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RAILWAY TRANSPORT UNDER POLISH LAW

Abstract

The article presents an outline of the law governing railway transport in comparison with the regulations for road transport. The comparison shows that railway entrepreneurs are much more encumbered with legal obligations than road carriers, which in part is due to the specificity of this branch of transport. The essential constraints to the competitiveness of railway transport relate to the cost of access to railway infrastructure and its condition. The article also points out the faulty legislation, disadvantageous to both modes of transport, and attempts to determine the impact of legal solutions for the development of rail transport.

Keywords: railway transport, railway infrastructure, carrier, carriage, forwarding, passenger

Introduction

The aim of the present paper is to provide a description of the legislative environment of railway transport in Poland and to attempt to assess the impact of the said environment on the development of railway transport. Although the main focus of the paper is railway transport, for the purpose of comparison it also considers road transport, given the competition between them.

In the first part of the article there's a description of the law regulating transport in Poland. The following parts cover the comparisons of administrative provisions for railway infrastructure and for road infrastructure, for railway carriers and for road carriers, and also presentation of the civil law concerning transport. Second to the last part concerns rules for passenger transport services. In the last part of the article there are conclusions.

The article is mainly addressed to those who are involved in management, organization, legal assistance, legislation and study of railway transport.

1. Legal System

Railway and road transport fall within the sphere of a common transport policy of the European Union, pursuant to Articles 90 and 100 (1) of the Treaty on the Functioning of the European Union (consolidated text: Official Journal of the European Union, C 326/01, 26 October 2012). Each of these branches of transport is regulated by a large number of Community legal acts, national legal acts, and international conventions (not including local and ministerial legislation). This amounts to over a hundred acts for each mode of transport, with some of these acts – civil law regulations of national transport and regulations regarding public collective transport in particular – governing both modes of transport.

To describe the system of law of transport by road and rail, it is necessary to provide a list of the key acts. Among the regulations of the most practical significance for both modes of transport we can list:

- 1) Act of 15 November 1984 – Transport Law (consolidated text: Dz. U. [Journal of Laws] 2015, item 915, as amended);
- 2) The Civil Code (consolidated text: Dz. U. [Journal of Laws] 2017, item 459);
- 3) 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 1107/70 (Official Journal of the European Union, L 315/1, 03 December 2007) as amended by the Fourth Railway Package in Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail (Official Journal of the European Union, L 354/22, 23 December 2016);
- 4) Act of 16 December 2010 on Public Collective Transport (consolidated text: Dz. U. [Journal of Laws] 2016, item 1867).

The most important regulations exclusively on railway transport include:

- 1) Act of 28 March 2003 on Railway Transport (consolidated text: Dz. U. [Journal of Laws] 2016, item 1727, as amended);
- 2) Act of 8 September 2000 on Commercialization and Restructuring of the State Enterprise “Polskie Koleje Państwowe” (consolidated text: Dz. U. [Journal of Laws] 2017, item 680);
- 3) Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers’ rights and obligations (Official Journal of the European Union, L 315/14, 03 December 2007).
- 4) Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as modified by the Protocol for the modification of the Convention concerning International Carriage by Rail of 3 June 1999 (consolidated text: Dz. U. [Journal of Laws] 2007, No 100, item 674).

The most important regulations exclusively on road transport include:

- 1) Act of 6 September 2001 on Road Transport (consolidated text: Dz. U. [Journal of Laws] 2016, item 1907, as amended);

- 2) Act of 21 March 1985 on Public Roads (consolidated text: Dz. U. [Journal of Laws] 2016, item 1440, as amended);
- 3) Act of 27 October 1994 on Toll Motorways and the National Road Fund (consolidated text: Dz. U. [Journal of Laws] 2015, item 641, as amended);
- 4) Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (Official Journal of the European Union, L 55/1, 28 February 2011);
- 5) Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC (Official Journal of the European Union, L 300/51, 14 November 2009);
- 6) Convention on the Contract for the International Carriage of Goods by Road (CMR) (1978 – Geneva, 19 May 1956 as amended by Protocol to the CMR, Geneva, 5 July, 1978 (Dz. U. [Journal of Laws] 1962 No 49, item 1727).

