Remigiusz ROSICKI
Uniwersytet im. Adama Mickiewicza
Wydział Nauk Politycznych I Dziennikarstwa

THE INSTITUTION OF TRANSMISSION EASEMENT IN POLAND

Introduction

An easement is a limited property right, which is expressed in a right to a thing of another. A transmission easement cannot be established on a movable, but only on an immovable. The right can be established only in favour of a specific entity (an entrepreneur). In the theoretical regard, we can speak about an active or passive easement – depending on which one of the parties is affected by an easement. The case of an entity affected by a limited right to use real estate will be a case of passive easement, whereas the case of an entity endowed with a right to use real estate of another will be a case of active easement.[1]

The problem of transmission easement can be analyzed on the grounds of two kinds of relations:

1. civil-law relations;
2. public-law relations.

It should be noted that attempts have been made to resolve the issues of transmission easement in the course of virtually simultaneous work on:

1. an amendment to the civil law provisions (which came to take the shape of the *Government Bill amending the Act on the Civil Code* – document no. 74 of 7 December 2011),[2]
2. a new institution of easement (which took the form of the *Bill on transmission corridors*; the latest version of the Bill dates from 18 July 2013.).[3]

Therefore, the text will address both the issues of *de lege lata* and *de lege ferenda* legal regulations. The transmission easement itself can be considered in a broader or narrower sense, which follows from the definition of a transmission facility, and so potential analyses might focus on all kinds of transmission facilities (e.g. a water supply networks, telecommunications, heat networks), or on selected kinds only. As regards the analysis of the institution of easement, apart from the synthetic approach to the legal provisions, a functional and teleological (given the method) interpretation of the facilities serving the transmission of energy carriers was presented.

The problem of transmission easement has some significant relevance to the electric energy, gaseous fuels, heat, crude oil and petroleum products supply security. Hence, the analysis of the transmission easement serves to complement the issues of public-law relations as far as energy security is concerned, i.e. energy supply security and infrastructure security (as part of the responsibilities of energy

---

[1] B. Rakoczy, *Transmission Easement in Practice*, LexisNexis. Warszawa 2009, p. 14-17.
[2] *Government Bill amending the Act on the Civil Code* (document no. 74) of 7 December 2011.
[3] *Bill on Transmission Corridors* of 18 July 2013 (version no. 5.3).

companies as well as the responsibilities of government administration bodies).[4] Furthermore, the development of the transmission and distribution network is vital, given the necessity to implement new technological solutions (e.g. the smart grid), and Poland's preparations to develop distributed energy resources as well as the tightening of gas supply security.[5]

1. Transmission easement and the civil law

1.1. The institution of transmission easement

Amendments to Article 49 of the Civil Code (CC) were vital to the introduction of the institution of transmission easement.[6] The previous provision of Article 49 stipulated that: "Transmission equipment for supplying or discharging liquids, steam, gas, electricity and similar facilities are not component parts of the real estate if they are part of an enterprise." This stipulation clashed with the provision of Article 47 of CC.

Amendments to Article 49 of CC were necessary on account of Poland's social and economic transformation; it should be noted that the bulk of the transmission infrastructure had been erected on private land by state-owned companies without any regulation of its legal status. Until the time of change, other and applicable types of easement were invoked in judicature in an auxiliary manner.

The application conditions and scope of the transmission easement were introduced in Article 305^1 of the Civil Code, which stipulates that "Real estate may be encumbered with a right in favour of an entrepreneur who intends to construct or which owns the facilities referred to in Article 49 § 1 under which the entrepreneur may use the servient estate within a designated scope, in accordance with the purpose of the facilities (transmission easement)."[7] In this case the encumbrance is in favour of the entrepreneur, the result of which is a possibility of constructing and operating a transmission device. Noteworthily, the device is the entrepreneur's property, which he can use within a designated scope and according to its intended use.

Article 305^2 § 1 provides that „if the real estate owner refuses to execute a contract establishing a transmission easement and the easement is required for the proper operation of the facilities referred to in Article 49 § 1, the entrepreneur may demand that an easement be established against appropriate remuneration." The provision of Article 305^2 § 1 means that in the first place an attempt should be made at reaching an agreement with the real estate owner; the attempt should be made by the entrepreneur. If the agreement cannot be reached, the entrepreneur

---

[4] Cf. M. Domagała, *Energy Security. Administrative and Legal Aspects*, KUL. Lublin 2008, p. 61-146; M. Pawełczyk, *Public-Law Obligations of Energy Companies as an Instrument of Energy Security Provision in Poland*, Wyd. A. Marszałek. Toruń 2013.

