

## INSTALLATION OF TRANSMISSION FACILITIES ON LANDS COVERED WITH FLOWING SURFACE WATER – THE POLISH EXAMPLE

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### ABSTRACT

The purpose of the research is to check whether it is possible to encumbrance lands covered with flowing surface water in favor of a transmission networks operator (hereinafter: transmission undertaking) by way of a transmission easement. The term ‘flowing surface water’ includes rivers and flowing lakes, which according to the Central Statistical Office occupy around 2% of Poland’s land area. These waters are located in both urban and rural areas, and the transmission infrastructure facilities involved may be constructed below ground, on the ground or in the air space above the ground. This applies to the transmission of all public utilities including but not limited to water, gas, electricity and telecommunications. The transmission undertaking should seek to acquire the right to the land to install the facilities. This article attempts to address the question of whether the land covered by flowing surface water constitutes a specific type of land which might in some way affect the possibility of establishing a transmission easement.

**Keywords:** transmission easement, land covered with surface water, transmission facilities

### INTRODUCTION

The purpose of this article is to answer the following questions: a) whether the transmission facilities of a public utility can be installed on land covered by flowing surface water, and b) if these facilities can be installed on such a land what right can a transmission undertaking obtain in order to do so. The area of Poland is 31,188,800 ha – an acreage which excludes internal waters and territorial sea (Environmental Protection, 2018). Inland flowing waters constitute about 514,000 ha, which represents around 2% of the

country’s total land area (Environmental Protection, 2018). Transmission facilities pass through or over many properties owned by various entities – i.e. natural and legal persons, including the State Treasury. Therefore, will the rights to land that the transmission undertaking can obtain also differ? The transmission undertaking should know whether, when applying for the right to access land for a specific purpose and use it in a particular way, he should strive to establish disparate rights, depending on the type of real estate or its owner. The research for the purposes of the article was conducted with reference

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to lands covered by flowing surface water which, in their current legal capacity are the property of the State Treasury, thus eliminating the consideration of a situation where the owner of real estate is another entity, while also considering that the State Treasury may encumber its proprietary rights with other rights. The research checked whether the fact that the land is covered with flowing surface water affects the situation of the transmission undertaking and whether, despite the fact that the land is covered with water owned by the State Treasury, the undertaking may effectively apply for the establishment of a transmission easement. This easement is a right dedicated to the acquisition of land for the construction of transmission facilities, and the possibility of its establishment should occur in each case.

It should be noted however, that Polish legal solutions in the field of installing transmission facilities on land do not correspond with global solutions. Thus, in Germany, France, Italy and Spain, an undertaking obtains the easement to install transmission facilities on land<sup>1</sup>. In the UK, the undertaking can choose between two rights: wayleave or easement<sup>2</sup>. A wayleave is usually treated as a temporary solution because the right is not transferred to the next owner or occupier. The easement provides permanent access rights for installing and maintaining transmission facilities, it also can be registered at the Land Registry in order to ensure that future owners of the land adhere to it, for a one-off payment<sup>3</sup>. The literature also points to right of way (Electrical Power Energy), which makes it possible to obtain the right to build transmission facilities on real estate.

<sup>1</sup> [http://www.gesetze-im-internet.de/englisch\\_bgb/index.html](http://www.gesetze-im-internet.de/englisch_bgb/index.html) (18.03.2020); [http://www.napoleon-series.org/research/government/code/book2/c\\_title04.html](http://www.napoleon-series.org/research/government/code/book2/c_title04.html) (18.03.2020); <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074075> (18.03.2020); *Codice civile*, 16 March 1942, (*Gazzettaufficiale*, 4 April 1942, *ze zm.*); <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1933-12-11;1775> (18.03.2020); [http://www.cne.es/cne/doc/legislacion/NE\\_LSE.pdf](http://www.cne.es/cne/doc/legislacion/NE_LSE.pdf) (18.03.2020).

<sup>2</sup> [http://www.utilityserve.co.uk/wayleaves\\_and\\_easement.php](http://www.utilityserve.co.uk/wayleaves_and_easement.php) (18.03.2020).

<sup>3</sup> <http://www.legislation.gov.uk/ukpga/Geo5/15-16/20> (18.03.2020).

## MATERIALS AND METHODS

The subject matter discussed concerns the interface between public and private law, therefore, the research is based on the analysis of both private and public law provisions. The research was based on the analysis of legal acts, case law and literature. The research concerns Polish legal norms in relation to land covered by flowing surface water and transmission undertakings willing to obtain the right to install transmission facilities on such land. The research was carried out in stages, first of all it was checked how the legislator interprets land covered with surface water. In reference to the purpose of the article, using the terminology derived from the civil law, the right of easement of transmission was characterized as a right by which a transmission undertaking obtains the right to land in order to install transmission facilities. This is not the only right that may constitute an aid to the installation of the facilities, therefore other rights that can be used to achieve such an objective are also indicated. Next, it was checked whether specific provisions (i.e. the water law) indicate a specific right or rights to be applied for the purpose of installing transmission facilities, with the authors pointing out the drawbacks of applying solutions contained in the water law.