The number of legal acts governing each of the two modes of transport is similar, as is the frequency of their amendments. For example, since the day of Poland's accession to the European Union, i.e., 1 May 2004, the Act on Railway Transport has been amended 62 times (not counting the amendments that have come into force since 1 May 2004). Since 1 May 2004, the Act on Road Transport has been amended 72 times. The Act on Public Roads has been amended 48 times in this time period.

It should nevertheless be noted that the purpose of the amendments made regarding railway transport is to support the realization of a deep reform introduced in the European Union by the so-called railway packages. Their aim is to establish a single railway area characterized by compatible technical solutions and safety requirements (interoperability) that would ensure freedom of economic activity and fair competition (Świątecki, 2013, pp. 49–51).

The main Community Directives concerning rail transport are following:

- 1) Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast) (Official Journal of the European Union, L 343/32, 14 December 2012);
- 2) 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 Community (Recast) (Official Journal of the European Union, L 191/1, 18 July 2008);
- 3) Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Official Journal of the European Union, L 164/44, 30 April 2004).

Described above directives were transposed into Polish law by Act on Railway Transport.

Directives and Regulation of the fourth railway package are waiting for entry into force:

- 1 January 2019 Amendment for Directive 2012/34/EU by Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure (Official Journal of the European Union, L 352/1, 23 December 2016);
- 24 December 2017 Amendment for Regulation (EC) No 1370/2007 by Regulation of the European Parliament and of the Council (UE) 2016/2338 of 14 December 2016 (Official Journal of the European Union, L 354/ 22, 23 December 2016);
- 16 June 2020 – Directives 2008/57/EC and 2004/49/EC will be replaced by Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system in the European Union European Union (Official Journal of the European Union, L 138/44, 25 May 2016) and by Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety (Official Journal of the European Union, L 138/102, 25 May 2016).

2. Rail and Road Transport Infrastructure

The key legal issues relating to transport infrastructures are associated with the management of the infrastructure and infrastructure charges.

A common feature of road and railway infrastructure regulations has become a separation of infrastructure management and transport services. While such an arrangement was natural for road transport, for rail transport it is a consequence of the reform in Community legislation carried out as part of subsequent railway packages.

In Polish law, the differences in road and railway infrastructure management are fundamental. The task of building and managing public roads lies, depending on the category of a road, within the competence of the government or local authorities (Article 19 of the Act on Public Roads). The use of roads is, generally speaking, free of charge, with the exception of motorways, pursuant to the Act of 27 October 1994 on Toll Motorways and the National Road Fund and with the exception of electronic toll collection system, pursuant to Articles 13 *ha et seq.* of the Act on Public Roads (via TOLL).

The situation of railway transport is much more complicated. Railway infrastructure is managed by commercial companies. In Poland, there is one main manager of national railway infrastructure (PKP Polskie Linie Kolejowe S.A.) and several smaller ones. However, a significant part of railway infrastructure – the traditional energy supply system – is administered by an entity independent from PKP PLK S.A.

Now that the Act on Railway Transport has been amended by the Act of 16 November 2016 Amending the Act on Railway Transport and Some Other Acts (Dz. U. [Journal of Laws] 2016, item 1923), the number of infrastructure managers of publicly available railway infrastructure is going to increase due to the fact that some railway sidings are going to be converted into railway lines, and others are most likely going to become part of the publicly accessible railway infrastructure.

