

Legislative Developments in Rail Transport in 2010

by

Katarzyna Bożekowska-Zawisza*

I. Introduction

Polish rail transport law did not overcome such important amendments in 2010 as in 2009. There was a lengthy amendment act transposing several directives supposed to be enacted in 2010, which is unfortunately still proceeded by the Polish Parliament. The act transposes Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on the interoperability of the rail system within the Community¹, Commission Directive 2009/131/EC of 16 October 2009 amending Annex VII to Directive 2008/57/EC of the European Parliament and of the Council on the interoperability of the rail system within the Community² and Directive 2008/110/EC of the European Parliament and of the Council of 16 December 2008 amending Directive 2004/49/EC on safety on the Community's railways³. This draft mainly concerns the interoperability of the Polish trans-European rail system with the Community trans-European rail system which has to be ensured while constructing and operating the parts of this system. It also particularizes the competences of the President of the Rail Transport Office (in Polish: *Urząd Transportu Kolejowego*; hereafter, UTK) in this area. This act is supposed to be enacted by September 2010 and to enter into force at the end of the year.

* Katarzyna Bożekowska-Zawisza, Senior Legal Expert at the European Union Law Department of the Ministry of Foreign Affairs. The views expressed are those of the author and do not represent the views, and should not be attributed to the Ministry of Foreign Affairs.

¹ OJ [2007] L 315/44.

² OJ [2009] L 273/12.

³ OJ [2008] L 345/62.

In the course of the year 2010 one of the most popular subjects in the area of Polish rail transport law was the case C-512/10 referred by the European Commission, which is pending before the Court of Justice in Luxembourg. In this case the Commission alleges that Poland has failed to meet the obligations imposed on it pursuant to the provisions of the first railway package, namely of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways⁴ and of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification⁵. The case is one of many court proceedings initiated by the European Commission against EU Member States concerning wrong implementation of the first railway package⁶. Firstly, the Commission alleges that Poland introduced no mechanisms to ensure the decision-making and organisational independence of the infrastructure manager, namely PKP PLK S.A., from the holding concern – from the dominant company PKP S.A. and from other subsidiaries that operate as rail carriers. Secondly, according to the Commission, Poland did not take necessary measures aiming at financial equilibrium of the infrastructure manager within an appropriate period of time. Thirdly, in the Commission's view, Poland did not provide for the incentives which would encourage the infrastructure manager to reduce the costs of provision of infrastructure and the level of access charges (such mechanisms are required under Article 6(2) and 6(3) of Directive 2001/14/EC). The fourth allegation is that Poland did not adopt the measures necessary to ensure that charges for minimal access to railway infrastructure are set at the cost that is directly incurred as a result of operating the train service (what is required by Article 7(3) of Directive 2001/14/EC). Moreover, the Commission alleges that Poland did not introduce any control mechanism that would enable an examination whether various market segments are in a position to bear the increased expenditure for access to and use of the railway infrastructure and thus did not fulfil Article 8(1) of Directive 2001/14/EC.

⁴ OJ [1991] L 237/25. OJ Social edition in Polish, Chapter 7, Vol. 1, p. 341.

⁵ OJ [2001] L 75/29.

⁶ Similar cases were referred by the Commission against: France (C-625/10), Slovenia (C-627/10), Czech Republic (C-545/10), Germany (C-556/10), Portugal (557/10), Greece (C-528/10), Austria (C-555/10), Hungary (C-473/10), Spain (C-483/10).

II. The Act on Public Collective Transport

No major amendment of the Act on Rail Transport (in Polish: *Prawo Kolejowe*, PK) was enacted in Poland in 2010. However, the Act of 16 December 2010 on Public Collective Transport⁷ made some significant changes into the Act on Rail Transport.

The Act on Public Collective Transport did introduce a common system for organisation of various modes of public collective transport. Most provisions of the act have a character of horizontal rules which are applied in several modes of transport. The act concerns public passenger transport services by rail, by road, by sea and also by inland waterways. Article 2 of the Act on Public Collective Transport excludes from the scope of its application regular passenger carriages operated for tourist aims and operated in the frames of international transport by road, sea and inland waterways. The act concerns among others the scope of Regulation (EC) No. 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70⁸. Article 3 of the act guarantees that its provisions are applied without prejudice to the Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations⁹.

One of the most controversial questions that came up during the works on the draft of the Act on Public Collective Transport was the possibility to grant exclusive rights in return for the discharge of public service obligations which could serve as an instrument to compensate the operators providing public service on 'economically unattractive' routes. The use of such a possibility – that is expressly allowed by the Regulation 1370/2007 [e.g. its Art. 1(1)] – was strongly opposed by the Polish Office of Competition and Consumer Protection. Finally, Art. 20 of the Act on Public Collective Transport excludes this possibility.

