

Rail Transport 2020

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Matthew J Warren

Sidley Austin LLP

Lexology Getting The Deal Through is delighted to publish the second edition of *Rail Transport*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Matthew J Warren of Sidley Austin LLP, for his continued assistance with this volume.



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Poland

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GENERAL

Industry structure

- 1 | How is the rail transport industry generally structured in your country?

There are 13 railway infrastructure managers in Poland that manage the railway infrastructure and make the tracks available to rail operators. The largest manager is the state-controlled company PKP Polskie Linie Kolejowe SA, which is responsible for the maintenance of rail tracks, managing the rail traffic across the country, scheduling train timetables and managing the railway land. More than 95 per cent of the infrastructure is managed by this company and the remaining part of the infrastructure is managed by local railway operators (eg, metropolitan railways, power plants, mines). A separate entity, PKP Energetyka SA, which was privatised in 2015, provides nationwide maintenance and emergency response services to the railway network.

Ownership and control

- 2 | Does the government of your country have an ownership interest in any rail transport companies or another direct role in providing rail transport services?

The government owns 100 per cent of shares in PKP SA, which controls leading nationwide rail passenger carrier, PKP Intercity SA. A second nationwide rail passenger carrier, Przewozy Regionalne, is controlled by the Industrial Development Agency (a state-controlled company responsible for implementing restructuring processes) and by regional self-government units (voivodeships). Regional self-government units and cities are owners or the majority shareholders of regional or metropolitan rail passenger carriers (currently there are 10 regional and municipal carriers). The government also indirectly controls approximately 30 per cent of shares in PKP Cargo SA, a freight carrier listed on the Warsaw Stock Exchange.

- 3 | Are freight and passenger operations typically controlled by separate companies?

Yes, freight and passenger operations are controlled by separate companies.

Regulatory bodies

- 4 | Which bodies regulate rail transport in your country, and under what basic laws?

Under section 3 of the Railway Transport Act, the president of the Office of Rail Transport (ORT), appointed by the Prime Minister, is the regulatory authority responsible for rail transport in Poland.

MARKET ENTRY

Regulatory approval

- 5 | Is regulatory approval necessary to enter the market as a rail transport provider? What is the procedure for obtaining approval?

Provision of passenger or freight transport services by rail (as well as the provision of traction services) is subject to approval issued by the president of the ORT. In order to apply for an approval, the rail transport provider must fulfil the following criteria: have good standing, financial credibility and professional competence; possess stock at its disposal; and be insured from third-party liability. The president of the ORT must issue the approval within three months after having obtained the application with all necessary documents.

- 6 | Is regulatory approval necessary to acquire control of an existing rail transport provider? What is the procedure for obtaining approval?

Approval from the railway regulatory authority is not necessary to acquire control over an existing rail transport provider and standard antitrust laws apply. Therefore, if the total global turnover of entrepreneurs in the fiscal year preceding the acquisition exceeds the equivalent of €5 billion or the total turnover in Poland exceeds the equivalent of €50 million, the consent of the president of the Office of Competition and Consumer Protection is required – he or she may issue an approval, a conditional approval or prohibit the concentration.

- 7 | Is special approval required for rail transport companies to be owned or controlled by foreign entities?

No, there is no such requirement.

- 8 | Is regulatory approval necessary to construct a new rail line? What is the procedure for obtaining approval?

The voivode (who is a representative of the government administration in the voivodeship) issues the decision on establishing the location of the rail line at the request of PKP Polskie Linie Kolejowe SA or the competent local government unit. The application to issue a decision should be preceded by a number of written arrangements, such as arrangements with managers of public roads that the railway will cross. The voivode further informs the property owners where the railway is to be located about the commencement of the proceedings. As of the date the owners are informed, no building permits may be issued with respect to such property and the land owners have to inform the voivode about the sale of land within the area where the new railway is to be located. The voivode should issue the decision within three months from the date

of filing the complete application. However, in the case of the construction of a private railway siding, the above procedure will not apply. The investor will be required to declare the intention to build a railway line or submit an application for the building permit to the relevant municipality.

MARKET EXIT

Discontinuing a service

- 9 | What laws govern a rail transport company's ability to voluntarily discontinue service or to remove rail infrastructure over a particular route?