As a rule, there are partial non-cost-recovery charges for the use of railway infrastructure. In the remaining scope, maintenance, construction, expansion, and renovation costs should be covered from public funds transferred on the basis of relevant agreements. This significantly complicates the financing of railway infrastructure, i.a. due to the risk of violating the principles of authorized state aid, especially in the case of smaller managers. A difficulty is also pointed out in reconciling the mission of PKP PLK S.A., which is to ensure the functioning of railway infrastructure of social and economic significance, with the commercial principles of entrepreneurial operations (Lesiak, 2013, pp. 104–110).

The problem which, despite the passage of time, has still not been definitively solved, is the regulation of the legal status of the land beneath the railway tracks. The land beneath the roads, on the other hand, is, depending on the category of a road, the property of either the State Treasury or a local governmental unit (Article 2a of the Act on Public Roads). In the case of railway, labour-intensive and time-consuming “enfranchisement” procedures have been implemented. The slow progress in the regulation of the legal status of the land made it necessary to implement special legal solutions which move away from the *superficies solo cedit* principle and were supposed to transfer the ownership of railway tracks without transferring the ownership of the land (Article 17, Section 5 of the Act on Commercialization and Restructuring of the State Enterprise “Polskie Koleje Państwowe”)¹. What is worse, as a result of errors made in the provisions on communalization, part of the land beneath railway tracks passed to the ownership of *gminy* [communes]².

It should be noted that a railway infrastructure manager is obliged to adjust to the interoperability requirements and to apply security principles much more elaborate than public roads managers.

It has been pointed out that the cost of accessing railway infrastructure is generally higher than the cost of accessing road infrastructure and that railway infrastructure is in bad condition, which translates into low average speed of freight trains. This significantly decreases the interbranch competitiveness of railway transport relative to road transport (Stawiński, 2016).

3. Carriers

There are significant differences between providing railway transport services and road transport services.

Apart from a licence, a railway carrier must have a safety certificate, pursuant to Articles 17e and 18b of the Act on Railway Transport. A safety certificate is a document confirming that the carrier has a safety management system approved by the President of the Office of Rail Transport and is capable of meeting the safety requirements (Article 4, Point 18a of the Act on Railway Transport).

In order to be able to pursue their occupation, road carriers are also obliged to meet certain requirements pursuant to Articles 5, 5a and 5b, 7a *et seq.*, as well

¹ Explanatory memorandum on a draft, p. 24 – Paper 908 of 4th-term Sejm.

² Cf. Resolution of Supreme Administrative Court, 7 judges, 27 February 2017, I OPS 2/16.

as Article 37 *et seq.* of the Act on Road Transport and Articles 3–8 of the Regulation (EC) No 1071/2009. They are, however, incomparably less burdensome than those imposed on railway carriers.

According to the list published by the Office of Rail Transport on its website (www 1) as of 28 February 2017, 118 rail transport licences have been issued in Poland, including 39 to perform passenger transport. According to the report published by the Main Inspectorate of Road Transport on its website (www 2) as of 31 December 2016, with regard to international road transport alone, 33.136 entrepreneurs have been issued a freight transport licence and 3.156 entrepreneurs have been issued a passenger transport licence. These data therefore indicate that the operations of railway carriers and road carriers are incomparable. The occupation of a railway carrier is much more resource-intensive, requires technical facilities, higher-qualified employees, and a more developed organization; it is also far more complicated, especially in terms of access to infrastructure (Articles 29 *et seq.* of the Act on Railway Transport), staff training (Articles 18d and 22 of the Act on Railway Transport), and meeting the requirements related to rolling stock maintenance (Articles 20 and 20a of the Act on Railway Transport) and safety.

At the end of this section one should mention the railway service facility, which are used to supply the services referred to in point 2 of Annex 2 to the Act on Railway Transport. Even if the owner of such a facility is a rail carrier, he has an obligation to share it with other carriers and to separate in its own structure operator of service facility. The source of this obligations is Directive 2012/34/EU. Similar obligations do not have the road carriers.