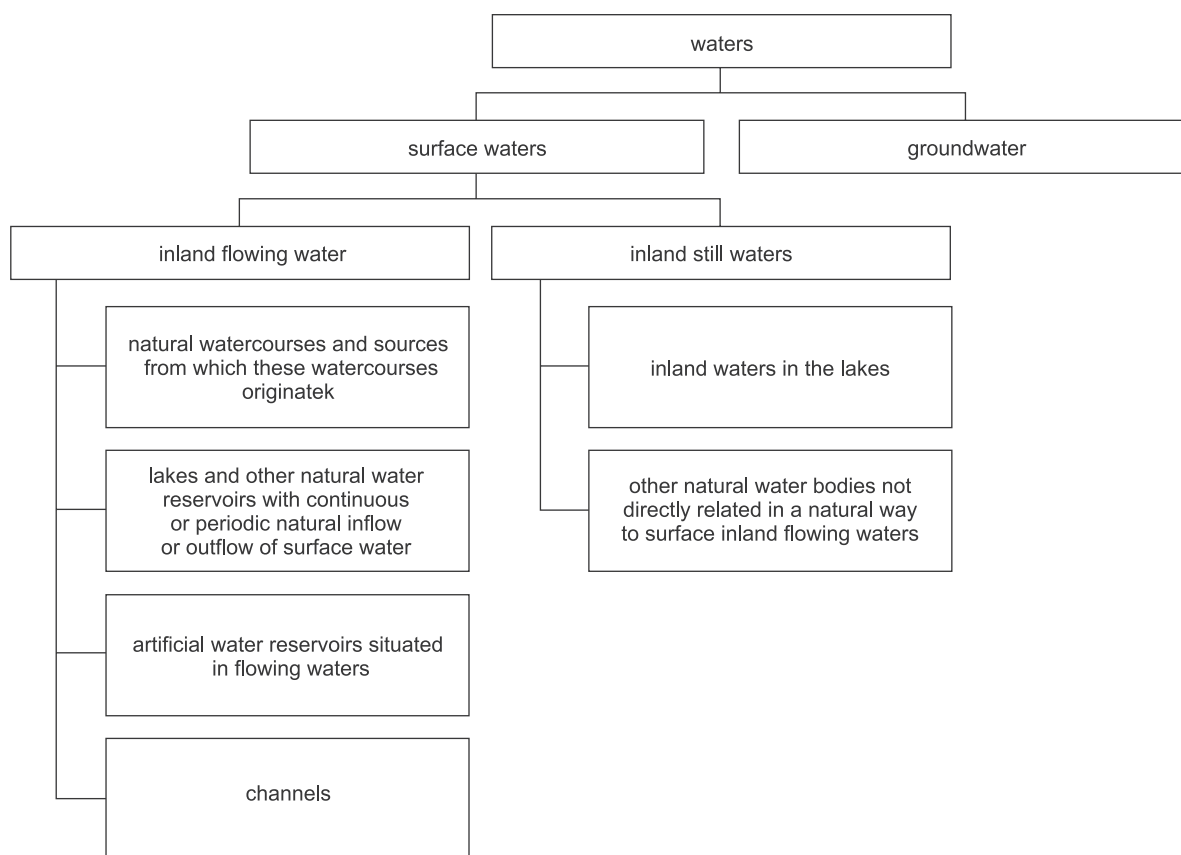
The English terms ‘rent’ and ‘lease’ can be used interchangeably. In the Polish legal system there are two similar but different rights of rent and lease. To avoid ambiguity in their translation, the word ‘rent’ refers to the Polish word ‘najem’ and the word lease to ‘dzierzawa’. Both rights will be explained further in the text.

## RESULTS

### Lands covered with flowing surface water

The legal act governing water management in Poland is the Water Law (WLA). It also regulates ownership of the waters and thus of the land covered by these waters and identifies the types of waters distinguished in Poland (cf. Figure 1).

