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## RIGHTS OF THE PRESIDENT OF THE OFFICE OF RAIL TRANSPORT REGARDING THE SUPERVISION OVER MAINTAINING THE ADMINISTRATOR'S INDEPENDENCE IN THE LIGHT OF THE DRAFT OF AMENDMENT TO THE LAW ON RAIL TRANSPORT (UC139)

### UPRAWNIENIA PREZESA URZĘDU TRANSPORTU KOLEJOWEGO W ZAKRESIE NADZORU NAD ZACHOWANIEM NIEZALEŻNOŚCI ZARZĄDCY W ŚWIETLE PROJEKTU NOWELIZACJI USTAWY O TRANSPORCIE KOLEJOWYM (UC139)

**Summary:** The goal of this paper is to analyse the prepared rights regarding supervision over maintaining of the administrator's independence vested in the President of the Office of Rail Transport (UTK) in the light of the draft of amendment to the Law on railway transport. The regulations of the Law of 28<sup>th</sup> March 2003 on rail transport (consolidated text, Journal of Laws 2019, item 710) set the following tasks for the President of the Office of Rail Transport: supervision over fair and non-discriminating treatment of all applicants by administrators in relation to the access to the rail infrastructure and supervision over fair and non-discriminating treatment of all railway carriers in relation to the access to the service infrastructure objects by operators of service infrastructure objects. Currently, a draft of the Law on amending the Law on railway transport and the Law on commercialisation and restructuring of the state company "Polish National Railways" (UC 139) is proceeded, which extends the catalogue of tasks and competences of the President of the Office of Rail Transport.

**Keywords:** President of the Office of Rail Transport, monopolistic practices

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**Streszczenie:** Celem opracowania jest analiza projektowanych uprawnień w zakresie nadzoru nad zachowaniem niezależności zarządcy przysługujących Prezesowi Urzędu Transportu Kolejowego w świetle projektu nowelizacji ustawy o transporcie kolejowym. Przepisy ustawy z dnia 28 marca 2003 r. o transporcie kolejowym (tekst jedn. Dz.U. 2019, poz. 710) nakładają na Prezesa UTK takie zadania jak nadzór nad sprawiedliwym i niedyskryminującym traktowaniem przez zarządców wszystkich aplikantów w zakresie dostępu do infrastruktury kolejowej oraz nadzór nad sprawiedliwym i niedyskryminującym traktowaniem przez operatorów obiektu infrastruktury usługowej wszystkich przewoźników kolejowych w zakresie dostępu do obiektu infrastruktury usługowej. Aktualnie procedowany jest projekt ustawy o zmianie ustawy o transporcie kolejowym oraz ustawy o komercjalizacji i restrukturyzacji przedsiębiorstwa państwowego Polskie Koleje Państwowe (UC 139), który rozszerza katalog zadań i kompetencji Prezesa UTK.

**Słowa kluczowe:** Prezes UTK, praktyki monopolistyczne

## INTRODUCTION

The purpose of the article is to analyse the draft powers of supervision over maintenance of the administrator's independence vested in the President of the Office of Rail Transport (UTK) in the light of the draft amendment to the Law on rail transport. The thesis of the article boils down to the statement that the draft amendment introduces provisions regarding the independence of the railway infrastructure administrator, however, it does not grant the President enough powers to supervise the administrator's independence.

The provisions of the Law of 28 March 2003 on rail transport (i.e. Journal of Laws 2019 item 710, hereinafter TKU) impose on the President of UTK supervisory tasks related to the protection of economic entities exposed to the use of monopolistic practices. The draft law is currently being processed to amend the law on rail transport and the law on commercialization and restructuring of the state-owned enterprise "Polish National Railways" (UC 139)<sup>1</sup>.

The main area of consideration will be legal footnotes and a draft amendment together with documents used in subsequent stages of the legislative procedure. Scientific studies will also be analysed, as well as data and comments provided to the author, thanks to the courtesy of Mr Marcin Trela, Director of the Legal Service Department at UTK. Dogmatic and legal as well as analytical and synthetic methods were used in the study.