The procedure of closing a railway is set out in the Railway Transport Act. The manager of a particular route may apply to the Minister of Infrastructure to approve closure of a railway route (and, as a consequence, removal of infrastructure) if the revenue from operations carried out on this route does not cover the costs incurred by the manager for maintenance of that route, and if no financing from the state treasury or the local government unit's budget was provided to cover the manager's loss.

- 10 | On what grounds, and what is the procedure, for the government or a third party to force a rail transport provider to discontinue service over a particular route or to withdraw a rail transport provider's authorisation to operate? What measures are available for the authorisation holder to challenge the withdrawal of its authorisation to operate?

Under the provisions of the Railway Transport Act, the president of the ORT is obliged to withdraw the approval for a railway operator in the following circumstances:

- upon commencement of insolvency proceedings;
- when the operator is deprived of the right to conduct business activities based on a final and non-appealable court judgment; or
- when the rail transport operator's approval was suspended owing to irregularities and these irregularities were not corrected within the deadline prescribed by the president of the ORT.

The withdrawal of the approval (as well as the approval itself) is issued in the form of an administrative decision and, as such, it may be appealed before the administrative court.

Insolvency

- 11 | Are there sector-specific rules that govern the insolvency of rail transport providers, or do general insolvency rules apply? Must a rail transport provider continue providing service during insolvency?

As mentioned in 'Discontinuing a service', if insolvency proceedings have commenced, the president of the ORT is obliged to withdraw the approval for the railway operator. In these circumstances, the railway operator should discontinue providing services when the decision to withdraw approval becomes final.

COMPETITION LAW

Competition rules

- 12 | Do general and sector-specific competition rules apply to rail transport?

Sector-specific competition rules apply to the access to infrastructure. General competition rules apply to antitrust practices and competitiveness.

Regulator competition responsibilities

- 13 | Does the sector-specific regulator have any responsibility for enforcing competition law?

The president of the ORT supervises non-discriminatory treatment of all applicants in the field of access to infrastructure. The president of the ORT also monitors the state of competition on the rail transport market, cooperates with competent authorities in counteracting the use of monopolistic practices by administrators and applicants, coordinating the operation of the rail transport market and respecting passengers' rights.

Competition assessments

- 14 | What are the main standards for assessing the competitive effect of a transaction involving rail transport companies?

The railway sector is supervised in the same way as in other industries. First, the president of the ORT will check whether the activities do not adversely affect passengers, and subsequently whether the transaction would result in a large company using its dominant position towards suppliers when concluding contracts.

PRICE REGULATION

Types of regulation

- 15 | Are the prices charged by rail carriers for freight transport regulated? How?

Prices for freight transport are not subject to regulations and are charged on a free-market basis.

- 16 | Are the prices charged by rail carriers for passenger transport regulated? How?

As a rule, transport prices are not regulated, but if the railway route is of a public utility nature and is co-financed, pursuant to the Act on Public Collective Transport, local government units' councils may set maximum prices for such journeys. In addition, pursuant to the Act on Entitlements to Concessionary Public Transport, public rail carriers, which constitute the majority of railway carriers, are obliged to apply discounts specified for passenger groups (eg, students, pensioners, soldiers, veterans and disabled persons) that will be refunded to them from the state budget.

- 17 | Is there a procedure for freight shippers or passengers to challenge price levels? Who adjudicates those challenges, and what rules apply?

Neither freight shippers nor passengers can challenge price levels. However, the passenger railway operators are bound by the Transportation Law, which requires that the tariffs applied by a given operator be situated in visible places. In case of serious delays, passengers are entitled to reimbursement of the price of the ticket and to compensation payable by the operator.

- 18 | Must rail transport companies charge similar prices to all shippers and passengers who are requesting similar service?

In the case of freight transport, the parties individually set the prices for transport and they do not have to be the same, although the principal freight operator, PKP Cargo SA, publishes price tariffs on its website and some companies may use these prices for reference. For passenger transport, the same prices for services must be established if the

transport is subsidised as public transport. In the case of commercial passenger transport services, prices may vary.

NETWORK ACCESS

Sharing access with other companies

- 19 | Must entities controlling rail infrastructure grant network access to other rail transport companies? Are there exceptions or restrictions?

