmission line easement, and at the same time regulate the actual facts that would arise in the future and those which arose prior to the entry into force of the amending act” [1]. The property owner will be interested in establishing transmission line easement in the case of unregulated legal status of the transmission devices located on his land. In the period before the amendment came into force, the legislator did not give him such a possibility. The owner of the encumbered property could only have demanded the removal of devices or payment of remuneration until now, but it was necessary for the entrepreneur to make a statement of will. The legislator, aiming at regulating the legal status in reference to the so-called entries granted the real estate owner rights in the form of demanding the establishment of transmission line easement when the entrepreneur evades the conclusion of a contract on this subject. I think that this direction of changes should be considered appropriate, taking into account the scale of the phenomenon with the lack of legal title of transmission companies to other people’s property on which devices for the supply or discharge of steam, fluid, gas or electricity are located.

The request for the establishment of transmission line easement should meet the requirements that the legislator demands of each process letter referred to in art. 126 of the Code of Civil Procedure. The application must be accompanied by a copy of the land register and an extract from the land register for the property to be encumbered by the transmission line easement, in order to prove ownership. Establishment of transmission line easement by the court occurs in non-litigious proceedings. The issue of jurisdiction is governed by art. 38 § 1 of the Code of Civil Procedure, according to which “a claim for ownership or other property rights in immovable property, as well as a claim for possession of immovable property, may only be brought before the court competent for its location. If the subject of the dispute is land easement, the property is determined according to the location of the encumbered property” [9]. It is true that this provision is distinguished only by the land easement, but it cannot be assumed that the legislature excluded transmission line easement from this standard because “there is no rationale for treating land easement or transmission line easement differently, all the more so because the criterion for the application of art. 38 of the Code of Civil Procedure is the location of the encumbered property. We are dealing with such property both in the case of land easement and transmission line easement. It is also important that, in matters not governed by the law on easement, the provisions on land easement apply accordingly. Although this is a legal-substantive provision, it seems that the procedural issue is likely to be applicable” [1]. “According to art. 626 § 3 of the CCP, in matters on the establishment of transmission line easement, art. 626 §1 and 2 of the CCP apply respectively, which means that:

- if the request to establish transmission line easement is to concern several properties, then all owners must be indicated as participants in the proceedings;
  - before making a decision on the establishment of transmission line easement, the court shall conduct proof of inspection of the property, unless the circumstances surrounding its establishment are indisputable” [6].
- On the other hand, when the property to be encumbered is the subject of co-ownership, all co-owners must be indicated as participants in the proceedings.

The establishment of transmission line easement through civil proceedings is possible only under certain conditions, which should be demonstrated during the proceedings. Failure to show evidence will result in the application being rejected. According to art. 305<sup>2</sup> of the Civil Code, the request for establishing transmission line easement should be preceded by an attempt to establish it by contract, regardless of whether the applicant is the owner of the property or the transmission operator. The compulsory establishment of transmission line easement will therefore apply when it is impossible to establish it by contract. It does not matter where the parties attempted to reach consensus, and also how the contract would be concluded. Therefore, the condition is refusal to conclude a contract by the other party. However, the application is not acceptable if the applicant himself refuses to conclude the contract. Therefore, the owner of the real estate demanding the establishment of transmission line easement must demonstrate in civil proceedings that the entrepreneur refused to conclude a contract. If the transmission operator applies with such a request, he has the responsibility of demonstrating that the real estate owner has objected to the conclusion of the contract. B. Rakoczy rightly notes that “the legislator does not indicate how many times the other party may refuse to conclude a contract or in what form it should be done. It may be considered that a single refusal to conclude an agreement on the establishment of transmission line easement is sufficient. No special form is required, therefore, every manifestation of the will statement expressed outside is sufficient” [1]. According to this concept, any manifestation of the will of the other party is sufficient to prove that he is not interested in concluding a contract. However, the question is whether the situation can be considered as refusing to accept the situation when the other party remained passive and did not respond to the submitted offer to conclude a contract. “As a rule, it is

