

Third National Conference: Consumer in the Rail Passenger Market. Łódź, 25 May 2016

The Third National Conference entitled “Consumer in the rail passenger market” was held on 25th May 2016 at the Faculty of Law and Administration of the University of Łódź. The event was organised for the third time by the Polish Foundation of Competition Law and Sector Regulation *Ius Publicum* and the Student Society of Energy Law and Infrastructural Sectors of the University of Łódź. The organising committee was joined for the first time by the Department of European Economic Law of the University of Łódź, the Department of Public Economic Law of the University of Łódź, and the Office of the Łódź Voivodeship. The Conference was held under the patronage of the President of the Office of Rail Transport (in Polish: *Urząd Transportu Kolejowego*, hereinafter, UTK), the Centre of Antitrust and Regulatory Studies (CARS, University of Warsaw) and the Railway Business Forum. PKP S.A acted as the Golden Partner of the conference, the Institute for Economic Law Sp. z o.o. as its Silver Partner, and Łódź Agglomeration Railway Sp. z o.o. as its Bronze Partner. A number of other bodies gave their support to the conference including: the Centre for Public Procurement and Public-Private Partnership of the University of Łódź, Pawełczyk & Szura Law Office, Wierzbicki Adwokaci i Radcowie Prawni Law Office, the Student Council of the Faculty of Law and Administration of the University of Łódź, the Scientific Association of Law Students of the Maria Skłodowska-Curie University of Lublin, the Scientific Group of Administrative Law at the Silesia University, and the Student Society of Energy Law and Sector Regulation of the Adam Mickiewicz University of Poznań.

The event was the continuation of the first and second edition of the “Consumer in the rail passenger market” conferences held on 10th May 2014 (in Katowice)¹ and 18th March 2015 (in Łódź)² respectively.

¹ Kraśniewski, M. (2014). Sprawozdanie z ogólnopolskiej konferencji naukowej pn. „Konsument na rynku kolejowych przewozów pasażerskich”, Katowice, 10 marca 2014 r. *iKAR*, 7(3), 133–135.

² Kraśniewski, M. and Ziarkowski, M. (2015). Sprawozdanie z II Ogólnopolskiej Konferencji Naukowej pn. Konsument na rynku kolejowych przewozów pasażerskich Łódź, 18 marca 2015 r. *iKAR*, 4(4), 159–163.



Professor Maria Królikowska-Olczak (head of the Department of European Economic Law, curator of the Department of Public Economic Law, University of Łódź) acted as the head of the conference. The position of the president of the Conference Programme Council was held by Professor Mirosław Pawełczyk (Chairman of the Board of the Polish Foundation of Competition Law and Sector Regulation *Ius Publicum*, Associate Professor, Department of Public Economic Law, Silesian University). The organisational works concerning the conference were led by Marcin Kraśniewski (Chairman of the Board of the Student Society of Energy Law and Other Infrastructural Sectors of the University of Łódź).

The aim of the conference was to get to know and understand the processes taking place on the rail passenger market as well as to exchange views and experiences between scientists, civil servants and businessmen in this area. The conference provided also an occasion for undergraduate and graduate students to get acquainted with the regulation of the railway sector.

Professor Królikowska-Olczak greeted the moderators, speakers, discussion participants, guests and other participants of the conference. Thereafter, Professor Agnieszka Liszewska (Dean of the Faculty of Law and Administration, University of Łódź) opened the conference. She drew the attention of the audience to the key role played by railway transport and expressed her satisfaction that this already third edition of the event had been organised at the University of Łódź. In the opening part of the conference, Alina Giedryś (advisor to the Marshal of the Łódź Voivodeship responsible for railway infrastructure) read a letter from the Marshal of the Łódź Voivodeship, Witold Stępień. Subsequently, Dr Jan Michajłowski (Principal in the Department of Infrastructure of the Office of Łódź Voivodeship) read a letter from the Voivode of Łódź, Professor Zbigniew Rau. Both letters were directed to the participants of the conference. On behalf of Professor Tadeusz Skoczny (Director of CARS, University of Warsaw), a speech was also given by Dr Jan Walulik (Associate Professor, CARS).

The opening speeches were followed by the first panel entitled “The role of the State and the EU in influencing the functioning of the rail passenger market”; the panel was moderated by Dr Jan Walulik.