According to the WLA, flowing inland waterways are the property of the State Treasury and, conse-



**Fig. 1.** Water distribution in Poland  
 Source: Authors own study based on the Water Law.

quently, the land covered by these waters also belongs to the State Treasury. The situation with inland still waters is different. They may be owned by entities other than the State Treasury. This is a question of the ownership of the waters and not of the land (real estate). The Act provides that the land covered with water is: land forming the beds and shores of natural streams, lakes and other natural water reservoirs within the shoreline, as well as land forming a part of artificial waterways, reservoirs, water levels, and back-up lakes, in both cases such land requires to be covered with surface water prior to the commencement of installing transmission facilities. Pursuant to art. 220 of the WLA, the shoreline is deemed to be the edge of the shore or a line of permanent grass growth or a line which is established according to the average water level over at least the last 10 years. Where the edge of the shore is clearly delineated,

the shoreline shall run along that edge. Where the edge of the shore is not clearly delineated, the shoreline shall run along the boundary of permanent grass growth and, if the boundary of permanent grass growth is above the water level, the line of intersection of the water table in that state with the adjacent ground. The shoreline for natural watercourses, lakes and other natural water bodies with continuous or periodic natural outflow of surface water shall be determined by a decision of the Minister responsible for water management.

For the purposes of the article, the focus is only on flowing surface waters, i.e. those owned by the State Treasury. Therefore, there is no need to consider whether land and water are separate objects of property rights or whether it is just one ‘thing’ that is the object of property rights.

## The easement of transmission

### Basic issues

The transmission undertaking should have a legal title to the real estate on which he is willing to install the facilities referred to in art. 49 §1 of the Polish Civil Code (Radwański, 2006), i.e. facilities used for supplying or discharging liquids, steam, gas, electricity and other similar utilities. In 2008, articles 305<sup>1</sup>–305<sup>4</sup> were added to the Polish Civil Code (PCC), allowing for encumbering the land (real estate) for the benefit of an entrepreneur who intended to build or whose property consisted of the facilities referred to in the said Article 49 § 1 of the PCC, with the right that the undertaking might use the encumbered real estate to a specified extent in accordance with the purpose of those facilities. These regulations were introduced after the prior regulations on praedial and personal easements, as a third easement, which, according to B. Lanckoroński, could be distinguished by the way the entitled person was defined (Osajda, 2019), as distinct from the other two easements) (Gniewek & Machnikowski, 2013; Pietrzykowski, 2013; Lewandowski, 2014; Judgement of Supreme Court of 27 June 2013). The easement has its own characteristic features, which include: a) establishment for the benefit of the undertaking; b) it applies to the facilities referred to in art. 49 § 1 of the PCC; c) it does not increase the usability of so called dominant real estate<sup>4</sup>, and as such property does not occur in this type of easement, it increases the usability of the transmission undertaking (Żelechowski, 2013); d) it does not secure the personal needs of natural persons (Gniewek, 2012).

This particular easement is intended to safeguard the interests of the transmission undertaking. It gives him the right to use the land to a specified extent, the right to enter the property and to install transmission facilities there, as well as to carry out later maintenance repairs of the facilities installed, but

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<sup>4</sup> It occurs in other types of easements, for example, the easement allowing access to the property through another property.

also imposes an obligation to maintain transmission facilities (Rondek, 2009).

The entrepreneur should have permanent access to the transmission facilities in order to be able to ensure the continuous supply of the utility. As already mentioned, the transmission easement differs from other types of easements in that the entitled person is defined, i.e. the PCC clearly indicates the entity for which it can be established. As the transmission undertaking's seat may be located a considerable distance from the encumbered real estate, it is not possible to indicate the dominant real estate, only the increase in the usefulness of the undertaking. However, the easement is not attributed to the undertaking as such, and therefore to his economic activity, but rather to the transmission facility itself, since it constitutes a component thereof within the meaning of Article 551 of the PCC (Osajda, 2019).

### Object of transmission easement

The easement of transmission is a right that is established on real estate (Lewandowski, 2014). It may encumber all types of real estate, in practice encumbering the land property (i.e., according to art. 46 § 1 of the PCC, that part of the land area constituting a separate object of ownership) which is of utmost importance. Consequently, real estate may be referred to if two conditions are met: a) the part of land is separated from the whole with its boundaries marked on the surface (Lewandowski, 2011) and b) it is a separate object of ownership (Rudnicki, 1994). The jurisprudence also highlights other issues of fundamental importance for recognition of the land as real estate. In the judgment of 2 June 2017, the Supreme Administrative Court assumed that the provision of Article 4 point 1 of the Property Management Act (PMA), contains a definition of the term real estate, according to which it is a land together with component parts, excluding buildings and premises if they constitute a separate object of ownership (Judgement of Supreme Court of 2 June 2017). The definition of real estate contained in the PMA serves only to distinguish this property within the framework of the provisions of the PMA from