assumed in Polish law that passive behavior (silence) does not mean either confirmation or denial.” [7]. The exception here is only art. 68<sup>2</sup> of the Civil Code, which states that “where an entrepreneur has received from the person with whom he has permanent economic relations an offer to conclude a contract within the scope of his business, no immediate reply shall be deemed to be acceptance” [8]. In other cases not covered by art. 68<sup>2</sup> of the Civil Code, silence cannot be considered as acceptance of the offer. According to B. Rakoczy, “it is possible to accept the thesis that silence in accepting or refusing to accept an offer must be treated in light of art. 305<sup>2</sup> - as refusal to conclude a contract on the establishment of transmission line easement. The purpose of the regulation is to conclude a contract on establishing transmission line easement, and any circumstance that does not lead to the conclusion of the contract may be treated as refusing to conclude it. If the party was interested in establishing transmission line easement by contract he would do the right thing.” [1] It is therefore admissible to accept that the refusal to conclude a contract on establishing transmission line easement may be expressed by the silence of the party to which the contract was submitted. The only problem may be demonstrating this case in the proceedings, as the lack of effective evidence will result in a rejection of the application. Also, if the initiation of the proceedings was not preceded by an attempt to negotiate or offer a contract, the application will be rejected as premature.

In the procedure for transmission line easement, both the owner of the property and the transmission operator must prove that the establishment of transmission line easement is necessary for the proper use of the device referred to in art. 49 § 1 of the Civil Code. This condition leaves no doubt with regard to the transmission operator to whom the easement is to be established, but the requirement imposed by the legislator for the owner to also demonstrate this circumstance is a little pointless. It is unreasonable for the property owner to show the circumstances which have to be proven by the transmission entrepreneur, because it is in his interest to obtain a legal title for equipment located on someone else’s grounds for their proper use. If in the entrepreneur’s assessment there was such a necessity, he would surely have requested the establishment of transmission line easement. On the other hand, failure to take any steps by the entrepreneur would mean that the easement was not necessary for the proper use of these devices. Therefore, the owner of the property will find it difficult to demonstrate the necessity of establishing transmission line easement for the purpose of proper use of the devices by the entrepreneur.

The legitimacy of an entrepreneur to demand the establishment of easement arises not only when the real estate owner refuses to conclude a contract, but also when the parties cannot determine the amount of remuneration. Such a request may also be lodged by the owner, but his application will be more about awarding appropriate remuneration for the establishment of easement. Evidence for remuneration will be more likely to be acquired by the property owner, since transmission devices are or will be located on his property, which will in turn restrict ownership and cause some nuisance with use of the land. The entrepreneur will refer to the adequacy of remuneration in relation to the resulting restrictions on the disposal of real estate. The legislator does not explain what remuneration will be appropriate. Using the appropriate remuneration clause provides freedom to the adjudicating courts. In practice, an expert opinion can have great significance in terms of the remuneration amount, which will allow the court to decide its proper balance while taking into account the interests of the real estate owner and the transmission operator. It is also worth noting that there is nothing to prevent the easement of transmission from being established by way of a settlement concluded before a court.

### **Conclusion**

The legislator, by introducing into Polish civil law the easement of transmission, contributed undoubtedly to the orderly arrangement of transmission equipment. It enabled the flexible development of legal relations between the owner of the burdened property and the transmission business. I think the emergence of easing is a step that is very important for facilitating trade. Thanks to this, entrepreneurs can have a permanent legal title for real estate on which transmission facilities are situated. It is also easier to plan investments using other real estate, with the scope of installing transmission equipment there. It is particularly important to introduce the possibility of judicial establishment of this easement, both when the trader intends to build new equipment and when the equipment is already installed and the trader has no legal access to them. I believe that with the introduction of transmission easement we have received from the legislator the opportunity to fully regulate access to devices located on other people’s property, and in spite of the perceived shortcomings, if no values were to disappear when interpreting the provisions of their *rationale*, interpreting them while taking into account social and economic principles, it will be possible to resolve collisions between the interests of property owners and transmission companies skillfully, thereby fulfilling the assumptions of the institution in question.

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