[5] M. Swora, *Intelligent Grids as a Combination of Energy Sector and New Economy*, Instal, 2008, No. 9, p. 41-44; M. Klos, *Distributed Generation in the Domestic Electricity System – Benefits and Problems*, [in:] J. Rączka, M. Sowa, W. Stawny (eds.), *Distributed Generation in Modern Energy Policy – Selected Problems and Challenges*, NFOŚiGW. Warszawa 2012, p. 29-33.

[6] *Act on the Civil Code* of 23 April 1964, (Journal of Laws 1964, no. 16, item 93, as amended).

[7] It should be stressed that the *Government Bill amending the Act on the Civil Code* (document no. 74) of 7 December 2011 provided that § 2 would be added to Article 305^1 of CC, which would emphasize that the transmission easement could only serve the purpose of increasing the utility of the company or a part thereof.

may demand an establishment of an easement for a proper consideration. Such a state of affairs concerns at least two kinds of situation:

1. an attempt to construct a new transmission facility,
2. an attempt to "legalize" an existing transmission facility which has already been constructed without permission.[8]

Another situation is regulated by Article 305^2 § 2, which stipulates the following: "If an entrepreneur refuses to execute a contract establishing a transmission easement, and the transmission easement is required for the proper operation of the facilities referred to in Article 49 § 1, the real estate owner may demand appropriate remuneration in exchange for establishment of the transmission easement." In the case of Article 305^2 § 2, we deal with a situation in which the entrepreneur refuses to execute a contract establishing a transmission easement. This is an opposite situation in relation to Article 305^2 § 1, where the refusing party is the real estate owner. This Article then safeguards the interests of the real estate owner, who demands a remuneration for the establishment of a transmission easement or action undertaken to legalize the transmission. This regulation allows real estate owners to regulate the conditions under which the transmission facilities were constructed in violation of the ownership right (without a proper legal title) – in the specific case of Poland, this was the result of the operation of state authorities under the previous political regime.[9] If no contract was executed, that is, if no agreement was reached, there is basis for court action (non-litigious proceedings). In such a case it does not matter whether the basis is Article 305^2 § 1 or Article 305^2 § 2 of CC. A lack of agreement may not only follow from the fact that the necessity to establish a transmission easement as such was denied, but also from a lack of agreement as to the course the transmission facility should take in the real estate, e.g. the width of the strip necessary for the operation of the transmission and distribution networks (the so-called operating or technological strip). It should be noted that in the second case the problem may be of some significance, which follows from the lack of special regulations as regards the determination of the surface area necessary to delineate the transmission facility operation strip. One of the determinants of the strip delineation, which the enterprise should define is a kind of transmission device (e.g. transmission line parameters). Another important determinant is security considerations related to the operation of the transmission facility.

Another issue related to a lack of agreement is a financial one, that is in the Civil Code the legislator did not define methods for calculating the remuneration for easement establishment. Hence, these issues are more often than not resolved at court. The court may invoke "the social and economic purpose of land" (Article 143 of CC), however while taking into consideration the decrease in its or the real estate's value, it may refer to a comparison to adequate cases.[10]

The transmission easement is transferred to the acquirer of an enterprise or the acquirer of the equipment (cf. 305^3 § 1 CC). The transfer of the easement referred to in Article 305^3 § 1 will result in the integration between the equipment

[8] G. Bieniek, *Transmission Facilities*, LexisNexis. Warszawa 2008, p. 56.
[9] Cf. K. Bator, *On the Nature of Transmission Easement – Conclusions Following from the Analysis of the Rulings of Institutions*, [in:] F. M. Elżanowski, M. M. Sokołowski (eds.), *System Determinants of Strategic Sectors. Conclusions for the Energy Sector*, Wyd. A. Marszałek. Toruń 2011, p. 93-96.
[10] Cf. Supreme Court Verdict of 8 February 2013, IV CSK 317/12.