4. Civil Law Regulations

Pursuant to the provisions of Article 775 of the Civil Code on carriage contracts and the provisions of Article 795 of the Civil Code on forwarding contracts, the provisions of their respective titles shall apply only insofar as they are not governed by separate provisions. Until the end of the 1980s, regulations were based on the orders issued by the competent minister in charge of transport which specified the rights and obligations of the parties in fair detail.

In terms of forwarding, the regulation contained in the Civil Code, which was supposed to perform merely an ancillary function, is currently the only one in force. Such a situation is conducive to exposing the imperfections of the said regulation, of which one of the most grave is the difficulty in distinguishing a forwarding contract from a carriage contract, especially when dealing with a so-called contracting carrier. Considering the radically limited burden of responsibility of a forwarder in comparison to a carrier, it constitutes an incentive for most carriers to apply a forwarding contract instead of a carriage contract at the expense of customers and *bona fide* competitors (Ogiegło, 2011, p. 908).

Carriage contracts and forwarding contracts are often distance contracts, entered into electronically, and establish only the most important provisions. As a result, there is a lack of detailed regulation. The Polish Chamber of Forwarding and Logistics

undertook to fill this gap by publishing Polish General Forwarding Rules; however, even regardless of their shortcomings, they cannot replace a legal act.

A peculiarity of transport law are periods of limitation. In civil law, as a rule, a limitations period, pursuant to Article 120, Section 1 of the Civil Code, is calculated from the date on which the claim became due, and for claims connected with conducting business activity, pursuant to Article 118 of the Civil Code, it is three years.

The provisions of Articles 77 and 78 of the Transport Law Act provide three limitations periods: two months, six months, and one year, with six different starting dates for the last one. The two-month limitations period is the shortest limitations period known to Polish law. For the six-month limitations period, applicable to claims of a carrier against other carriers who participated in the transport of a consignment, two different starting dates have been provided, and the claim may become time-barred before it becomes due.

This issue is regulated differently by Articles 32 and 39 of the CMR Convention, which provide two limitations periods: one year and three years, with three different starting dates.

Different still are the limitations periods specified by the COTIF Convention. Limitations periods regarding passenger transport established in this convention are also applicable to domestic transport services, pursuant to Article 11 of the Regulation (WE) 1371/2007. They run for either one, two, three, or five years, with three different starting dates for one-year and two-year limitations periods.

Separate limitations periods are provided by the provisions of Articles 803 and 804 of the Civil Code for claims under a forwarding contract. These limitations periods run either for a year or for six months, with several different starting dates.

The complicated legal status creates a risk for both carriers and their customers. It is difficult to find a justification for such short and differing limitations periods and for so many different starting dates (Szancilo, 2015, p 12).

5. Passenger Transport

For years now the application of the Regulation (EC) No 1370/2007 of the European Parliament and of the Council as well as the Act on Public Collective Transport, which supports its implementation in domestic legislation, has been of major significance for the legal issues of railway passenger transport. This Regulation lays down the so-called competition mechanisms (Jarecki, 2013, pp. 38–44). While introducing a general requirement of awarding contracts in tendering procedures, it also allows for a number of exceptions.

Less than seven years since the Regulation (WE) No 1370/2007 came into force, a far-reaching amendment of this Regulation has been made, as part of the fourth railway package, by the Regulation (UE) 2016/2338, with the aim of gradually limiting the permitted exceptions to tendering procedure.

These changes are intended to increase competition between passenger carriers having regard to British solutions. However, the study of the European Commission

Directorate General for Mobility and Transport “Study on the price and quality of railway passenger services” (www 3) shows that ticket prices in the UK are among the highest in Europe (point 3.7 of the Study). From 2004 onwards, these prices have increased by over 60% (point 2.22 of the Study). The relation between cost of travel by rail and cost of travel by car or coach in the UK is the worst in Europe (points 5.4–5.5, 5.16–5.18 of the Study). Punctuality of local and regional trains in the UK is lower than in Poland, while higher of long-distance trains (point 7.28 of the Study). According to Network Rail Monitor, 20 July 2017 published by Office of Rail and Road on its website (www 4), punctuality of trains in the UK from the beginning of 2012 to the end of 2016 has worsened by 4.9% (point 3.1).