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<sup>1</sup> <https://legislacja.rcl.gov.pl/projekt/12321831/katalog/12594851#12594851> [access: 22.11.2019].

## MONOPOLISTIC ADMINISTRATIVE AND LEGAL INSTRUMENTS VESTED IN THE PRESIDENT OF THE OFFICE OF RAIL TRANSPORT (UTK)

The issue of monopolistic administrative and legal instruments vested in the President of UTK is related to the issue of qualifying this authority as strictly regulatory. In 2008, Waldemar Hoff pointed out that the Polish legislator only for a short period, in 2005-2006, fulfilled the Community requirement of independence of the regulatory body. The lack of independence did not allow this body to be considered regulatory. This influenced the assessment of its actions, which therefore belonged more to traditional administration than to the regulated sphere. In the author's assessment, the legislator's focus was more on security issues, not market issues<sup>2</sup>.

The President of UTK has the competences and performs regulatory tasks, however their area changed with Poland's accession to the European Union. These changes are compatible with the tasks and competences belonging to the primary, regulatory and police function of this body. It should be emphasized that its evolution was aimed at creating a national regulator of the railway sector, which performs its tasks and competences within the European administration network<sup>3</sup>. Under the influence of subsequent railway packages adopted by the European Commission, the focus shifted from technical issues towards economic regulation of the railway market and competition protection, and the gradual extension of the scope of responsibilities and competences of railway regulators in the member states. It should be emphasized that in the light of the provisions contained in the 4th railway package, the importance of the EU regulator is to increase<sup>4</sup>.

Ten years after the establishment of UTK, Jan Pieriegud undertook an assessment of the activities of the President of UTK. He emphasized that he had relatively broad powers in the field of rail transport regulation in Poland. However, he pointed out a specific conflict of interest arising due to the location of this body in the structure of the government administration and the assignment of its activities to the minister responsible for transport, also supervising the activities of the state infrastructure administrator, which is not conducive to the development of competition on the Polish rail market<sup>5</sup>.

<sup>2</sup> W. Hoff, *Prawny model regulacji*, Warszawa 2008, p. 21; compare: W. Szpringer, *Regulacja konkurencji a konkurencja regulacyjna. Ujęcie instytucjonalne*, Warszawa 2010, pp. 57 et seq.

<sup>3</sup> M. Goss, *Charakter prawny zadań i kompetencji Prezesa UTK w obszarze interoperacyjności europejskiej sieci kolejowej ze szczególnym uwzględnieniem zezwoleń na dopuszczenie do eksploatacji pojazdu kolejowego zgodnego z TSI*, iKAR 2017, No. 4(6), p. 62.

<sup>4</sup> J. Pieriegud, *Rola i funkcje regulatorów w transporcie kolejowym*, iKAR 2015, No. 1(4), pp. 89; see: J. Engelhardt, *Czwarty pakiet kolejowy – zarządzanie infrastrukturą kolejową*, PTiL 2018, No. 1(41), pp. 53 et seq.

<sup>5</sup> J. Pieriegud, *Rola i funkcje...*, p. 89; see K. Dyl, *Działania regulacyjne Prezesa Urzędu Transportu Kolejowego w latach 2011-2014*, iKAR 2015, No. 1(4), pp. 10 et seq.

In the light of Art. 13 of the Law on rail transport, most of the tasks of the President of UTK are supervisory and controlling. These are:

- supervision of fair and non-discriminatory treatment by administrators of all applicants regarding access to the railway infrastructure, including: checking the correctness of the development and application of network regulations, supervision of the conclusion of contracts for the allocation of capacity and the use of capacity, consideration of matters related to occasional passenger services and supervision of the correctness of the administrator setting and charging fees for providing access to the railway infrastructure;
- supervision of fair and non-discriminatory treatment of all railway carriers by operators of the service infrastructure facility in terms of access to the service infrastructure facility, including control over the correctness of the development and application of the regulations governing access to the service infrastructure facility, supervision of the conclusion of contracts with operators of the service infrastructure facility, and supervision over correctness of determination and charging the operator of the service facility for the use of the service facility.

