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Legislative Developments in Rail Transport in 2008

by

Katarzyna Zawisza*

The Act of 28 March 2003 on Rail Transport[1] was amended three times in 2008. The first set of amendments was enforced under the Act of 7 February 2008 amending the Act on Rail Transport[2] and related to certificates of compliance. It transposed the Commission's Directive 2007/32/EC of 1 June 2007 amending Annex VI to Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Annex VI to Directive 2001/16/EC of the European Parliament and Council on the interoperability of the trans-European conventional rail system[3]. Subsequently, the Amendment Act of 10 July 2008[4] expanded the Act on Rail Transport by a new Chapter 4a on the working time of railway employees engaged in interoperable cross-border services. The latter implemented Council Directive 2005/47/EC of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of working conditions of mobile workers engaged in interoperable cross-border services in the railway sector[5].

From the point of view of regulatory developments, the most important of these three groups of amendments was the last set introduced by the Act of 24 October 2008 amending the Act on the Commercialization, Restructuring and Privatization of the State Company "Polish State Railways" and the Act

* Katarzyna Zawisza, expert at the European Union Law Department of the Office of the Committee for European Integration; Ph.D. Seminar Attendee, Chair of Administrative Law, Faculty of Law and Administration of the University of Cardinal Stefan Wyszyński in Warsaw. The views expressed are those of the author and do not represent the views, and should not be attributed to the Office of the Committee for European Integration.

[1] Consolidated text: Journal of Laws 2007 No. 16, item 94, with subsequent amendments.

[2] Journal of Laws 2008 No. 59, item 359.

[3] OJ [2007] L 141/63.

[4] Journal of Laws 2008 No. 144, item 902.

[5] OJ [2005] L 195/15.

on Rail Transport[6]. This amendment act partly modified the provisions of the Act on Rail Transport linked to the scope of Directive 2001/14/EC of the European Parliament and 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 certification[7] (even tough Poland has already implemented Directive 2001/14/EC by the Act of 16 December 2005 amending the Act on Rail Transport[8]).

First, the Amendment Act of 24 October 2008 strengthened the regulatory function of the President of the Rail Transport Office (UTK). Article 13 of the Act on Rail Transport was supplemented by paragraph 6a granting the UTK President the right to declare his decisions concerning the regulation of rail transport immediately executable, in whole or in part, provided that this is necessary in light of public interest or an exceptionally important interest of a party. In such cases, an appeal against the decision of the UTK President will not result in the suspension of its enforcement. This amendment may be important with respect to the fulfillment of the obligation imposed by Article 30(5) of Directive 2001/14/EC, which requires regulators to decide on complaints, and take action to remedy the contested situation, within a maximum of two months from the receipt of all information. Meeting this time-limit could have been impossible if the execution of the regulator's decision was stayed by an appeal. According to Article 30(2) of this Directive, this might concern, for instance, appeals against decisions of the infrastructure manager on the allocation of infrastructure capacity, the charging scheme or the level of infrastructure fees.

Second, the Act of 24 October 2008 introduced several changes to Article 33 of the Act on Rail Transport with respect to scarcity charges. It modified the elements of the charges collected by the infrastructure manager (Polish Railway Lines JSC - PLK S.A.) and somewhat clarified the methods of their calculation. The charges continue to consist of the basic charge and additional charges and the wording of Article 33(3) was slightly modified. According to its new version, "[t]he charge for the use of railway infrastructure is a sum of the basic charge and additional charges". This amendment is editorial in nature bringing in line the earlier discrepancy between Article 33(3), which mentioned a single "additional charge", and Article 33(11), which referred to plural "additional charges". Conversely, as will be seen below, the scope of the basic and additional charges changed.

According to the current wording of Article 33(2) "[t]he basic charge for the use of railway infrastructure is determined while taking into account

[6] Journal of Laws 2008 No. 206, item 1289.

[7] OJ [2001] L 75/29.