building property and premises property, i.e. buildings and premises listed in this definition being separate from the land as an object of ownership. Since the legislator used the term ‘real estate’, then the rule contained in the provision of art. 46 § 1 of the PCC applies to the real estate within the meaning of the PMA, which means that the notion of property used in the provisions of the PMA should be understood as defined in art. 46 § 1 of the PCC. The provision of art. 46 § 1 of the PCC provides (similarly to Article 4 point 1 of the PMA) that certain components, such as buildings or their parts (premises), may in certain situations constitute a separate object of ownership from land – then they are separate properties (building property or premises property). Therefore, real estate, within the meaning of the PMA includes, as well as property within the meaning of art. 46 § 1 of the PCC, land together with its component parts, save for cases specified in the legal provisions where buildings or premises are considered separate from land as an object of ownership. On the other hand, the Provincial Administrative Court in Olsztyn, in its judgment of 8 December 2016, ruled that real estate (land) is land owned by one entity and that property (land property) is land owned by one entity surrounded from outside by land owned by other entities (Judgment of the Provincial Administrative Court in Olsztyn of 23 September 2019, II SA/Ol 1176/16, *Legalis*). This corresponds to the judgment of the Supreme Administrative Court of 6 December 2012 (Judgment of the Supreme Administrative Court of 6 December 2012, I OSK 1309/11, *Legalis*), in the light of which the provision of art. 46 § 1 of the PCC when defining real estate, indicates when land becomes real estate that may be subject of the law. The real estate must be physically and legally separated to be subject to legal transactions. Separation of property in the legal sense is connected with the regulation contained in the Act of July 6, 1982 on the Land and Mortgage Register and Mortgage, hereinafter referred to as ALMRM, which states in art. 24 that a separate land and mortgage register is kept for each real estate (Judgment of the Supreme Administrative Court of 6 December 2012, I OSK 1309/11, *Legalis*). This line of judgement, defined

by the rule of one land and mortgage register – one real estate, is reflected in many judgments, for example that: a) the real estate is a part of the earth’s surface for which the land and mortgage register has been established, i.e. the rule applies (the concept of the land and mortgage register) one land and mortgage register – one property (Judgment of the Provincial Administrative Court in Łódź of 28 June 2017, I SA/Łd 335/17, *Legalis*); b) bordering plots of land owned by the same person, for which separate land and mortgage registers are kept, constitute two separate real estates within the meaning of art. 46 § 1 of the PCC. This separation is lost in the case of a merger in one land and mortgage register, as the rule ‘one register – one real estate’ applies (Judgement of Supreme Court of 22 February 2012, IV CSK 278/11, *Legalis*); c) The land is separated by the fact that the plot of land is entered in the land and mortgage register, which is expressed in the formula ‘one register – one real estate’. In any case, there are no grounds for assuming that the mere geodetic separation of a plot of land and assigning a separate number to it changes its status as a component part of the real estate. Consequently, an agreement for the sale of shares only in certain plots of land constituting, together with other plots of land not covered by the agreement, one real estate is invalid (Judgement of Supreme Court of 16 June 2009, V CSK 479/08, *Legalis*); d) If a single land and mortgage register is established for several geodetically separated plots of land only and some of them are covered by the land easement, the separation from the land and mortgage register of the plot of land not covered by the easement and the establishment of a new land and mortgage register for it does not result in expiration of the burden of the easement (Judgement of Supreme Court of 17 April 2009, III CZP 9/09, *Legalis*); e) Establishing the land and mortgage register means that there are as many real estates as there are land and mortgage registers, because – pursuant to art. 24 of the ALMRM – a separate land and mortgage register is maintained for each real estate unless specific provisions provide otherwise (Judgement of Supreme Court of 30 May 2007, IV CSK 56/07, *Legalis*).

When analyzing the territorial and material scope of the transmission easement, it should be noted that the legislator does not indicate on which real estate (i.e. where located or whose) such easement cannot be established. This means that it does not limit the possibility of establishing the easement in relation to a specific real estate. Therefore, the easement may be established on the territory of the entire country, on all real estate, regardless of who owns them – because there is no exemption under which the easement may not be established on real estate owned by specific entities (Balwicka-Szczyrba, 2015).

### The easement of transmission

A situation in which a transmission undertaking does not have the right to install a transmission device on someone else's land is uncomfortable as it may lead to a conflict between him and the owner of the land. Therefore, it seems obvious that he should obtain such right before attempting to achieve his economic goals. The catalogue of rights that allow the transmission undertaking to obtain the right to use the land in a specific way is wide and the scope of rights resulting from them varies. The rights that can be used to install transmission facilities are: a) ownership right to real estate, b) right of perpetual usufruct, c) usufruct, d) (praedial or transmission) easements. A transmission undertaking may also conclude with the owner of the real estate a loan, lease or rent of land agreement, which will provide for the installation of transmission facilities thereon. While all of the rights mentioned above result from actions performed by the parties (the undertaking and the owner of the land), or possibly from a court decision (for example in relation to land easement), an administrative decision may also provide the legal title to install transmission facilities.