The applicants can submit requests for infrastructure capacity to the infrastructure managers. If the infrastructure manager refuses to consider the request or refuses to allocate the infrastructure capacity, the applicant can submit a complaint to the president of the ORT, who may state that the refusal is valid or that the infrastructure manager's decision should be modified or withdrawn. The infrastructure manager is bound by the decision. The application should be preceded by an agreement to allocate the capacity entered into by the applicant and the infrastructure manager. Such an agreement may contain appropriate, transparent and non-discriminatory obligations to provide financial guarantees to secure future payments. In order to gain access to the railway infrastructure, the applicant must submit to the manager certified copies of the valid carrier's licence and a valid security or safety certificate as well as submit a statement that he or she will use the rolling stock, meeting the conditions set out in the regulations to carry out the railway service. Once the capacity is allocated, an agreement for use of the capacity should be entered into by the applicant and the infrastructure manager.

Access pricing

- 20 | Are the prices for granting of network access regulated? How?

Railway infrastructure managers are required to develop a uniform, non-discriminatory price list for the duration of a yearly train timetable. The infrastructure manager is obliged to submit the draft price list to president of the ORT for approval no later than nine months before the start of the annual train timetable. The president must approve or reject the price list within 90 days of receiving it. If the decision is not issued within this period, the price list is considered approved.

Competitor access

- 21 | Is there a declared policy on allowing new market entrants network access or increasing competition in rail transport? What is it?

All Polish market participants, including market entrants, are entitled to minimum access to the railway infrastructure (with observance of equal treatment rules), including, inter alia, having the right to review their capacity allocation application, use the services of controlling the railway traffic, and use railway stations and ancillary infrastructure. Market participants from other member states of the European Union are entitled to minimum access to the railway infrastructure only for the purposes of performing international passenger transport and freight services. Notwithstanding this, the infrastructure manager may limit minimum access to the railway infrastructure because of technical parameters of rolling stock or by prohibiting railway vehicles carrying dangerous goods to enter the tunnels. In May 2018, the President of Poland signed into law the bill introducing the fourth EU railway package, the aim of which is to increase competition through the obligation to award tenders.

SERVICE STANDARDS

Service delivery

- 22 | Must rail transport providers serve all customers who request service? Are there exceptions or restrictions?

Under article 6 of the Act of 3 December 2010 on the implementation of some regulations of the European Union regarding equal treatment, any discrimination in access to the services offered publicly based on gender, race, ethnicity or nationality is forbidden.

- 23 | Are there legal or regulatory service standards that rail transport companies are required to meet?

Service standards are set out in the legislation both at the European Union level (Regulation No. 1371/2007 of the Parliament and the Council) and at the national level in the Railway Transport Act and in the Transportation Law.

Challenging service

- 24 | Is there a procedure for freight shippers or passengers to challenge the quality of service they receive? Who adjudicates those challenges, and what rules apply?

In case of infringement of their rights guaranteed by European and national legislation, rail passengers may submit complaints to the president of the ORT. There is an independent rail passengers' rights adviser working alongside the ORT who conducts out-of-court proceedings and settles the disputes between passengers and rail operators.

SAFETY REGULATION

Types of regulation

- 25 | How is rail safety regulated?

Pursuant to the Act on Railway Transport, the president of the ORT supervises safety management systems in accordance with the principles set out in Commission Regulations (EU) Nos. 1158/2010 32 of 9 December 2010 on a common safety method for assessing conformity with the requirements obtaining railway safety certificates and 1169/2010 of 10 December 2010 on a common safety method for assessing conformity with the requirements for obtaining a railway safety authorisation.

Competent body

- 26 | What body has responsibility for regulating rail safety?

The president of the ORT is the administrative body responsible for regulating rail safety.

Manufacturing regulations

- 27 | What safety regulations apply to the manufacture of rail equipment?

There are both national and EU rules regulating the manufacturing of rail equipment. The Regulation of the Minister for Infrastructure and Development lays out the grounds for authorisation for placing in service certain types of structures, equipment and railway vehicles. At the EU level, many pieces of legislation have been issued, the most relevant being Regulation No. 2016/919 on the technical specification for interoperability relating to the 'control-command and signalling' subsystems of the rail system in the European Union.