Other regulatory tasks include issuing opinions on draft public service contracts, issuing decisions on capacity allocation and issuing decisions on granting open access.

In this regard, attention should be paid to the two-area concept of regulatory supervision, according to which regulatory supervision is performed by the regulator on the relationship between the authority and a specific entrepreneur, and between the authority and the sector.

As part of the first area, the activity of a given entity is verified through the prism of its compliance with the target vision of the market and its participants adopted by the regulator. The regulator's area of interest includes problems such as the entity's compliance with formal requirements for participation in a given sector and the availability of specific technical and human resources related to the adopted regulatory goal. To achieve these goals, instruments are also used in traditionally understood rationing, such as, for example, individual administrative acts necessary to conduct a given type of activity. However, their connection with the issue of competition is noticeable, which affects the difference in their role.

Within the second area, the regulator conducts long-term actions aimed at achieving the appropriate state of competition within a given sector. The undertaken actions are of a phased nature. The regulatory body constantly monitors the situation, whether there are any actions unauthorized by market participants that lead to the creation of entry barriers undesirable by the regulator, restricting the access for new entities<sup>6</sup>.

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<sup>6</sup> M. Goss, *Charakter prawny...*, pp. 67 et seq.

Based on the conducted considerations, a question arises about the regulatory instruments vested in the President of UTK, ensuring the implementation of the tasks imposed on him. Piotr Lissoń attempted to organize the instruments of administration in the context of regulation by reviewing the divisions presented in the doctrine. Particularly noteworthy is the division created by T. Skoczny covering instruments “for regulating market participation” and instruments “for regulating the behaviour of enterprises”, distinguished by the criterion of the subject of regulation. Another distinction is presented by K. Strzyczkowski, who indicates the legal means of: rationing, supervision, control, dispute resolution and imposing penalties, distinguished by the criterion of the function of the authority. Due to the formal criterion A. Walaszek-Pyziół distinguishes imperious and non-imperious instruments<sup>7</sup>. In his specification, Waldemar Hoff is guided by the criterion of the legal form of undertaken actions and on this basis he distinguishes regulatory decisions in the strict sense, decisions on the predominance of administrative and legal elements, and auxiliary activities of regulation<sup>8</sup>.

## AMENDMENT TO THE LAW ON RAIL TRANSPORT (UC139) – GUARANTEES OF THE INDEPENDENCE OF THE ADMINISTRATOR OF THE RAIL INFRASTRUCTURE

The draft amendment to the law on rail transport (UC139) has two purposes. First, adjustment of national legal standards in the field of rail transport with Directive (EU) 2016/2370 of the European Parliament and the Council of 14 December 2016 amending Directive 2012/34 / EU as regards the opening of the market for domestic rail passenger services and the management of rail infrastructure (Official Journal of the EU L 352 of 23.12.2016, page 1). The deadline for its implementation expired on 25 December 2018. It completes the process of gradual opening of the EU rail passenger market to competition. This directive grants railway companies the right to fair and non-discriminatory access to the rail infrastructure in all Member States for the purpose of operating rail passenger services, paying particular attention to the transparency of the infrastructure administrator's activities in the process of management and allocation of the rail infrastructure. Secondly, the correction of the implementation into the national legal order of the provisions of Directive 2012/34 / EU of the European Parliament and of the Council of 21 November 2012 on the creation of a single European railway area (Official Journal EU L 343 of 14.12.2012, p. 32, as amended)<sup>9</sup>. Currently, the draft of 23 May 2019 in the

<sup>7</sup> P. Lissoń, *Formy oraz instrumenty prawne działania organu regulacyjnego na przykładzie Prezesa Urzędu Regulacji Energetyki*, [in:] B. Popowska, K. Kokocińska (ed.), *Instrumenty i formy prawne działania administracji gospodarczej*, Poznań 2009, p. 326.

<sup>8</sup> W. Hoff, *Prawny model...*, pp. 255-261.