Dr Stefan Jarecki (Associate Professor, Faculty of IT Management, Warsaw School of Information Technology) delivered the first paper entitled “Incentives other than competitive efficiency”. The speaker discussed the aims of the EU legislator concerning railway transport, such as increasing the share of railway use in transport overall and better quality of transport services, EU regulatory solutions, and competition models in the rail passenger market. He noted that there are two models of appointing an operator on the railway market – a competitive model and direct handover. Dr Jarecki indicated that in view of those two models, the EU legislator decided to introduce other mechanisms than competitive pressure, which could impose an improvement of efficiency (both economical and related to quality of service). He described those mechanisms as “motivational incentives” that should be practised by public transport organisers. He then proposed an example of motivational incentives, presented preparations of the Fourth Railway Package and potential effects of the new EU rules.

Dr Michał Będkowski-Koziół (acting head of the Department of Public Economic Law, Faculty of Law, Kardynał Wyszyński University, partner at Kochański Zięba i Partnerzy Sp.j.), presented the next paper focusing on the European Railway Agency in light of the Fourth Railway Package. He first outlined the main aim of the new package (removing technical and administrative barriers for the development of the EU railway area) and then presented its technical and market pillars. He stressed the place of the Agency in the EU's institutional system and the controversies surrounding the delegation of competences of the EU to the Agency. The speaker referred to the Maroni doctrine and to the CJEU's *Romano* and *Short selling* judgments. He stated that the CJEU has not yet decided whether the possibilities of delegating competences are properly limited. The speaker also indicated that the Agency should be treated as an answer to the so called "liberalisation paradox", which resulted in creating new regulators in infrastructural sectors. Dr Będkowski-Koziół described later the tasks of the Agency conferred upon it by the Fourth Railway Package, the stages of creating that package, and changes in the organisational structure of the Agency. In conclusion, he indicated that organisational changes are the result of the implementation the Commission's plan referring to unifying structures of EU agencies.

Dr Bartosz Mazur (member of Prokolej Programme Board, advisor for integrated transport of the President of Rybnik) delivered the next paper entitled "Claims and complaints from railway operators towards public railway transport authorities". The aim of the paper was to present key jurisprudential theses developed by administrative and general courts concerning the organisation of public transport. The speaker started by presenting the reasons for choosing this topic and the basic legal acts regulating the relation between organisers of public transport and transport entities. He then spoke of those that are "organisers" or "operators of public transport" and the opportunities surrounding the organisation of public transport. He also stressed the rules of direct entrustment of the provision of transport services and focused on presenting a number of jurisprudential theses developed by the administrative and general judiciary. Finally, Dr Mazur set out what conclusions arise from his jurisprudential analysis and spelled out existing legal imperfections concerning the organisation of public transport and the fact that courts failed to explicitly solve many of the contentious issues.

Dr Jan Walulik subsequently invited the participants of the conference to raise questions. In the discussion that followed, the floor was taken by Professor Królikowska-Olczak who noted the centralisation tendency occurring in EU law and referred to experiences in road transport and changes in intellectual property law. She also mentioned the effects of centralisation, that is, the increasing costs for entrepreneurs. After a short presentation, she asked about the costs of proceedings before the European Railway Agency. Adrian Furgalski (president of the Board of Directors of the Railway Business Forum, vice-president of the Board of Directors of Zespół Doradców Gospodarczych TOR sp. z o.o.) was the next person to ask about centralisation. He indicated that the idea of strengthening the Agency is in general correct, since it makes it possible to reduce the number of proceedings with which transporters are currently struggling. The following questions remain unanswered at the moment however: How much will proceedings cost? How much will Polish

transporters pay for them? How long will proceedings last? What requirements will transporters need to fulfil? Elaborating on the issue of requirements, he pointed out that potential demand of “top-end” requirements, like for instance in Germany or France, will negatively influence the Polish entities dealing with examining supply trains. Dr Będkowski-Koziół agreed stating that strengthening the Agency will surely create winners and losers. Changes will certainly improve the situation of transporters, who are or will focus on developing their activity in the wider area of the EU. At the moment, there are no details on the costs of proceedings and increasing the administration of the Agency. However, it is known that the cost will not be higher than the European average, and this means that Polish transporters will have to spend more on proceedings. The speaker also indicated that the process of unification and centralisation is unavoidable, because the paradigm of the market can lead to the teardown of the internal market. Relocating some competences to the EU level is necessary – otherwise the market would not function properly. At the end, Professor Królikowska-Olczak stressed the fact that none of the agencies have their seat in Poland and asked if Poland applied to have the Agency situated on its territory. Dr Będkowski-Koziół answered that the seat of the Agency would be situated in Lille, France.