Ownership in the sense of civil law is a subjective right of absolute nature, the content of which is described in art. 140 of the PCC (Pietrzykowski, 2013). The regulation indicates that the owner may: use the thing, including collecting benefits and other income and dispose of the thing. These rights do not constitute

a closed catalogue. The owner may, therefore, also exercise other rights in relation to his item, such as possession (Ciszewski, 2014). Disposing of it can be very broad in nature, it can consist of disposing of the right to the thing, encumbering it, abandoning it or destroying it (Gniewek & Machnikowski, 2013).

The most important features of the right of ownership include: the absolute nature of the right of ownership, its indefinite nature, the fact that it relates to things, as well as the fact that it entitles to use the thing to the greatest extent from all rights in rem. The absolute nature of the right of ownership lies in the fact that only the owner is entitled to the right in rem. It also means that he may exercise the rights to his property arising from art. 140 of the PCC. The ownership right is effective *erga omnes*. No one may infringe property rights belonging to another entity. The owner in exercising his right is limited by legal acts, rules of social coexistence and socio-economic purpose of a given right. These restrictions are listed in art. 140 of the PCC.

Perpetual usufruct is a right similar to ownership in that it grants the right to use the real estate excluding the other person and to dispose of his right. The perpetual usufructuary is not the owner of the real estate, he is the owner of the buildings which were located on the land or which he will build there. The real estate remains the property of the State Treasury or local government units. The exercise of the perpetual usufructuary's rights must be within the limits set by the legal acts, rules of social coexistence and the agreement with the owner of the land.

Because perpetual usufruct may be established only on land owned by the State Treasury or by local government units, it cannot be applied to every real estate. This right is established for a specific period of time (art. 236 of the PCC). The maximum perpetual usufruct may be established for a period of 99 years.

Easements are limited rights in rem which ensure the possibility to use the encumbered real estate. The easement is aimed at ensuring proper use of the real estate at the expense of another real estate. It ensures that the needs of the owner of the dominant real estate are met, which cannot be

achieved without encumbrance of another real estate (Gniewek & Machnikowski, 2013). The easement may arise as a result of a legal action of the real estate owner or another entity entitled to dispose of the real estate, also a court decision and an administrative decision, by virtue of law or on the basis of *legatum per vindicationem*.

The praedial easement is intended to grant rights to someone else's real estate. It can only be created if it increases the usability of the owner's real estate without causing an excessive burden on the encumbered real estate (Gniewek & Machnikowski, 2013). By establishing such an easement a third party is allowed to use the real estate to a limited extent. The establishment of a praedial easement results in respect both the entity, for the benefit of whom the easement is established, and the owner of the real estate. By establishing the easement, the owner of the real estate may be restricted in carrying out activities on his property or may not carry out activities with respect to the dominant real estate. The praedial easement applies to every owner of each of the real estates. A change in ownership of the real estate does not affect the content of the easement. If the new owner of the encumbered or dominant property will seek to change the content of the easement, nothing will stand in the way of that, however, the change of subject itself does not entail a change in the content of the easement. The easement does not grant full rights to the encumbered real estate. Limitations in exercising the right of the praedial easement result from legal acts such as the PCC. Such restrictions may also arise from an agreement between the parties or rules of social coexistence taking into account local customs.

A usufruct is another limited right in rem, through which the right to land for the purpose of installing facilities may be obtained. This is the right by which one can obtain the right to use and to collect benefits. The exercise of usufruct can be limited to a part of the real estate, in which case the usufructuary may only use that part of the real estate indicated. In addition, the scope of usufruct can be limited by excluding designated benefits of the

real estate. The usufructuary may then only collect benefits of the real estate indicated by its owner. This is a non-transferable right and ends with the death/permanent cessation of trade of the usufructuary (natural person/legal person) at the latest. If it is established for a transmission undertaking, it should be considered whether the right of usufruct remains in the event of a change of undertaking or whether it expires and should be re-established.

In addition to the rights in rem, one can also enter into contractual agreements that give the right to use the land, for example by way of loan, lease or rental agreements (these agreements may of course concern movables as well as immovables). Here, depending on the chosen contract, the undertaking obtains the right to use the real estate or the right to use and to collect the benefits of the real estate. The lending agreement is a free of charge agreement, under which the lender undertakes to allow the recipient to use the thing given to him for this purpose free of charge. The contracts of rent and lease base on the fact that the entity (the undertaking) receives a thing for use and, in the case of lease, may additionally collect benefits of the thing. Both, the tenant and the lessee have to pay a rent.