The changes of the Act on Rail Transport introduced by the Act on Public Collective Transport concern the organisation of public rail transport and access to the infrastructure. The act introduced the notion of the public rail transport organiser. The organiser is either a unit of local government or the Minister of Transport. The organiser is responsible for planning the development of transport, organising and managing public collective transport. These duties of the rail transport organiser are characterised in the Act on

⁷ Journal of Laws 2011 No. 5, item 13.

⁸ OJ [2007] L 315/1.

⁹ OJ [2007] L 315/14.

Public Collective Transport because they also concern the organisers of public transport of different modes. One of the organiser's tasks, if it is required according to Art. 9(1) of the Act on Public Collective Transport, is to prepare the plan of well-balanced public transport development. With a view to prepare this plan the organiser may ask the infrastructure manager to pass all the necessary information, including the plans of renovations and investments in the infrastructure. The transport plan determines also the range, in which the organiser may conclude with an operator the agreement on providing public services.

The Act on Public Collective Transport defined what is an occasional passenger rail transport. Occasional rail transport is exercised on a railway line within the limits of its free capacity. An interested entity has to file the motion for exercise of such transport is at least 7 days before the planned date of carriage. If the line disposes of free capacity, the infrastructure manager allows the motion and the conditions of exercising the carriage are specified in the agreement on access to the rail infrastructure.

The Act on Public Collective Transport introduced also a new form of decision on access to railway infrastructure, namely the decision on open access. According to the provisions on open access the rail passenger transport which does not have a character of public utility transport may be exercised by a railway operator on the basis of open access decisions. The decision is issued for a concrete route on the motion of the operator. Its issuance is preceded by the analysis of the effects that would be exerted by the activity specified in the motion on the economic conditions of the services which are provided on the same line on the basis of an agreement on providing public services. The decision is issued for a maximum period of 5 years and is reversed by the UTK President when the conditions specified in the decision were manifestly infringed and when the operator - for the reasons caused by himself - discontinued the exercise of transport for at least 6 months. The questions of occasional rail transport and the issuance of the decisions on open access were placed under the competence of the UTK President.

According to the amended Act on Rail Transport the agreement on access to the rail infrastructure with the aim to exercise passenger transport may be concluded on three basis: earlier conclusion of the agreement on providing public services, issuance of the decision on open access or allowance of the motion for occasional passenger transport. Moreover, in the area of passenger rail carriages the infrastructure manager is obliged to maintain the parameters of the line and the time of trains passage, such as they were specified in the data handed over to the organisers of public rail transport, as long as the agreement on access to the rail infrastructure or the framework agreement is in force. The train routes in passenger rail transport are planned in the

timetable by the infrastructure manager in line with concluded agreements on providing public services and issued decisions on open access.

Articles 39-40a PK which concerned among others the state subsidies compensating the operator's losses resulting from the fare reductions specified in national law were repealed by the Act on Public Collective Transport. This is caused by the fact that such subsidies are now commonly regulated in the Act on Public Collective Transport in order to unify the rules for various transport modes and make them compatible with the Regulation (EC) No. 1370/2007.

The changes of the Act on Rail Transport introduced by the Act on Public Collective Transport enter into force on 1 March 2011. On 8th June 2011 Minister of Infrastructure issued Regulation on the documents and information which has to be enclosed to the motion for the decision on open access and on the level of charge for its issuance.

III. The Act on Commercialization, Restructuring and Privatization of a State Company 'Polish State Railways'

Other important drafts concerning railway market enacted in 2010 result from two amendment acts: the Act of 20 May 2010 amending the Act on Rail Fund and the Act on Commercialization, Restructuring and Privatization of a State Company 'Polish State Railways'¹⁰ and the Act of 29 October 2010 amending the Act on Commercialization, Restructuring and Privatization of a State Company 'Polish State Railways' and some other acts¹¹.

The last of those acts created a possibility for the PKP S.A. to transfer the property or the perpetual usufruct of an estate together with the buildings of railway stations situated on those estate. Such transaction takes effect on a motion of the unit of local self-government and has to be pre-approved by the Minister of Transport. The unit of local government has to declare in its motion that in a given period it will rebuild or renovate the railway station and that it will conclude agreements to enable the companies, which are active in the domain of passenger carriages, to serve the passengers, e.g. to use ticket-offices, car parks, waiting rooms and the rooms for the equipment used to conduct rail traffic. The agreement between PKP S.A. and local government unit specifies the deadline and conditions of renovation (or rebuilding) of the station together with the terms of liability for failure to carry out such a renovation. Such transactions result in the extinction of the obligation that

¹⁰ Journal of Laws 2010 No. 108, item 686.