Professor Królikowska-Olczak moderated the second panel of the conference entitled “Integration of railway transport with other means of transport” and it was discursive in nature. The panel had the following participants: Dr Michał Beim (Member of the Board of Directors of PKP S.A., Associate Professor, Faculty of Land Reclamation and Environmental Engineering, Poznań University of Life Sciences), Adrian Furgalski, Ryszard Rebilas (President of the Board of Directors of Koleje Małopolskie Sp. z o.o.), Alina Giedryś and Włodzimierz Wilkanowicz (President of the Board of Directors, Koleje Wielkopolskie Sp. z o.o.).

Professor Królikowska-Olczak indicated first that European policy includes every type of transport (inland, railway, air, road, maritime transport) but if looked at through the lens of EU law, it is fair to say that Article 100 TFEU prioritises railways, inland and road transport. As a result, railway transport is regulated both by primary and secondary EU law (while air and maritime transport are subject to secondary EU law only). She then pointed out that economic integration consists of mainly obeying the principle of non-discrimination which covers not only transporters, but also contractors and passengers. She spoke of the challenges of railway transport which include, for instance, increasing competitiveness by liberalising freight and passenger transport. Some limitations of that process result from the network nature of transport and from the need of providing public services. The speaker asked the participants of the panel about State policy on the shape of public transport.

Dr Michał Beim was the first to respond stating that integration happens on many levels. The first concerns technical matters, which is likely to be the easiest and most standard to deal with. As a justification of this thesis, he indicated that building rail hubs constitutes an important position of the 2020 budget. However, he also noted that, according to technical integration, it is important to outwork “best practice” when it comes to the way and range of providing passenger information. Dr Beim spoke

next of the problem of functional integration, which consists of the harmonisation of timetables and improving the way in which train delays are handled. Moreover, he claimed that Poland was a sectorial country because every sector prepared its own set of assistance for specific categories of passengers, which greatly hinder the integration process and disorient passengers. In this respect, it is necessary to start the discussion about simplifying the assistance system in Poland. At the end, he noted the problem of the “real” powers of transport organisers. Polish metropolises are currently in the process of undertaking intensive activities meant to integrate their transport systems but meanwhile financial issues arise and so systemic measures should be undertaken as well. Dr Beim concluded that, without integration, railways will not be able to attract passengers, especially the younger generations.

The floor was taken by Mr A. Furgalski who started by talking about simplifying ticketing systems. In his opinion, ticketing systems should not be used which can soon lose their modern and passenger-friendly advantages (referring to London’s experiences of introducing a ticketing system which is currently not used). In his assessment, railway transport should be integrated firstly in the area of its own market – a railway operator defines his competitor incorrectly as another railway operator, rather than as an individual road transport. An example of this kind of thinking is the campaign of PKP S.A.: “Not every train is PKP”. Mr Furgalski claimed that what should be done instead is for railway companies to find a common ground and stop treating each other as competitors. He then mentioned the issue of common tickets asserting that the pathology should be eliminated whereby a passenger of one railway-company cannot buy a ticket at another’s cashier. He also spoke of the issue of joint connections – common consideration of railway timetables that should provide a mental integration of the railway environment, seeing as legislation will not solve all of the problems. He noted the already existing integration, inhibited by the creation of the new metropolitan act. Mr Furgalski mentioned also the integration of air transport and railway transport and stated that it should be based on loyalty programmes. The speaker referred here to German experiences where Lufthansa tickets include connecting railway tickets.

Włodzimierz Wilkanowicz elaborated subsequently on the topic of railway and air transport integration. First he said that it is hard to speak of changing attitudes where there is financial competition. He indicated also that infrastructure integration is very tough partly because it has many owners, and partly because it is not always possible for the owners to provide the same standards. This problem is related to the State’s role since it should provide proper order in this regard. Moreover, the speaker also claimed that access to railway infrastructure should include not only access to railways itself but to the exchange infrastructure as well.