The rights in personam arising from obligation agreements do not have as strong a nature as the rights in rem, also the changes of their parties may influence the existence of the right and its content. Because of the distinction between lease and tenancy rights and providing the essential role of the collection of benefits in the lease agreement, the application of this contract for the purpose of installing transmission facilities may be questionable. The transmission undertaking does not collect any benefits of the real estate. Therefore, the application of the lease agreement is somewhat distracted from the purpose of the undertaking, as he needs only to use the property, which excludes the collection of benefits. Undoubtedly, the rental agreement is an instrument that is more useful in achieving the objectives of the transmission undertaking, insofar that the payment of rent centres on use of the real estate.

The transmission undertaking may also obtain the right to install transmission facilities on property based on an administrative decision. As an example, the procedure provided by art. 124 of the PMA can be mentioned. The regulation introduces the possibility to limit the right to real estate in order to establish and run drainage lines, pipes, ducts, transmission towers and other equipment for the collection, and distribution of fluids, steam, gas, electricity and telecommunications, along with other public utility service infrastructures situated below the ground, on the ground or in the air space above the ground. The decision concerns the acquisition of suitable real estate in order to perform necessary activities on that real estate or to provide access for the operation and maintenance of such activities. Limitation of the use of the real estate by the entitled entity may be made *ex officio* or at the request of the entity interested in undertaking the investment on the real estate. This procedure may be applied only where it is aimed at achieving a public purpose and the purpose cannot be achieved in any way other than by limiting the use of the real estate. The owner of the real estate in this regard is entitled to compensation. In the opinion of Truskiewicz, a restriction of the right to real estate may consist in imposing an obligation on its owner to refrain from performing acts to which he is otherwise entitled by virtue of right, or to endure interference with his property, without establishing an easement or other limited right in rem (Truskiewicz, 1994).

### **Building permit and the right to land**

The right to specific use of the real estate is necessary when the transmission undertaking seeks to obtain a building permit (Judgment of the Provincial Administrative Court in Szczecinie of 25 October 2006, II SA/Sz 267/06, LEX No. 901621). He has to demonstrate that he has the right to the land, pursuant to art. 32 sec. 4 point 2 of the Construction Law (CL), and the right to dispose of the real estate for construction purposes. Art. 3 point 11 of the CL, stipulates that the rights to dispose of property for construction purposes may be legal titles

resulting from: ownership right, perpetual usufruct, management, limited right in rem or personal rights resulting from a contractual relationship providing for the right to perform construction works. The fact that a right held gives the right to dispose of the plot of land for construction purposes must result from the content of this right or the contract. A praedial easement does not give the right to develop encumbered real estate (Judgment of the Supreme Administrative Court of 11 May 2000, SA/Rz 2826/98, LEX No. 657594). Obligatory agreements that may give the right to dispose of property for construction purposes include lease and rent (Kuźma, 2014). The normal scope of a lease does not extend to granting the right to develop and therefore that right must be specified in the content of the agreement (Judgment of the Supreme Administrative Court of 4 September 2007, II OSK 1160/06, LEX nr 374725). The right to dispose of the real estate for construction purposes is not only the investor's legal title to own the real estate derived from the right in rem, but also the right to own the real estate derived from the obligation relationship. In such case, an obligation agreement (e.g. a loan agreement) gives the investor the right to dispose of someone else's property for construction purposes if the owner of the property has agreed to dispose of it for a specific construction purpose but only to the extent provided for in the agreement, i.e. the agreement concluded between the parties should clearly indicate what the owner of the real estate on which the investment is to be carried out agrees to (Judgment of the Provincial Administrative Court in Warszawa of 7 September 2017, VII SA/Wa 2267/16, Legalis.). It follows from the Construction Law (CL) that management also gives the possibility to build on the land<sup>5</sup>. While the legal title resulting from ownership, perpetual usufruct, management or limited right in rem is in principle sufficient grounds for considering that the right to dispose of property for construction purposes exists, in the case of the

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<sup>5</sup> This is permanent management within the meaning of the PMA. Judgment of the Supreme Administrative Court of 28 April 2006, II OSK 800/05, LEX.



title resulting from the obligation relationship, the CL clearly states that this title must ‘provide for the right to carry out construction work’ (Judgment of the Supreme Administrative Court of 19 October 2018, II OSK 2648/16, Legalis). The right to dispose of the real estate for construction purposes may result, among others, from a limited right in rem, which includes the transmission easement (art. 244 § 1 in connection with art. 305<sup>1</sup> of the PCC) (Judgment of the Supreme Administrative Court of 6 April 2017, II OSK 2004/15, Legalis). In addition, if the owner has given his consent to erect a structure on the land and this consent has been ‘availed of’ on the basis of the building permit, it must be considered that in a situation where the user of the building intends to renovate, say a gas installation inside the building, there is no interference with the property owner’s rights which would deplete those rights in relation to the depletion which the property owner consented to at the time the building permit decision was issued (Judgment of the Supreme Administrative Court of 24 May 2017, II OSK 2439/15, Legalis). Finally, the transmission undertaking is not required to declare that he has the right to dispose of plots of land along the entire route of say a power line for construction purposes (Judgment of the Provincial Administrative Court in Warszawa of 22 March 2017, VII SA/Wa 679/16, Legalis). It follows that the undertaking carries out works on the property to which it has the right of disposal for construction purposes (Judgment of the Provincial Administrative Court in Szczecin of 25 October 2006, II SA/Sz 267/06, LEX No. 901621). Disputes arising from the civil law relationship, which results in the right to dispose of the property for construction purposes, should be resolved by the civil court (Judgment of the Supreme Administrative Court of 12 December 2002, II SA/Gd 262/00, LEX No. 655063).