and the transmission network. Moreover, the Article brings into relief a difference in relation to other types of easement – easement appurtenant and easement in gross, which comes to be expressed in the statement that the transmission easement becomes transferred to the acquirer of the transmission network.[11] This means that the existence of a transmission easement depends on the existence of an enterprise adequate to it, whereas Article 305^3 § 2 of CC prescribes that the transmission easement expires at the latest the moment the liquidation process of an enterprise comes to an end – this provision determines a termination of the transmission easement in the final form, which does not mean that there cannot be other situations affecting the termination. The result of the expiry of the transmission is an obligation to remove any of the transmission facilities (cf. 305^3 § 3 CC). It must also be noted that the transmission easement expiry will not follow on the occasion of the liquidation of the transmission enterprise if the transmission equipment is sold.

Moreover, pursuant to Article 291 of CC, should it prove necessary (an important economic need arises), the real estate owner may demand that the substance of the easement or the manner in which it is exercised be changed. This provision introduces a possibility of verification of the actual state of affairs as far as transmission easement is concerned. Still, the owner's demand may not be based on irrational premises. Justification of such a verification may be a major economic need on condition that it will not cause incommensurate harm to the entrepreneur who is an owner of the transmission equipment.[12]

Of great relevance for the transmission easement is the possibility of adverse possession of the transmission easement. Article 292 of CC specifies that "An easement appurtenant may be acquired by adverse possession only if it consists in the use of a permanent and visible facility. The provisions on acquiring real estate ownership by adverse possession apply accordingly." In this case attention should be paid to other purposes of easement appurtenant and transmission easement, as the latter one is established so as to operate a transmission facility, without which the transmission of a substance (heat, electricity, gas, water) would not be possible.[13] Another characteristic is a connection to the transmission network, which determines the ownership (a component part) of the transmission enterprise. In this case the "permanent and visible facility" mentioned in Article 292 of CC does not perform the function of a transmission facility, all the more so because the legislator pointed out the functional interpretation of the facility in Article 49 § 1 of CC (operating the facility in accordance with its intended use). Hence, the transmission facility is necessary to realize the substantive provisions of the transmission easement, while the "permanent and visible facility" will be of an optional nature and will not form substantive part of the easement appurtenant.[14] A moot point is the possibility of applying Article 292 of CC as for the adverse possession of the transmission easement, which results from the indicated

---

[11] Cf. Z. Gołba, *Easements Appurtenant, Road and Transmission Easements, Easements in Gross*, LexisNexis. Warszawa 2011; G. Matusiak, *Ownership of Transmission Facilities and Land Rights*, LexisNexis. Warszawa 2011.

[12] G. Bieniek, *Transmission*..., op. cit., p. 62-63.

[13] Z. Gołba, *Easements*..., op. cit., p. 141.

[14] „A permanent and visible facility" results from the increase in efficiency of the transmission easement operation (Supreme Court Verdict of 24 May 1974, III CRN94/74, OSNCP 1975, no. 6, item 94).

characteristics of the facilities mentioned in Article 49 § 1, Article 292, Article 305[1] of CC.[15]

1.2. Functional and teleological interpretation

In the articles introducing the transmission easement the legislator ossified the solutions applicable in Polish judicature before 2008. The judicial interpretation followed in the direction of clarification, that is the establishment of a norm in the situation where the understanding of it was dubious. That does not however mean that the functional or teleological interpretations would be meaningless, but they would not fulfil the role of ultimate sense verification.

The amicable tools were insufficient in the face of the opposition to the projected transmission investments. On the one hand, the landowner could make steep demands for financial benefits, whereas on the other hand, entrepreneurs, that is the equipment owners, could avoid the resolution of the issue on the required conditions.

It should be noted that while amending the Civil Code in 2008, the legislator anticipated legal solutions to the existing state of affairs, but also to the situation where an easement was to be established and the facility to be constructed. Here we are dealing with action aimed at putting in order an unregulated legal status, but also with action securing investment processes.

Also, it must be noted that *de facto* civil-law solutions served the doctrine of easement in the public interest. This follows from the fact that apart from the aforesaid aims, the legislator found important the issues concerned with state and energy security as well as the fulfilment of collective needs as regards the supply of energy, gas, etc. Undoubtedly, issues related to the constitutional protection were also of significance here – e.g. dispossession was not allowed in favour of private legal entities (in this case transmission companies).