Ad vocem Dr Beim said that the existence of several operators in the area of railway infrastructure is not a negative situation. He claimed that for the proper course of integration, there is no need for only one administrator to exist and to repeat the same solutions; here he referred to German experiences. In general, in Dr Beim’s opinion, it is difficult to introduce identical infrastructural standards and having many administrators might be beneficial as it can influence efficiency.

There is no doubt that identical information standards should be strived for.

W. Wilkanowicz asked Dr Beim how railway buildings, which have lost their railway-function and are currently used as schools or libraries for instance, should be administrated and who should provide railway passengers with relevant information therein. Dr Beim responded that those problems should be solved through cooperation between local governments and railway administration.

The floor was taken by Ryszard Rebilas who first outlined the beginnings of Poland's youngest railway transporter – Koleje Mazowieckie. He noted, among other things, how important it is for a railway transporter to properly prepare and settle its timetable, which is not easy since administrators introduce many revisions during the year and often change their prices. Those actions result in higher costs (in comparison to those set out in the contract) for the transporter. He also pointed out that investments into improvements of railway infrastructure are not perfect yet, and that Koleje Małopolskie are estimated to gain a stronger position in the railway market. Professor Królikowska-Olczak asked Mr Rebilas about the state of Koleje Małopolskie's preparations in relation to the World Youth Day, which place a duty on the transporter to ensure safety of the participants. Mr Rebilas replied that a special committee was created last year which coordinates those preparations – the transporter will also provide for that purpose its newest carriages, train its workers and cooperate with airports.

In the next part of the discussion, the moderator asked the participants about transport integration plans. Alina Giedryś was the first to take the floor here stressing first that integration is necessary. She started with a short historical summary of railway transport in the city of Łódź. The speaker indicated that transport integration is the basis of planning and explained that the level of integration depends on the level of preparation and execution of local sustainable development plans. She then mentioned that the infrastructural aspect of transport integration is not fulfilled properly. Infrastructural integration encounters a lot of obstacles of administrative nature, which do not make it possible to prepare common EU projects by local governments or other entities. Finally, she introduced the transport plans for the Łódź Voivodeship. Professor Królikowska-Olczak commented that all of the mentioned issues paint an optimistic picture.

The next part of the panel discussion included questions from the audience. It was indicated therein that there are important issues in relation to the hypothetical acquisition of PLL LOT by PKP, especially the duties of the participants and the contracts between transporters and passengers. The fact was also stated that integration is hindered because of certain issues arising from the state of railway infrastructure. With respect to common tickets, it was observed that these are not necessary since they are already integrated. The realisation was also stressed that there are flaws in the metropolitan act because it does not provide the possibility of concluding agreements between a metropolitan organiser and a transporter. Finally, it was indicated that transport plans are announced with a big delay.

Professor Agata Jurkowska-Gomułka (Chair of Administrative Law, University of Information Technology and Management in Rzeszów) chaired the next traditional

session that concerned the significance of railway infrastructure for the functioning of passenger rail transport.

Professor Aleksander Werner (Warsaw School of Economics) presented a paper entitled “Forms and allocation of state aid in the rail transport sector”. At first he indicated that the rail transport sector, in addition to the steel sector, the coal mining sector, the shipbuilding industry, as well as the agriculture and fisheries sector is known as a “hard sector”. Referring to the work of Professor Karol Sobczak (Warsaw School of Economics), he pointed out that rail transport is subject to many pressures which impede competition. He also pointed out that the significance of those sectors exceeds the scope of a given company and that these sectors are prone to maintain natural monopolies. The speaker also stressed that all of these aspects had been noticed by the creators of EU primary and secondary legislation, reporting that this is manifested by the creation of its state aid rules in the rail transport sector. He then outlined the content of Article 93 TFEU, which acts as *lex specialis* for Article 106(2) TFEU. He also elaborated on the content of Regulation 1370/2007 of the European Parliament and of the Council, pertaining road and rail passenger transport and repealing Council Regulation No. 1191/69 and No. 1107/701, as well as the Commission Communication which contains the Community guidelines on aid for railway undertakings³. Professor Werner noted in conclusion the assumptions of the Fourth Rail Package that will introduce market rules for state aid.