<sup>9</sup> Justification to the Draft Law amending the Law on rail transport and the Law on commercialization and restructuring of the state-owned enterprise “Polish State Railways” (UC 139) in the version of

legislative procedure is at the stage of consideration by the Legal Committee. On 15, 16, 18 and 21 October 2019, a meeting of the Legal Committee was held at the headquarters of the Government Legislation Centre the subject of which was the above mentioned draft law, which was reflected in the Minutes of the meeting of the Legal Affairs Committee regarding the draft law amending the law on rail transport and some other laws RCL. DPRRI.550.29/201. It should be emphasized that this draft is currently being processed in the version of 30/09/2019.

The draft includes the addition in the second chapter of the Law on rail transport of a new chapter 2 'Guarantees of administrator independence' (in the original version of the draft chapter 2aa) which introduces provisions aimed at strengthening the organizational and functional independence of the infrastructure administrator as well as transparency and impartiality of decisions made by the administrator. According to the proposed wording of Art. 9ma in section 1, it is not possible to outsource the tasks of an infrastructure administrator to a railway company or an entity which is controlled by this carrier or supervises it. In addition, the provisions specify the requirements for the infrastructure administrator to order specific work in the area of maintenance, renewal and participation in the development of the railway infrastructure, for the infrastructure administrator to outsource only basic functions within a vertically integrated company, to supervise the infrastructure administrator and his responsibility for performing outsourced tasks (Article 9ma, section 2 to 5).

It is also assumed to indicate the scope of regulations that apply to entities commissioned by the infrastructure administrator to perform basic functions (draft Art. 9mb) and to strengthen the independence of the infrastructure administrator by establishing the requirement of legal separation of the administrator from railway carriers, and in the case of a vertically integrated company, also from other entities included in this company (drafted Art. 9mc). In the draft provisions of Art. 9md-9mi bans have been established regarding combining specific functions with the infrastructure administrator and the railway carrier or holding managerial positions, receiving remuneration and bonuses, rules for using the common ICT system and issues of providing information on basic functions. These regulations implement the relevant provisions of Directive 2016/2370 / EU. As the project promoters emphasize, the goal of the draft solutions is to guarantee the independence of the infrastructure administrator in the performance of his basic functions. The provisions of Art. 9mj impose on the infrastructure administrator the obligation to immediately inform about disruptions in the operation of trains of the railway carrier concerned in order to ensure the transparency of the administrator's activities.

Draft Articles 9mk-9mp are aimed at ensuring the financial transparency of the infrastructure administrator, in particular the flows and settlements between him and the carriers or other entities forming the vertically integrated company. Based on Article 9mk, the infrastructure administrator may not pay dividends to an entity that is part of a vertically integrated company, while exercising control over that administrator and the railway carrier. It is also planned to introduce a ban on mutual loans between the infrastructure administrator and the rail carrier (Article 9ml). The next article regulates the rules for granting, paying out and servicing loans between entities included in the vertically integrated company. The conditions for the provision of services by the entity being a vertically integrated company in favour of the infrastructure administrator were also specified. Added Article 9mo indicates the manner of keeping the accounts of the infrastructure administrator and other entities included in the vertically integrated company, including those relating to debt. Under the drafted Art. 9mp the infrastructure administrator operating as part of a vertically integrated company is required to maintain detailed documentation regarding commercial cooperation and capital relations with other entities being part of this company in order to demonstrate the independence of the administrator from other entities.

Provisions of the proposed Art. 9mq allow the infrastructure administrator to conclude cooperation agreements with rail carriers, with a view to ensure benefits to the rail carrier's customers, while maintaining the principle of non-discriminatory treatment of carriers<sup>10</sup>. The cited regulation has the following wording:

"1. The administrator may, subject to the principle of non-discriminatory treatment, conclude cooperation agreements with rail carriers to provide railroad customers with benefits, including those related to reducing costs or improving the conditions for the provision of services on part of the administrator's railway network covered by this agreement.