Maintenance rules

28 | What rules regulate the maintenance of track and other rail infrastructure?

There are both national and EU rules regulating the maintenance of track and other rail infrastructure. At the national level, the Regulation of the Minister for Infrastructure and Development on common safety indicators (CSI) deals with, among other things, such matters as the length of tracks and the number of level crossings or pedestrian crossings on the railway lines. Commission Regulation (EU) No. 1078/2012 regulates the European common safety method for monitoring to be applied by railway undertakings, infrastructure managers after receiving a safety certificate or safety authorisation.

29 | What specific rules regulate the maintenance of rail equipment?

The maintenance of rail equipment is regulated in the provisions of the Act on Rail Transport and the Regulation of the Minister of Infrastructure of 12 October 2005 on general conditions for railway vehicles operation, amended by the Regulation of the Minister of Transport of 7 November 2007 and the Regulation of the Minister for Infrastructure and Development of 10 December 2014.

Accident investigations

30 | What systems and procedures are in place for the investigation of rail accidents?

If an accident occurs, the railway employee must notify the supervisor and the dispatcher of the infrastructure administrator, whose tracks the siding is connected to. If necessary, the employee should notify the emergency services, including the police. The president of the ORT (either directly or through a competent local branch) and the chairman of the State Commission for Investigation of Railway Accidents should be notified of the accident. If the accident is a threat to the environment, the voivodeship inspector for environmental protection must be notified. If there are dangerous goods on the railway siding, the voivode should be notified. Depending on the size of the siding, the employee should check whether the other tracks can be traversed. Victims should be assisted and material secured to help determine the cause of the accident. The State Commission for Investigation of Railway Accidents investigates the accident or incident, and seeks to determine the cause and circumstances of the accident or incident, estimates losses, and draws preventive conclusions; however, it does not establish fault or liability. Members of the Commission include a railway siding user and a railway carrier who operates the siding.

Accident liability

31 | Are there any special rules about the liability of rail transport companies for rail accidents, or does the ordinary liability regime apply?

The ordinary liability regime applies to road transport accidents, but EU law requires railway undertakings to have adequate insurance or appropriate warranties under market conditions to cover their civil liability. This insurance must cover, in particular, passengers, luggage, parcels, mail and third parties. Ultimately, the minimum amount of civil liability of railway carriers is €100 million.

FINANCIAL SUPPORT

Government support

32 | Does the government or government-controlled entities provide direct or indirect financial support to rail transport companies? What is the nature of such support (eg, loans, direct financial subsidies, or other forms of support)?

State and local railway companies receive financial support in accordance with the principles established in the Treaty on the Functioning of the European Union and EU regulations regarding state aid in the railway sector. The aid may take the form of direct payments in case of restructuring and the cancellation of debt of the railway companies. In addition, the railway companies may receive compensation payments for providing sustainable and accessible railway services within the territory of local government units.

Requesting support

33 | Are there sector-specific rules governing financial support to rail transport companies and is there a formal process to request such support or to challenge a grant of financial support?

The sector-specific rules governing financial support to rail transport companies are regulated at the EU level. Generally, all public aid should be prohibited unless it qualifies as an exception. Sectoral aid, granted to companies acting in a given sector, is characterised by some specific rules. As regards transport, public aid may be granted only for passenger transport. The EU legislation sets forth that certain actions made by the governments of EU member states with the aim to support passenger transport companies will not constitute the prohibited state aid. For instance, Regulation No. 1370/2007 concerning the opening of the market for domestic passenger transport services by rail lays down that competent authorities may decide to take appropriate measures to ensure effective and non-discriminatory access to suitable rolling stock.

LABOUR REGULATION

Applicable labour and employment laws

34 | Are there specialised labour or employment laws that apply to workers in the rail transport industry, or do standard labour and employment laws apply?

Generally, standard labour and employment regulations, such as the Labour Code or the Trade Unions Act, apply to the rail transport industry. Additionally, appendices to the Rail Transport Act constitute some specific requirements concerning particular posts (eg, train dispatcher, conductor) and sector workers' duties. Some specific rules concerning workers in the rail transport industry are set out in regulations of the Minister of Infrastructure and Development, which lay down the requirements for the personnel employed in posts directly related to the operation and safety of rail traffic, and driving certain types of railway vehicles (which requires a specific driving licence and certificate). Certification of train drivers operating locomotives and trains on the railway system in the European Union are regulated in Directive 2007/59/EC. The rail industry has traditionally been and continues to be a highly unionised sector.