Przemysław Ciszak (solicitor, PKP S.A.) focused in his presentation on the legal status of the distribution system operator of traction energy in view of the Act on Rail Transport. He indicated that his statement should be linked with the sale in 2015 by PKP S.A. of shares of PKP Energetyka to a private investor. The sale, regardless of its business and political assessment, caused numerous discussions connected to the legal status of the assets of PKP Energetyka – especially those assets that constitute elements of the power catenary – as well as referring to the legal status of the company itself, in view of the Act on Rail Transport. Mr Ciszak also noted that one of the arguments raised in the discussion concerned recognising that PKP Energetyka’s legal status excludes the possibility of qualifying its assets as railway infrastructure. As a result, it also makes it impossible for the provider of traction energy services to railway companies to be categorised as a railway infrastructure supervisor. Subsequently, the speaker analysed the legal conflict between the Act on Rail Transport and the Act: Energy Law, having regard to EU rules.

During this part of the conference, Alina Gierdyś focused on the impact of modernization projects concerning railway infrastructure on the standard of rail transport in the Łódź Voivodeship. She first stated that the standard of rail carrier offer addressed to passengers depends on many factors such as the standard of rolling stock and that of railway infrastructure. She then presented the stages of railway activation by the Łódź Agglomeration Railway, its rolling stock standard, actions taken in order to create its brand as well as presented changes in the number of its passengers between 2014-2016. The speaker also detailed the common agglomeration

³ OJ C 184, 22.07.2008, p. 13.

ticket that offers favourable prices for rail and local transport and promoted the passenger satisfaction survey of the Łódź Agglomeration Railway (based on time of travel and on service frequency). In conclusion, Ms Gierdyś presented railway infrastructure improvement plans for 2014-2020, emphasizing the significance of the new Łódź-Fabryczna Railway Station.

In conclusion, conference participants were invited by Professor Jurkowska-Gomulka to ask questions and share their own insights with the participants of the panel. Highlighted here was the Polish system of railway infrastructure financing, which doesn't deviate from the standards adopted in other EU Member States. The consequences of taking the statutory release of buildings and equipment belonging to PKP Energetyka from property tax was also mentioned. The confusion surrounding Article 5 of the Act on Rail Transport was noted, which defines duties of the railway infrastructure supervisor, as well as the consequences of the amendment of the Act on Rail Transport implementing Directive 2012/34/EU of the European Parliament and of the Council.

Parallel panels took place after lunch. Associate Professor Monika Namysłowska (Department of European Economic Law WPiA UŁ) chaired the consumer panel entitled "Protection of consumer rights in the rail transport sector". Marcin Kraśniewski chaired the access panel entitled "Access to railway infrastructure as a pro-competitive instrument in the rail transport sector".

During the consumer panel, Dr Sebastian Gajewski (researcher, Faculty of Law and Administration, University of Warsaw) presented a paper entitled "Rights of disabled persons and persons with reduced mobility and their protection in rail traffic". He stressed that an important part of Regulation 1371/2007 lies in standards relating to the rights of disabled persons and persons with reduced mobility in rail traffic. He then pointed to four main powers vested in this category of passengers: the right to transport, the right to information, the right to assistance and the right of access. The speaker outlined the detailed content of these individual rights – along with the scope and conditions of their permissible restrictions – and legal measures meant to guarantee their realization. In conclusion, he stressed the major role of the President of UTK when it comes to due protection of the rights of persons with disabilities.

Karol Kłosowski (Head of Unit –UTK, Passenger Rights Department, Administration Procedure and Supervision Unit; PhD Student in Nicolaus Copernicus University in Toruń, Faculty of Law and Administration, Department of Civil and Family Law) presented the next paper entitled "Unlawful practices infringing collective interests of rail passengers – remarks *de lege lata* and *de lege ferenda*". Mr Kłosowski spoke first of the powers of the President of UTK to conduct administrative proceedings concerning illegal practices infringing collective interests of rail passengers. He presented the origins and legal structure of this institution. He then analysed the current practice of the President of UTK in the area of administrative proceedings conducted in such cases and covered the imposition of fines in cases of violations of the prohibition of the use of illegal practices infringing collective interests of rail passengers. The speaker compared the competences of the President of UTK to those of the President of the

Office of Competition and Consumer Protection (UOKiK), the National Competition Authority, and formulated *de lege ferenda* proposals.