[8] Journal of Laws 2006 No. 12, item 63.

the costs directly incurred by the manager as a result of operating the train service by the rail carrier". Prior to the amendment, Article 33(2) provided that "[t]he charge for the use of railway infrastructure is determined taking into account the costs incurred by the manager as a result of the allocation and of making it possible to use the allocated train routes and the railway infrastructure". A new paragraph 3a was added to Article 33 that determines the elements of the basic charge. It specifies that the basic charge is collected by the manager separately for minimum access to the railway infrastructure, which includes the services referred to in Part I paragraph 1 of the Annex to the Act (Article 33(3a)(1)), and for access to facilities related to train operation, which includes the services referred to in Part I paragraph 2 of the Annex to the Act (Article 33(3a)(2)). These amendments are linked to Article 7(3) of Directive 2001/14/EC requiring that "[t]he charges for the minimum access package and track access to service facilities shall be set at the cost that is directly incurred as a result of operating the train service". Accordingly, the new wording of Article 33(2) is identical to the wording of this Directive. Moreover, services included in the charge for minimum access to railway infrastructure (Article 33(3a)(1)) are identical to those specified in paragraph 1 of Annex II to Directive 2001/14/EC concerning the minimum access package. Similarly, services included in the charge for access to facilities related to train operation (Article 33(3a)(2)) correspond to those specified in paragraph 2 of Annex II relating to the charge for track access to service facilities mentioned in Article 7 of this Directive. Thus, this set of amendments should ensure full compliance with the relevant provisions of Directive 2001/14/EC.

According to the current Article 33(11) of the Act on Rail Transport, "[a]dditional charges are levied for services provided by the manager other than those listed in Part I of the Annex to the Act, which shall be provided by the manager, if they were listed in the network rules and carrying them out is required by the rail carrier in its application". In the past, additional charges could also be collected for the services listed in Part I paragraph 2 of the Annex to the Act (e.g. the use of refueling facilities, passenger stations, freight terminals, marshalling yards, tracks and facilities for train formation, storage sidings, maintenance and other technical facilities). These services are currently the starting point for the calculation of the basic charge for access to facilities related to train operation (an element of the basic charge specified in Article 33(3a)(2)).

Paragraph 4 was also slightly modified. It states that "[t]he basic fee for minimum access to railway infrastructure [the charge specified in Article 33(3a)(1)] is calculated as a product of passage of trains and unit rates determined depending on the category of the railway line and the train type, separately for passenger and freight transport". The new wording is more

precise than its predecessor, which stated that "[t]he basic fee is calculated taking into account the planned passages of trains and unit rates determined depending on the category of railway line and the train type, separately for passenger and freight transport". At the same time, paragraph 4b was repealed which used to state that "[t]he amount of the minimum unit rate referred to in paragraph 4a may not be lower than variable costs incurred by the manager in relation to the run of a given train".

The Amendment Act of 24 October 2008 specified also in Article 33(4a) that it is possible to use a minimum unit rate of the basic charge, applied on the basis of the same rules to all rail passenger carriers, for the use of railway infrastructure related to the activities performed according to a public service contract. This minimum rate may concern the basic charge for minimum access to railway infrastructure (i.e. the first element of the basic charge mentioned in paragraph 3a(1)). Previously, this minimum rate concerned the whole basic charge. Paragraph 5 used to state that the unit rate of the basic charge is determined for a run of one train on a distance of 1 kilometer. Currently, it relates only to the unit rate of the basic charge for minimum access to railway infrastructure. These changes are coherent with the fact that in the past the basic charge did not include the component referred to in paragraph 3a point 2 because, it used to constitute an element of additional charges.

The new Article 33(4c) stipulates, in relation to the second element of the basic charge referred to in paragraph 3a(2), that "[t]he basic charge for access to facilities related to train operation is calculated as a product of the ordered services and of the corresponding unit rates set separately for the types of services defined in Part I paragraph 2 of the Annex to the Act". Paragraph 5c, added by the Act of 24 October 2008, should stabilize unit rates of the basic charge for public passenger rail transport services, performed under the public service contract, as it guarantees that rate increases within a timetable validity period shall not exceed the expected inflation rate (adopted in the draft budget for a given year). Still, according to Article 6 of the Act of 24 October 2008, all of these changes concerning the charges for infrastructure use are not applicable to the calculation of charges in the period when the rail timetable for 2008/2009 is valid, unless they result in a decrease of the unit rates of the basic charge.