2. Transmission corridors (public interest easement)

2.1. Transmission easement and the administrative law

In 2013 a new version of *Bill on Transmission Corridors* (BTC) was presented; subsequent solutions included previous comments related to the consultation process, and yet a way of determining compensation for the establishment of transmission easement as part of the so-called transmission corridors was still an open issue.

The legislator defines the transmission corridor as "the area of land necessary for the location of transmission equipment or for the operation of this equipment according to its intended use" (Article 2, Item 1, BTC). Furthermore, corridors have been divided into local and supralocal ones (i.e. the ones located within the area of one or several counties). Transmission equipment was defined as installations, technical devices and facilities used for the transmission:

1. or distribution of electric energy, gaseous fuels or heat,
2. petroleum and petroleum products as well as liquids necessary for the construction and operation of an underground tank-free storage facility,

[15] Z. Gołba, *Easements...*, op. cit., p. 146-147.

3. carbon dioxide along with other installations, technical devices and facilities necessary for the operation of this equipment according to its intended use (Article 2, Item 5, BTC).

This equipment is to be located under-, over- and on the ground. The transmission equipment may also be located in a building (Article 2, Item 5, BTC)

The location of transmission equipment is to be determined by „location plans" (Chapter II, BTC). The projected location of transmission equipment is binding while delineating the course of the transmission corridor (Article 13, Para 1, BTC). Depending on the spatial scope, the transmission entrepreneur is obliged to include in his proposal "area development plans for a given province" as well as the borders of the equipment location zone, defined in "location plans" (Article 13, para 2, item 1-2, BTC). Still, the transmission entrepreneur is free to propose a different course for a transmission corridor if

1. its impact is less negative (particularly on the environment),
2. it better addresses the requirements concerned with architectural monuments protection.

The entrepreneur may also propose a course of the corridor if there is no "area development plan for a given province" or a "location plan" (Article 13, para 3 and 4, BTC).

A decision establishing a transmission corridor for new transmission equipment – in standard situations -- is made by a proper county governor (local scope) or a proper province governor (supralocal scope or a local one if the equipment has nationwide significance). There remains the problem of supralocal corridors whose course will lead across the area of more than one province. In such a case the decision is made by the governor of the province with the largest part of real estate earmarked for the establishment of corridors (Article 14, para 1-2, BTC). The ultimate decision establishing the transmission corridor is to be a title to dispose of the real estate for construction purposes.

2.2. Functional and teleological interpretation

Introducing new transmission easement solutions grounded in the administrative law expresses the legislator's recognition of the immense significance of the public interest as regards infrastructural investments. On the one hand, regulations impose duties on certain state authorities with respect to energy policy and security, while on the other hand infrastructure (energy) companies are burdened with public-law obligations. Despite the fact that enterprises are private entities, they should be recognized as representatives of the public interest. The notion of public interest itself is vague, and its definition is frequently hard to come across in the official documents that invoke it. The law does not always have to use precisely specified definitions, which can be illustrated with general clauses, among which the public interest is reckoned.[16]

[16] A. Żurawik, *Public Interest and the Economic Law*, C.H. Beck. Warszawa 2012, p. 7-32; A. Żurawik, *Public Interest, Social Interest and Socially Justified Interest. An Attempt at Specifying the Notions*, "Journal of Law, Economics and Sociology", 2013, No. 2, p. 57-69.

Nevertheless, the public interest can be considered through the prism of the function it performs in the juridical system; in this particular case it determines the positive premise of the activity on the part of state authorities – that is, it legitimizes action undertaken by the state.[17] However, it must be stressed that in the course of work on the bill amending the Act on the Civil Code (document no. 74) the legislator was intending to include in Article 305^2 of CC § 3, which was supposed to make the establishment of a transmission easement conditional on the consideration for "the public and economic interest" as well as "the justified interest of the real estate owner" in a way that would make the easement the least possible encumbrance for the land in which the facilities were to be located. So in this case we would not be speaking only about an independent criterion shaping the substance of rulings settling the issue of a transmission easement, but about a conflict of two interests that would have to be resolved.[18]