Grzegorz Pilecki (Senior Law Consultant in Legal Department of Administrative Proceedings and Supervision of UTK) delivered a speech entitled “Railway Passenger Ombudsman – alternative systems of extra-judicial dispute resolution as a new element of protecting the rights of rail passengers”. The starting point of his speech was to direct the attention of the audience to the concept and rationale of alternative systems of extra-judicial dispute resolution (ADR). The speaker clarified the powers and operational mode of the Rail Passenger Ombudsman, which was entered into the public system model of extra-judicial settlement of consumer disputes, based on general applicable provisions. Mr Pilecki outlined applicable provisions and the establishment of the Act of 18 May 2016 on extrajudicial resolution of consumer disputes. He then consecutively presented: the rules for the election and dismissal of the Ombudsman, the mode and manner of proceedings before the Ombudsman, the request for initiation of proceedings and possible outcomes of a case before the Ombudsman. In conclusion, he also pointed to that UTK is working on the regulation of the institution of the Ombudsman.

Dr Przemysław Kowalik (Assistant Professor, Department of Quantitative Methods in Management, Faculty of Management, Technical University of Lublin) introduced the principles for the construction of tariff offers in rail passenger transport as the cause of damage to the interests of consumers. At the outset, he stated that Regulation 1371/2007 obliges railway carriers or ticket vendors to provide information before traveling on, among others, the conditions for the lowest fares. Citing studies, he argued that rail operators do not fulfil that obligation. The speaker continued on to presented the guidelines for the proper construction of transportation tariffs, the compliance of passenger tariffs of Polish railways to the assumptions of correct tariff structures, and examples of failure to inform about the cheapest fare. He concluded by speaking about proposals for changes in the construction of passenger tariffs and their potential effects.

After the presentations, Professor Namysłowska opened the floor for a discussion which highlighted the consequences flowing from the principles of the structure of passenger tariffs, the issue of decisions finding a violation by a rail carrier of its information duty concerning lowest prices, and the vagueness of the term “conditions for lowest fares”. In addition, it is indicated on the practice of the President of UTK for the protection of passengers’ rights of persons with disabilities and limited mobility, which makes the relevant supervisory and control activities in this area.

During the parallel concerning access, Łukasz Romański (Department of Safety, UTK, PhD student, Faculty of Law and Administration, Warsaw University) presented a paper entitled “Liberalization policy in the railway sector in the EU in relation to the position and role of regulatory authorities in EU Member States”. Ochirsuren Badral (student, Faculty of Law and Administration, University of Łódź) spoke next of a fee for access to railway infrastructure. Aleksandra Bogusz (PhD student, Faculty of Law and Administration, University of Łódź) considered the environmental aspect of access to railway infrastructure. Michał Bałdowski (student, Faculty of Law and

Administration, University of Warsaw) presented the jurisprudence of the CJEU on access to railway infrastructure. Katarzyna Surmiak (student, Faculty of Law and Administration, University of Silesia in Katowice) spoke of activities and expertises of the President of UTK in the area of railway infrastructure. The session ended with a speech by Tomasz Mizioch (student, Faculty of Law and Administration, University of Silesia in Katowice) entitled “An administrative law analysis of a decision of the President of UTK replacing a contract for access to railway infrastructure”.

The conference ended with speeches given by Professor Królikowska-Olczak and Professor Pawełczyk. During the closing ceremony they announced the organization of the next edition of the conference, which will take place in March 2017 in Łódź. They also announced the publication of a book containing a selection of papers concerning the regulation and protection of consumer rights in the railway sector. The planned publication will be the continuation of the speeches presented during the Third National Law Conference “The consumer in the passenger rail transport market”.

Katarzyna Chojecka

Faculty of Law and Administration of the University of Warsaw;
k.chojecka00@gmail.com

Marcin Kraśniewski

Faculty of Law and Administration of the University of Łódź,
Polish Foundation of Competition Law and Sector Regulation “Ius Publicum”;
krasniewski@iuspublicum.pl

Tomasz Mizioch

Faculty of Law and Administration of the Silesia University; tomasz.mizioch@gmail.com

Agnieszka Sobierajska

Faculty of Law and Administration of the University of Łódź; agnieszka92.92@o2.pl