Last but not least, the amendments made by the Act of 24 October to the Act on the Commercialization, Restructuring and Privatization of the State Company "Polish State Railways" were meant to facilitate the realization of the "Strategy for Rail Transport until the year 2013" adopted by the Polish Council of Ministers on 17 April 2007. They were intended to facilitate the restructuring of the property of PKP S.A. and strengthen its coordinative function. They will, among other things, help the transfer progress of railway

lines to self-government units. Indeed, a definition of railway station was introduced into Article 4 of the Act on Rail Transport (supplemented by point 8a) due to the possibility of railway stations being also transferred to self-government units.

Simultaneously, the Minister of Transport has issued many executive orders concerning railways. The Executive Order of 18 August 2008 amending the Order on the Conditions for Access to and Use of Railway Infrastructure[9] concerned the so-called "reservation charges", for capacity that is requested but not used (paragraph 16(1) of the Order), collected by the infrastructure manager. This act set two distinct thresholds of such charges. First, when a railway operator resigns from a run of train later than 30 days before the planned time of its realization the infrastructure collects 10% of the costs, on the basis of which the basic charge for the run of this train on an allocated route would be calculated. Second, 25% of this sum is due when the resignation took place later than 72 hours before the scheduled time of its realization or when the allocated route was not used. Still, the actual Order of the Minister of Transport on the Conditions for Access to and Use of Railway Infrastructure of 30 May 2006[10] was repealed in whole by an equivalent Executive Order of 27 February 2009[11] which should not only settle the provisions in question but also ensure full compatibility with the requirements of Directive 2001/14/EC.

Several executive orders linked to the interoperability of trans-European railway systems were also amended in 2008. The Order of the Minister of Transport of 20 June 2004 on the Basic Specifications Related to Railway Interoperability and Conformity Assessment Procedures of the Trans-European High-Speed Rail System[12] and the Order of the Minister of Transport of 5 September 2006 on the Basic Specifications Related to Railway Interoperability and Conformity Assessment Procedures of the Trans-European Conventional Rail System[13] were amended twice on 7 January[14] and 29 September[15]. These changes made it possible to apply the Commission's decisions that came into force in this field.

To sum up, most of 2008 amendments related to the adjustment of Polish rules to EC law. This phenomenon illustrates a growing involvement of EC institutions in ensuring transparency, interoperability, security in European railways and, as a result, enhancing the competitiveness of railways with

[9] Journal of Laws 2008 No. 157, item 984.
[10] Journal of Laws 2006 No. 107, item 737, as amended.
[11] Journal of Laws 2009 No. 35, item 274.
[12] Journal of Laws 2004 No. 162, item 1697.
[13] Journal of Laws 2006 No. 171, item 1230.
[14] Journal of Laws 2008 No. 11, item 64 and 65.
[15] Journal of Laws 2008 No. 182, item 1126 and 1127.

respect to other modes of transport. This process forces structural changes in the management of railway markets such as, guaranteeing managerial independence. As show, the UTK President may be entrusted with additional regulatory tasks. 2009 sees similar trends as it is the time-limit for the transposition (entrance into force) of key EC legislation in the field of railway transport. These acts change the system of certification of train drivers[16], the rules of compensation for public service operators and those on granting exclusive rights[17]. They also regulate the liability of railway undertakings and their insurance obligations for passengers, their luggage and train delays[18]. However, the key change expected to take place in 2009 resulting from Poland's obligations imposed by EC law[19] is the introduction of the necessary provisions on the right of access to infrastructure by rail carriers from other Member States for the purpose of operating international passenger services.

[16] Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community, OJ [2007] L 315/51.

[17] 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, OJ [2007] L 315/1.

[18] Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, OJ [2007] L 315/14.

[19] Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure, OJ [2007] L 315/44.