2. The conclusion of the contract referred to in section 1, the administrator shall immediately inform the President of the Office of Rail Transport". It should be considered in relation to the proposed wording of Art. 13 section 3a point 6, pursuant to which the President of UTK supervises the conclusion and performance of the contract referred to in Art. 9mq section 1, and in justified cases recommends that the parties terminate it.

It should be noted that the draft provisions introducing new regulations related to maintaining the independence of the railway infrastructure administrator indicate that the supervision over the correct application of these principles is exercised by the President of UTK, however he does not have the appropriate capacity to

<sup>10</sup> Justification to the Draft Law amending the Law on rail transport and the Law on commercialization and restructuring of the state-owned company "Polish State Railways" (UC 139) in the version of 30/09/2019, pp. 22 et seq., <https://legislacja.rcl.gov.pl/projekt/12321831/katalog/12594881#12594881> [access: 22.11.2019].



act. There are also no sanctions that the President of UTK could apply if they were found to be in violation. In this way, the provider of the draft proposes a solution without the regulatory body being able to fully implement it. Another problem is not including in the draft provisions the additional competences of the President of UTK in the field of supervision. This partly confirms the thesis outlined in the introduction that the draft amendment introduces provisions regarding maintenance of the independence of the railway infrastructure administrator, however, it does not grant the President sufficient powers to supervise the administrator's independence. Therefore, the demands submitted by the Office of Rail Transport during the legislative procedure deserve special attention.

## AMENDMENT TO THE LAW ON RAIL TRANSPORT (UC139) – SUPERVISION OF THE PRESIDENT OF THE OFFICE OF RAIL TRANSPORT (UTK) OVER MAINTAINING OF THE INDEPENDENCE OF THE RAILWAY INFRASTRUCTURE ADMINISTRATOR

Recently, as part of legislative work on the draft amendments to the Railway Transport Law (UC139), demands have been submitted by the Office of Rail Transport, among others, aimed at expanding the catalogue of financial penalties, as well as the rights of the President of UTK to supervise the independence of the administrator.

The need to change art. 1 point 21 of the draft in such a way that after Art. 34 and planned art. 34a also Art. 34b is added in the following wording: "Art. 34b. 1. The administrator may, subject to the principle of non-discriminatory treatment, conclude cooperation agreements with rail carriers in order to provide railroad customers with benefits, including those related to reducing costs or improving the conditions for the provision of services on part of the administrator's railway network covered by that agreement.

2. The administrator informs the President of UTK about the intention to conclude the contract referred to in para. 1.

3. The President of UTK may request the administrator and the carrier to provide explanations and to provide documents regarding the subject of the contract referred to in para. 1, and may also participate in administrator and carrier negotiation meetings.

4. The President of UTK is entitled to express an opinion on the subject of the contract referred to in para. 1. The opinion of the President of UTK is delivered to the administrator and the carrier.

5. The administrator shall immediately inform the President of UTK about the conclusion of the contract referred to in para. 1.



This proposal assumes the transfer of the content of the proposed art. 9mq to chapter 6 on the provision of infrastructure, in which chapter, according to the draft, Art. 34a regarding the conduct of negotiations by the administrator and the applicant is added. Therefore, in the opinion of UTK, also the article on the conclusion of contracts by the administrator with carriers should be in the same chapter. This idea also includes clarifying the content of the added Art. 9mq as to the competence of the President of UTK.

The described solution is combined with the proposed change regarding Art. 1 point 7 letter b second indent of the draft: in the form of the following wording of item 6 added in art. 13 in section 3a: “6) supervises the performance of the contract referred to in Art. 34b paragraph 1, and in justified cases recommends that the parties terminate it.”

The submitted demands solve the problem of very poor possibilities of undertaking actions by the President of UTK to perform a new planned task. It should be emphasized that the draft Art. 9mq only provided for the obligation of the administrator to inform the President of UTK about the conclusion of the contract. In practice, the President of UTK could only check the provisions of this agreement on general principles. It draws attention that such an inspection would be initiated and carried out only after receiving the information. It would also lead to negative consequences. If it is found that it contains unlawful provisions, before it was eliminated from legal circulation, it would apply for the period of conducting appropriate procedures. Therefore, the solution proposed by UTK guarantees that such situations will not occur, as the proposal includes information on the intention to conclude a contract and the possibility to request relevant documents and express an opinion by the President of UTK. This confirms the thesis formulated in the introduction.