¹¹ Journal of Laws 2010 No. 247, item 1651.

PKP S.A. has towards local government units due to real estate tax in the sum not higher than the market value of the property or the perpetual usufruct (if they would extinct above this sum it could have been questionable from the point of view of EU state aid rules).

The amendment act introduced also some possibilities to pay off the debts of PKP S.A. versus the state resulting from the corporate income tax or value added tax. It will be possible by the way of transferring the property of shares of PLK S.A. According to new Article 24d of the Act on Commercialization, Restructuring and Privatization of a State Company 'Polish State Railways' the shares of the face value corresponding to the obligations of PKP S.A. are acquired by the State Treasure (represented by the Minister of Infrastructure). Transfer of shares takes effect through conclusion of a written agreement.

According to added Art. 33ba of the Act on Commercialization, Restructuring and Privatization of a State Company 'Polish State Railways' also the claims of the State Treasure versus PKP S.A. due to the accomplishment of the agreements of guarantee will be exchanged into the shares of PLK S.A. It concerns the sums of payments made by the State Treasure as the accomplishment of guarantee agreements. The rights resulting from the shares acquired by the State Treasure will be exercised by the Minister of Infrastructure.

The Act of 20 May 2010 amending the Act on Rail Fund and the Act on Commercialization, Restructuring and Privatization of a State Company 'Polish State Railways' added Art. 3(3a) to the Act on Rail Fund, which allows to use the resources allocated in the Rail Fund to finance the acquisition of the shares of PLK S.A. by the State Treasure. Article 3(3c) of the Act on Rail Fund clarifies that after such acquisition the rights and obligations resulting from such shares are exercised by the Minister of Infrastructure.

New Article 3a of the Act on Rail Fund dedicates 150 millions PLN from the Fund to co-finance the organization of regional rail passenger carriages by the voivodeships. New Article 39a of the Act on Commercialization, Restructuring and Privatization of a State Company 'Polish State Railways' obliged PKP S.A. to contribute to PKP PR – as a non-monetary contribution – real estates that are necessary to exercise activity in the domain of rail passenger carriages. The maximum netto value of these assets was fixed for 300 millions PLN. According to Art. 39a(2) of this act, in exchange for those assets, PKP S.A. acquires the shares in the initial capital of PKP PR and these shares are acquired by the State Treasure. The acquisition by the State Treasure (represented by the Ministry of Infrastructure) is financed from the Rail Fund. Afterwards, the State transfers those shares to the local government units.

IV. Executive acts

Also in the domain of regulations of the Ministry of Infrastructure concerning railway transport there was not as much new as in 2009. There were two new regulations issued. One of them was a brief Regulation of the Minister of Infrastructure of 22 December 2010 on the companies created by PKP S.A., whose shares will be used to secure the claims of the State Treasury resulting from guarantees¹².

Second was the Regulation of 20 July 2010 on Common Safety Indicators which implements Commission Directive 2009/149/EC of 27 November 2009 amending Directive 2004/49/EC of the European Parliament and of the Council as regards Common Safety Indicators and common methods to calculate accident costs¹³. Common Safety Indicators specified in the regulation are collected from the railway operators and infrastructure managers and inserted in the annual safety report prepared by the UTK President. The safety indicators are statistical data concerning basic activities of rail transport, railway accidents and the precursors of accidents, suicides, dangerous goods, the economic impact of accidents, technical safety of infrastructure, management of safety. The regulation replaced Regulation of the Minister of Infrastructure of 18 August on Common Safety Indicators¹⁴.

* * *

In 2011 Polish Ministry of Infrastructure is continuing its works, some of which were initiated in previous years, on various amendment drafts concerning among others interoperability of the rail system, absorption of EU financing for investments in railways, organization of rail transport and better protection of passenger rights, state aid for railways, restructuring of PKP holding, system of certification of train drivers. One of the shortest but very important amendment acts proceeded in the Parliament seeks to guarantee more independence of the personnel (including the managers) of the infrastructure manager from the personnel of PKP S.A. and railway operators. We will see how many of those drafts will be enacted before the elections that will take place in autumn 2011.

¹² Journal of Laws 2010, No. 258, item 1757.

¹³ OJ [2009] L 313/65.

¹⁴ Journal of Laws 2009 No. 142, item 1159.