ENVIRONMENTAL REGULATION

Applicable environmental laws

- 35 | Are there specialised environmental laws that apply to rail transport companies, or do standard environmental laws apply?

There are no specialised environmental laws that apply to the rail transport industry (including rail transport companies) and standard environmental regulations shall be applied. According to these regulations, building and rebuilding railway lines constitutes an investment that is deemed to have a potentially significant effect on the environment and should, therefore, be preceded by an environmental assessment report.

For many years there has been a debate about the need to prioritise freight rail transport over road freight transport because of the environmental advantages of the former, such as less congestion and less traffic. However, this shift is not likely to take place in the near future as the road transport sector in Poland is a vital part of the transport industry. This would also require a significant increase in investments in the railway infrastructure.

UPDATE AND TRENDS

Update and trends

- 36 | Are there any emerging trends or hot topics in your jurisdiction?

The most challenging and ambitious development in the Polish infrastructure sector currently is the planned construction of the Central Transport Hub (CTH), which is scheduled to be completed by 2027. The CTH aims to be established as Poland's key transport hub, comprising an airport with an estimated annual capacity of 100 million passengers, a well-developed system of motorways and a fully integrated network of rail infrastructure, and it is expected have a large impact on the Polish rail sector in the coming years. The hub is due to be located in central Poland with its railway lines forming 'spokes' (as though constituting the centre of a wheel) and connecting the hub with Polish cities.

The railway component of the CTH is crucial to project, as high-speed trains are intended to be the primary form of passenger transportation. Currently, there are approximately 19,000km of railway tracks in Poland; however, the government plans to expand the railway system by constructing an additional 1,600km to take full advantage of the geographical location of the project. Over 40 per cent of the new network will be serviced by bullet trains, which are planned to exceed the speed of 250km/h. The setup of the network will be based on the 'hub and spoke' model and the government's decisions state that to achieve the hub's full operational power, the establishment of 10 spokes will be necessary to connect the CTH with the main metropolitan areas. Several hubs will be based on modernised existing lines but the majority will be built from scratch. The construction is planned to take place in three stages. Within Stage 0, which will commence before the actual construction of the CTH, 140km of high-speed railways will be installed between the CTH, Lodz and Warsaw. Thanks to this, passengers will be able to travel to the CTH in 15 or 25 minutes from Warsaw or Lodz respectively. Stage 1 will envisage establishing of approximately 870km of new railway tracks, aiming at connecting the CTH with most cities with over 100,000 inhabitants and enabling passengers to get to the CTH in under two and a half hours. Within the construction of Stage 2, approximately 570km of new railway tracks are planned to be established. This will allow shortening the time of travel from the main agglomerations by up to two hours.



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Currently, there is an ongoing debate on how to implement the strategic investments concerning the CTH. Preliminary decisions indicate that some of the investments regarding the railway component of the hub might be subsidised with EU funds. The current 2014–2020 EU budget perspective has provided the government with €10 billion for railway modernisation purposes and the upcoming 2021–2027 budget perspective may provide more, taking into account that this transport sector is considered eco-friendly, which is one of the reasons that it is being promoted at the EU level.

The new spokes will be designed and constructed by the state-controlled SPV, established under the CTH Act (and declared state-strategic thereunder) to facilitate the construction of the airport and the necessary infrastructure. At the same time, the role of PKP Polskie Linie Kolejowe SA concerning the rail section of the project will be limited to the modernisation of the existing railway system.

Other than that, several large developments are contemplated to take place in Warsaw. PKP Polskie Linie Kolejowe SA has recently introduced a new plan for the city's rail transport system, its principal goal to increase the general passenger capacity of the system. The plan to achieve this includes minimising train congestion on passenger lines by constructing two additional railway stations in the city centre, preventing cargo trains from disrupting passenger lines by creating new cargo-only routes, and integrating the infrastructure of railway and metro systems. The project will be carried out by PKP Polskie Linie Kolejowe SA; however, the manner and the sources of financing have not yet been announced.

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