The legislator's main point in introducing a new institution of easement into the law was the intention to create proper and stable conditions for the realization of public goals. Hence, we are dealing with a legislator's direct reference to the construct of public interest easement. In this case a conflict of the public interest with the private interest with respect to the transmission easement would have to assume the primacy of the former one. The public interest objectives would be expressed in the form of the necessity to construct, maintain and modernize the technological infrastructure which would be used for an incessant supply of electricity, gases and liquids. In the case of energy carriers the aspect of supply security was highlighted. Therefore, one can recognize that the *Act on Transmission Corridors* (the Bill) is one of the elements facilitating the fulfilment of the principles concerning the state authorities' obligation to take care of energy security and public-law responsibilities of energy companies in this respect.[19]

In the process of consultation about the *Bill on Transmission Corridors* the greatest number of remarks was made about the method for calculating compensation for the establishment of transmission easement. However, the prepared solutions were treated as the only way of solving the so-called "left-overs", e.g. the problem of unregulated legal statuses of the existing transmission facilities. The necessity to introduce a proper algorithm has some relevance for the pragmatic objective, that is the reconciliation between the private and public interests (the issues of remuneration and compensation are frequently addressed in the disputes seeking civil law solutions). Another pragmatic objective is the willingness to eliminate impediments that might negatively affect the economy. New solutions in the domain of public interest easement would markedly speed up investment processes as well as prepare public authorities and energy companies for infrastructure development with respect to the fulfilment of energy security principles, proliferation of distributed energy resources, etc.

---

[17] B. Bogdanowicz, *Public Interest and the Energy Law of the European Union*, C.H. Beck. Warszawa 2012, p. 71-80.

[18] Cf. A. Wilczyńska, *Public Interest in Statutory Law and Constitutional Tribunal Judicature*, "Commercial Law Review", 2009, No. 6, p. 48-55.

[19] On the obligations of energy companies as entities of special status within the context of energy security, [in:] M. Pawełczyk, *Public-Law...*, op. cit., p. 111-308.

Conclusions

The object of analysis in this text was the institution of transmission easement, which has been presented from the perspective of civil-law and public-law relations. The aim of the text was not a detailed analysis of all the facets of transmission easement – the attention was chiefly focused on the notion of a "transmission facility", general issues related to the establishment of transmission easement and transmission corridors. Of special significance was the analysis of transmission easement in respect of a functional and teleological interpretation, given a narrow delineation of "transmission facilities," which means that the interpretation considers only "transmission facilities" that enable the transfer of energy carriers (or allow for the licensed activity, defined in the Energy Law Act).

The text analyzed the institution of transmission easement in respect of the function that it is supposed to perform in the legal system, and in respect of the goal that the legislator wished to achieve by way of introducing the regulation of legal relations on the basis of private and public law. In this respect, the following conclusions can be presented:

1. the legislator aimed to regulate the disorderly legal status in the civil-law relations, but also to avoid dispute in the future by securing investment processes,
2. with the aid of new regulations, the legislator wished to accommodate the public interest, e.g. in relation to infrastructural investments,
3. by regulating the issues of transmission easement (in civil-law and public-law relations), the legislator wished to make it easier for infrastructure entrepreneurs to realize public-law obligations, e.g. in relation to the responsibilities imposed by the energy law,
4. on account of the public interest, the legislator facilitated the realization of the principles of state energy security and the fulfilment of collective needs for energy supply (and/or other public services).

Streszczenie

Tekst przedstawia analizę instytucji służebności przesyłu, która zaprezentowana została z perspektywy stosunków cywilnoprawnych i publicznoprawnych. W tekście nie poruszono wszystkich kwestii związanych z instytucją służebności, tj. nie analizowano kompleksowo problemu źródeł ustanowienia, wygaśnięcia, także wynagrodzeń i odszkodowań za służebność.

W tekście przedstawiono ogólną charakterystykę ustanowienia służebności przesyłu na gruncie polskiego Kodeksu Cywilnego i przygotowywanego *Projektu ustawy o korytarzach przesyłowych* z 18 lipca 2013 r. W analizie instytucji służebności, oprócz syntetycznego ujęcia przepisów prawnych, przedstawiono interpretację funkcjonalną i teleologiczną. Warto wskazać na cel, jaki chciał osiągnąć ustawodawca w związku z pracami nad nowymi rozwiązaniami, zarówno na gruncie prawa prywatnego, jak i publicznego:

1. ustawodawca zmierzał do regulacji nieuporządkowanego stanu prawnego w stosunkach cywilnoprawnych, ale i do uniknięcia sporów w przyszłości,
2. ustawodawca, za pomocą nowych regulacji, chciał realizować interes publiczny.