An undertaking seeking to obtain the right to real estate to install transmission facilities can ‘choose’ a right best suited to his needs. The issue of freedom can be seen in many contexts: the common good versus the common good, possibly sustainable

space management and the principle of sustainable development, see: A. Czarnecka, M. Woźniak, E. Dołęgowska, In this regard, transmission easement is a right dedicated to the installation of transmission facilities and seemingly it has been designed to speed up and streamline the process. There are also detailed laws created specifically for the needs of these investments. For example, in 2015, the Act on the Preparation and Implementation of Strategic Investments in Transmission Networks (APISITN) has entered into force. The APISITN enables the acquisition of the right to real estate to construct equipment as well as the right to enter the property. It shortens the procedure for the acquisition of the right to real estate and, consequently, the construction and erection of facilities thereon. The power transmission lines featured in the annex to the APISITN are important not only for Poland but also for the European Union. The APISITN has several purposes: a) limiting the number of permits needed to commence the investment (introduction of a comprehensive decision on determining the location of the investment in the transmission network, combining aspects of the location, division and expropriation decision), b) significantly shortening the duration of the procedures necessary to obtain the required decisions in order to ensure that the total length of proceedings does not exceed the assumed period of 3 years and 6 months, and c) concentrating the competence to issue the location decision and the construction permit in the hands of a single authority – the voivode from the area of the voivodeship in which the longest section of the investment is located (Parliament Print No. 3475). This act defines the procedure for purchasing properties for the construction of transmission networks. The locally relevant voivode issues a decision on determining the strategic location of the investment in transmission networks. This decision entails far-reaching consequences, both in the sphere of rights of property owners and undertakings such as: expropriation decisions, compensation and securing the right of perpetual usufruct of property by the undertaking.

## DISCUSSION

Projects related to transport or transmission infrastructure may be conducted on the lands covered by waters owned by the Treasury. The WLA indicates that land for this purpose is put into usufruct for an annual fee (art. 261 sec. 1 point 4). The condition for putting the land into usufruct is that the usufructuary has a water-law permit or a water-law notification, if required by the provisions of the WLA. Obtaining the water-law permit does not mean obtaining rights to real estate and water facilities and does not violate the ownership rights and rights of third parties to such property and facilities. The water law permit is needed in the case of: bridge structures, the laying of pipelines including protection ducts and/or culverts traversing surface waters and floodbanks, and similarly overhead power and telecommunication lines running through inland waterways and floodbanks (art. 389 point 9 and 10). The operation of erecting transmission towers stringing overhead power and telecommunication lines requires a water-law notification (Article 394 sec. 1 point 3). Figure 2 shows how power lines are typically erected on surface water. Figure 2 shows transmission towers on surface water supported on piled foundations.

The transmission undertaking who seeks to carry out the installation of transmission facilities obtains the right to usufruct the land on which the facilities are to be constructed. The right of usufruct gives the undertaking the right to use and collect benefits from the real estate. The provisions of the PCC regulating the usufruct should be applied to the right of usufruct provided by the WLA. The Provincial Administrative Court in Warsaw, in its decision of 31 August 2010, indicated that the legislator regulating the process of transferring water-covered land of the State Treasury for usufruct, provided for the operation of administrative bodies in the form of a bilateral legal action – a civil law agreement (Judgment of the Provincial Administrative Court in Warszawa of 2 December 2008, IV SA/Wa 1329/10, LEX No. 672738). Thus, the legislator left the determination of conditions of usufruct at the disposal



**Fig. 2.** Transmission towers on surface water supported on piled foundations

Source: <https://pixabay.com/photos/power-lines-power-electricity-bay-472248/> (11.03.2020).

of the parties to the agreement, regulating only certain requirements of its conclusion. The parties may freely shape the land usufruct agreement. The State Treasury then acts as a civil law entity and does not exercise authority over the entity with which it concludes the agreement.