Moreover, Article 5a of the amended Regulation contains recommendations for organizers with regard to ensuring access to rolling stock for the operators participating in a tendering procedure. The proposed solution, which consist in acquiring the rolling stock by the organizer, gives rise to doubts, as it is discriminatory towards carriers who provide their own rolling stock and overlooks the fact that rolling stock is an element of the carrier’s competitive strategy (Jarecki, 2013, p. 79). A guarantee to procure the rolling stock for one of the tenderers introduces an inequality to the conditions of tendering.

One could think, that these measures are aimed at strengthening the competitiveness of small railway companies by eliminating the barrier to entering the market created by the lack of rolling stock. However, as has been indicated above, railways carriers, unlike road carriers, must have extensive structures at their disposal. The reason is that railway is a very complicated system – and its very complexity constitutes a major barrier to entering the market for small enterprises. It is therefore doubtful that increased accessibility to rolling stock would eliminate the barriers to entering the market for small enterprises.

It can, however, intensify the competition between carriers that have previously been operating in other areas. For such enterprises, facilitated access to rolling stock minimizes the risk connected with engaging into new transport undertakings. Thus, paradoxically, it may turn out that facilitating access to rolling stock will favour the expansion of large carriers. For such expansion the opening of the market for domestic passenger transport services by rail accordingly to Directive (EU) 2016/2370 will be helpful. The Regulation (WE) 1371/2007 introduced elaborate rail passengers’ rights protection rules. Among others, passengers are entitled to compensation for train delays, which amounts to 25% of the ticket price in the case of 60- to 119-minute delay and 50% of the ticket price in the case of a delay of 120 minutes or more (Article 17 (1) of the Regulation). It should be emphasized that the carrier is obliged to carry out transportation and to pay compensation.

Under the Regulation (EU) No 181/2011 on rights and obligations of passengers in bus and coach transport, which was issued several years later, passenger rights are less protected. For instance, it does not provide for any compensation for delay.

The above-described differences in passenger rights protection confer an advantage on road carriers.

With regard to the issue of passenger transport we can also note the problem of repeated fare evasion. It is a problem which both modes of transport share.

Although railway carriers and road carriers should be protected from repeated fare evasion under the provisions of Article 121, Section 1 of the Code of Petty Offences (consolidated text: Dz. U. [Journal of Laws] 2015, item 1094), due to faulty construction it does not fulfil its function (Krajewski, 2015, p. 36).

Conclusions

Generally speaking, transport legislation is significantly dominated by provisions of Community law. In the remaining scope it is a rather chaotic conglomerate of solutions from different time periods. In certain areas it is overregulated, while in other it remains underregulated. It undergoes frequent amendments. It requires reorganization.

In particular, with regard to civil law regulations, the simplest solution would be to model the provisions of Polish law after the international conventions in force, considering that it would be difficult to change the conventions. The provisions of the CMR Convention should be applied to road transport, and the provisions of COTIF Convention should be applied to railway transport. Moreover, the provisions on forwarding contracts should be better specified.

Increasing the interbranch competitiveness of railway transport requires improving the condition of railway infrastructure and establishing such access charges to the said infrastructure so as not to discriminate railway carriers. The question of whether it is possible to achieve this goal without reorganizing the national railway infrastructure management, however, raises some doubts. The legal discrimination of rail carriers should also be eliminated, for example the obligation to pay compensation to passengers, resulting from the article 17 of Regulation (EC) 1371/2007, which has no equivalent in road transport.

With regard to railway passenger transport, it is recommended to analyse the influence of the fourth railway package on railway passenger carriers in the longer run and to make preparations to cope with competition, which is most likely going to increase in the future. However, it does not mean that the competitiveness of rail transport compared to road transport will be increased.

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