Słowa klucze: służebność przesyłu, służebność interesu publicznego, korytarze przesyłowe

Summary

The text presents an analysis of the institution of transmission easement, which is featured from the perspective of civil-law and public-law relations. The text does not address all the issues related to the institution of transmission easement, that is, no comprehensive analysis of the issues of the grounds for easement establishment, expiry, or remuneration and compensation for easement was conducted.

The text presents a general description of the establishment of transmission easement against the backdrop of the Polish Civil Code and the *Bill on Transmission Corridors* of 18 July 2013, which is currently being drafted. The analysis of the easement institution, apart from the synthetic approach to legal provisions, features a functional and teleological interpretation. It is worth pointing out the aim that the legislator wished to achieve with respect to the work on new considerations both in the domain of the private and public law:

1. the legislator aimed to regulate the disorderly legal status of civil-law relations, but also to avoid dispute in the future,
2. with the aid of new regulations, the legislator wished to respond to the public interest.

Key words: transmission easement, public interest easement, transmission corridors

Bibliography

1. *Act on the Civil Code* of 23 April 1964, (Journal of Laws 1964, no. 16, item 93, as amended).
2. Bator K., *On the Nature of Transmission Easement – Conclusions Following from the Analysis of the Rulings of Institutions*, [in:] F.M. Elżanowski, M. M. Sokołowski (eds.), *System Determinants of Strategic Sectors. Conclusions for the Energy Sector*, Wyd. A. Marszałek. Toruń 2011.
3. Bieniek G., *Transmission Facilities*, LexisNexis.Warszawa 2008.
4. *Bill on Transmission Corridors* of 18 July 2013 (version no. 5.3).
5. Bogdanowicz B., *Public Interest and the Energy Law of the European Union*, C.H. Beck. Warszawa 2012.
6. Domagała M., *Energy Security. Administrative and Legal Aspects*, KUL. Lublin 2008.
7. Elżanowski F.M., Sokołowski M.M. (eds.), *System Determinants of Strategic Sectors. Conclusions for the Energy Sector*, Wyd. A. Marszałek. Toruń 2011.
8. Gołba Z., *Easements Appurtenant, Road and Transmission Easements, Easements in Gross*, LexisNexis. Warszawa 2011.
9. *Government Bill amending the Act on the Civil Code* (document no. 74) of 7 December 2011.
10. Klos M., *Distributed Generation in the Domestic Electricity System – Benefits and Problems*, [in:] J. Rączka, M. Sowa, W. Stawny (eds.), *Distributed Generation in Modern Energy Policy – Selected Problems and Challenges*, NFOŚiGW. Warszawa 2012.
11. Matusiak G., *Ownership of Transmission Facilities and Land Rights*, LexisNexis. Warszawa 2011.

12. Pawełczyk M., *Public-Law Obligations of Energy Companies as an Instrument of Energy Security Provision in Poland*, Wyd. A. Marszałek. Toruń 2013.
13. Rączka J., Sowa M., Stawny W. (eds.), *Distributed Generation in Modern Energy Policy – Selected Problems and Challenges*, NFOŚiGW. Warszawa 2012.
14. Rakoczy B., *Transmission Easement in Practice*, LexisNexis. Warszawa 2009.
15. Supreme Court Verdict of 24 May 1974, III CRN94/74, OSNCP 1975, no. 6, item 94.
16. Supreme Court Verdict of 8 February 2013, IV CSK 317/12.
17. Swora M., *Intelligent Grids as a Combination of Energy Sector and New Economy*, Instal, 2008, No. 9.
18. Wilczyńska A., *Public Interest in Statutory Law and Constitutional Tribunal Judicature*, "Commercial Law Review", 2009, No. 6.
19. Żurawik A., *Public Interest and the Economic Law*, C.H. Beck. Warszawa 2012.
20. Żurawik A., *Public Interest, Social Interest and Socially Justified Interest. An Attempt at Specifying the Notions*, "Journal of Law, Economics and Sociology", 2013, No. 2.