The disadvantage of applying the right of usufruct to the transmission undertaking is that the right is not transferable. Changes concerning the undertaking may result in loss of the right. The same may happen in the case of withdrawal or amendment of a water-law permit, in cases where obtaining the right of usufruct is combined with the acquisition

of such permit. Here, if the prior issue of the permit was a precondition for concluding a contract of usufruct, it is quite reasonable to expect that its loss may result in expiry or termination of the contract. Indeed art. 261 sec. 7 of the WLA, provides that: an agreement of usufruct may be terminated at any time by each of the parties in the case of withdrawal, expiry or limitation of the water-law permit, if this limitation concerned the subject of usufruct, as well as in the case of termination of the activity covered by the water-law notification.

An annual fee shall be charged for usufruct. This fee is calculated in accordance with the Regulation of the Council of Ministers of 28 December 2017 on the amount of unit rates of the annual fee for the usufruct of the lands covered by water. The regulation defines unit rates for the usufruct of one square meter of land. In the case of transmission infrastructures intended for: water or sewage disposal facilities, pipelines, power cables and foundations of other facilities run by water – it is PLN 8.90 (ca. 2 Euro) (§ 2 sec. 1 point 6 a). Therefore, it should be assumed that the agreement must specify what area of land the transmission entrepreneur will need for this kind of activity. In the light of the judgment of the Supreme Court of 25 October 2012, the water law is the *lex specialis* to civil law and provides for an exception to the principle of *superficies solo cedit* (Judgement of Supreme Court of 25 October 2012, I CSK 145/12, Legalis) in relation to certain water facilities erected on land covered by flowing water. Consequently, it can be assumed that the WLA not only regulates property rights to the water facilities specified therein differently from the civil law but also, due to the dominance of public interest, the regulation is exhaustive. This means that a party renounces the right of perpetual usufruct only in relation to renunciation of the perpetual usufruct of land, not in relation to the facility built on it and rising above water level. This is because it remains the property of the party until it is disposed of in the manner specified in art. 139 of the WLA.

In connection with such character of water law provisions, a number of doubts arise in the sphere of establishing transmission facilities. While the

possibility of installing them on lands covered with flowing surface water does not raise doubts, the WLA directly addresses this issue, the existence of a procedure clearly defined by the WLA seems to exclude the application of the PCC provisions on transmission easement. In such a situation, the installment of devices on land covered with water will be connected with passing a specific water law procedure and the conclusion of a usufruct contract, which, even in the sphere of benefitting, is not a perfect tool in this case. Moreover, it should explicitly provide for the right of the usufructuary to erect, build, or install certain facilities. While it is not possible to contractually extend the scope of usufruct, i.e. to go beyond the right to use and collect benefits (Książak, 2019), nothing stands in the way of the parties to agree on the use of the land in such a way that the transmission facilities will be located on it. The usufructuary's rights will then be broader than those under the PCC's transmission easement regulation, as he will also be entitled to the benefits (although the parties may agree that the usufructuary will be of no benefit at all).

The two constructions of transmission easement and usufruct, are different from each other, although they both refer to the use of someone else's thing to a certain extent. The transmission easement refers to the whole property and as such it may be entered as a property encumbrance in the land and mortgage register. The usufruct may be limited to the part of the property and the fee depends on the area of land used by the usufructuary to install the transmission facilities.

Also the following terms do not match: the PCC's land property and the WLA's land covered by water, by which is meant land forming the beds and shores of natural watercourses, lakes and other natural water reservoirs within the shoreline, as well as land forming part of artificial water reservoirs, water steps and back-up lakes, being land covered with surface water prior to the construction of a dam facility (art. 16 sec. 16). Therefore, it is not entirely clear whether the land covered by water is at the same time the land property and vice versa.

## CONCLUSIONS

Lands covered by flowing surface water may be encumbered by third party rights. This is regulated in the WLA, where it is also indicated that usufruct may be established for the purpose of installing transmission facilities. The usufruct is a limited right in rem giving the right to use and collect benefits from the property. The parties conclude an agreement in which they have to determine the scope of the usufruct of the land, the manner of its use and the fee rate. Usufruct as a limited right in rem encumbers the entire property, while the transmission undertaking does not require to use the entire property, so that part of the property that is used in exercise of this right has to be determined (or the parties to the contract may limit the use to a particular part of the land). An annual fee is payable for this right, its sum dependent on the actual area of land used. The usufruct may be limited to the collection of only some of the property's benefits or it may be waived in total. The usufruct is an inalienable right, so that in the event of changes within the transmission undertaking, the contract may have to be renewed. The application of the right of usufruct to lands covered by water for the purpose of the installment of transmission facilities seems inappropriate, which is supported by the following arguments:

Establishment of a legal institution dedicated to the installation of transmission facilities on property, i.e. transmission easement.

Inalienable nature of the usufruct.

The collection of benefits as a user's right, while it is impossible to indicate what benefits the transmission undertaking could collect in connection with the use of the land.

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