The next change proposed in the draft refers to the catalogue of penalties. UTK indicated the need to amend art. 1 point 28 of the draft as follows: in art. 66 in section 1:

- in point 2 in letter the semicolon is replaced by comma and letter j is added in the following wording: “j)”violates the provisions of section 2, in Chapter 2, regarding the maintenance of the administrator’s independence”;
- point 9 is receives the following wording:
- “9) entity that has not provided the information referred to in art. 13 section 3a item 3 or 4, or provided this information beyond the deadline referred to in art. 13 section 3b.”
- the following point 10 is added: “10) an entity that fails to comply with the provisions referred to in Art. 13 section 1 point 6”.

The aforementioned provisions relate to the possibility for the President of UTK to impose a financial penalty in the cases of: violation by the administrator of the

provisions on ensuring the independence of the administrator, failure to inform the President of UTK by the administrator of the lack of capacity as a result of unplanned maintenance works, failure by administrators, rail carriers and OIU operators to comply with the regulations concerning accounting and financial transparency<sup>11</sup>.

The proposed solution is a response to the lack of correlation of the catalogue of penalties with the tasks imposed on the President of UTK visible in the current Law on rail transport. In the event that the legislator decides not to extend the catalogue of penalties by the indicated UTK proposal, there will be a situation in which the authority will be able to only indicate abnormalities. In this way, the President of UTK will be deprived of the ability to enforce relevant behaviour from administrators. The situation of the shortage of appropriate penalties confirms the thesis indicated in the introduction.

## CONCLUSION

The conducted considerations and analyses confirm the thesis formulated in the introduction: the proposed amendment introduces provisions regarding the maintenance of the independence by the administrator of the railway infrastructure, however, it does not grant the President sufficient powers to supervise the administrator's independence. As shown on the example of the proposed art. 9qm of rail transport law, the draft provider plans to impose a new task on the President of UTK, at the same time in the absence of specific provisions enabling their implementation. Therefore, UTK's postulates assuming the extension of supervisory powers of the President of UTK and amendment of the catalogue of penalties should be assessed very positively. Only if the President of UTK has been equipped with appropriate instruments, the legislator can compensate for the unfavourable phenomenon in the form of legal transactions infringing the provisions regarding the independence of the railway infrastructure administrator.

## References

Dyl K., *Działania regulacyjne Prezesa Urzędu Transportu Kolejowego w latach 2011-2014*, iKAR 2015, No. 1(4).

Engelhardt J., *Czwarty pakiet kolejowy – zarządzanie infrastrukturą kolejową*, PTiL 2018, No. 1(41).

Goss M., *Charakter prawny zadań i kompetencji Prezesa UTK w obszarze interoperacyjności europejskiej sieci kolejowej ze szczególnym uwzględnieniem zezwoleń na dopuszczenie do eksploatacji pojazdu kolejowego zgodnego z TSI*, iKAR 2017, No. 4(6).

<sup>11</sup> Author's own study, e-mail interview with Mr Marcin Trela, Director of the Legal Service Department of UTK, 10 November 2019.

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Hoff W., *Prawny model regulacji*, Warszawa 2008.

Lissoń P., *Formy oraz instrumenty prawne działania organu regulacyjnego na przykładzie Prezesa Urzędu Regulacji Energetyki*, [in:] B. Popowska, K. Kokocińska (ed.), *Instrumenty i formy prawne działania administracji gospodarczej*, Poznań 2009.

Pieriegud J., *Rola i funkcje regulatorów w transporcie kolejowym*, iKAR 2015, No. 1(4).

Szpringer W., *Regulacja konkurencji a konkurencja regulacyjna. Ujęcie instytucjonalne*, Warszawa 2010.