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Eligibility to Claim of Activities of Public Transport Authorities Within Passenger Services on the Regional Level – Remarks Based on Case II SA/Ke 329/15

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Summary
Prior announcement of intention of public transport authorities in the area of the chosen procedure of awarding PSC (direct or tender) is to ensure that the carriers interested in gaining contracts may act regarding the intentions. In the case of direct award, administrative judgement control may apply as a consequence of promoting transparent, non-discriminatory market procedures. The article describes successive actions undertaken by a public transport authority before contracting. The new-entrant to the market has to bear objective difficulties with defining which particular action of the authority could be claimed. The consequent steps were so complicated that it was hard to find the true intentions of the public transport authority.

Keywords: public procurement, public transport authority, judiciary claim

1. Introduction

Railway carriers interested in gaining public service contracts on the regional level face the possibility of abuses from public transport authorities due to their market position. These abuses refer mostly to unsatisfactory level of transparency of the commitments what puts market participants in a worse position.

The general purpose of the article is to define the position of railway carriers towards public transport authorities. On the basis of analysed case it's been proved that complication of valid legal rules is a factor unfavourable to the development of railway market. That's because the public contractor may freely interpret its obligations during the preparatory (pre-contractual) period. Additional purpose of the article is to put the analysed case among other cases covering the aspect of claiming acting of public transport authorities by railway carriers.

During elaboration of the topic exegesis of II SA/Ke 329/15 case has been conducted as an implementation of linguistic-logical research method. The material, based on the information contained in a court decision [5], re-creates the course of the preparatory proceedings (pre-contractual) stage and analyses the role that the current law assigns to market operators at different stages of the public transport authority's operations. So this text concerns the pre-contractual stage of public transport authority's actions. The matter of the juridical conclusion has been put under evaluative analysis in the context of common legal rules, esp. Act [9].

The relevance of the topic undertaken stems from two premises. On the one hand, the proceedings described illustrate the fundamental need for the transparency of proceedings and non-discriminatory treatment of all interested (and potentially interested) operators, which is inherent not only for public transport authorities but for all public sector operations. On the other hand, it reveals the complexity of the statutory provisions, which are a source of interpretation difficulties not only for economic entities, but also for the judicature.

2. Passenger railway market in Poland

The general rules of passenger railway market in Poland have been defined by the Act on Public Transport [9]. This Act constitutes foundations of organ-

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izing public transport. It transfers the rules of Regulation (EC) 1370/2007 of the European Parliament and of the Council [6] on the national level.

Voivodeship local governments are an important link in the system of public transport organisation in Poland. The voivodeships organise railway transport and, as the public transport authority, fulfil the obligations resulting from the provisions of the Act on Public Transport [9], especially in the area of passenger railway services. In the period before the described case passenger railway market in Poland has been facing growing importance of new railway undertakings. These companies took over services from former incumbent Przewozy Regionalne. Changes occured in two alternative ways: by creating own carries (like for example Koleje Dolnośląskie) fully owned by voivodeships or via tender procedures (like in Kujawsko-Pomorskie Voivodeship). Railway market participants may expect further changes – new tenders executed by following regions as well as closing market by creating own passenger railway companies. At the same time there have been changes affecting Przewozy Regionalne, incumbent operator in the majority of Polish regions. These changes covered restructuring, financial support, ownership changes and contracting services for regions.

This strategic uncertainty forced passenger railway carriers to care about gaining potential new public service contracts. These companies paid special attention to voivodeships which include tenders in their forthcoming actions (or – at least – which do not eliminate the possibility of tender procedure by the commitment of public services on rail). Information from public transport authority (here: voivodeship) should be announced in proper advance, due to the rules of [9] and should include anticipated form of contracting (tender or non-tender).

Intention of public transport authority should be announced in advance especially for enabling market participants to conduct reasonable acting, according to the announcement of intention of public transport authorities. During pre-contractual stage, driving finally to contract provision of public transport services, the public contractors' activities should, in principle, be addressed in a non-discriminatory manner to all potential market operators.

3. Nature of the claimed action

On 17 April 2015, a judiciary claim was lodged in the Voivodeship Administrative Court in Kielce against the action of the public transport authority in connection with the intention to directly award the provision of public transport services. An important aspect of the dispute was the classification of the claimed action as each party to the dispute referred differently to the matter in the dispute, i.e. the action that was the subject of the claim.

In the claimant's view, this action bore all the hallmarks of a public invitation under Article 23(1) [9]. The party's reasoning for treating the claimed action in this way is that it was the first point at which all the requirements for an invitation under Article 23(1) [9] were met. In particular, according to the claimant, it was the first point at which the organiser clearly complied with the requirements of Article 23(4)(2) [9]. By contrast, the defendant presented the position that the claimed action should not be considered in isolation from the authority's previous actions in publicising its intentions.

While the assessment of the action that was the subject of the claim is crucial to the proper judicial review, it is the totality of the authority's actions that sheds significant light on how the legislation fails to fulfil its primary function, i.e. to protect the market and promote transparency.

4. Similar cases

In the area of pre-contractual procedures, the action brought before the Kielce Court may be compared to other judgments in which administrative courts examined the actions of authorities leading to the direct award of public transport services [cf. 2]. A list of the claims showing the nature of the claim and the court's decision is included in the Table 1.

Table 1

Other similar disputes involving regional rail services

Subject of the claim	Resolution of the court (File No.)	
	Rejection of the claim	Repeal of the authority's actions
Announcement of intent to direct award (or revise the announcement)	–	II SA/Gl 1267/12 II SA/Gl 1269/12 II SA/Bd 992/15
Another action of the authority	II SA/Gl 1024/12 II SA/Gl 1408/12 II SA/Gl 1409/12	II SA/Gl 1268/12

[Author's study].

The above list does not include the II SA/Ke 329/15 case in light of the concerns as to whether the matter of the claim was an announcement (the claimant's position) or not (the position of the defendant). In most similar cases, the judicial decision takes the view that it is inadmissible to claim the actions of the authority other than the announcement. This is an in-

correct interpretation since the Act does not limit the material scope of claims to announcements, but only conditions the admissibility of a claim on the chosen mode of award, limiting its admissibility only to the non-tender procedure. In fact, Article 59(1) [9] provides that (…) *in case of announcement of intention to contract directly, the undertaking interested in gaining contract is able to lodge a claim in an administrative court* (…). The cited rule does not in any way state that the sole matter of an effective claim would be the act of announcement itself. It rather opens claiming to all activities undertaken by the public contractor in case of the intention of direct award.

Jurisdiction tended to interpret rules narrowly. According to cases courts used to reject claims against activities other than announcement, what in fact is not fulfilling general rule, included in the Act [9]. Nevertheless legal rules seems not necessarily to be changed as the rules are clear and corresponding to the broad scope of needed protection of market participants. The only problem is in courts, inappropriately tightening sense of rules.

5. Objectives of announcements of authorities' intentions

When considering the admissibility of the control of authorities' conduct by administrative courts, one must bear in mind the objectives pursued by the relevant provisions of legal acts. It seems that, at the stage of creating the provisions of the Regulation [6], the intention of the European legislator was to improve the transparency of proceedings and market transparency. At the same time, however, these rules had to take into account the existing situation, which differed from country to country and from one transport mode to another. The implemented provisions of the Regulation [6] (and further – also of the Act [9]) provide two basic paths of conduct at the stage of public transport organisation, i.e.:

- a market-oriented, openly competitive and non-discriminatory mode,
- direct mode, limiting competition and accessibility for potentially interested parties.

It is significant that the EU legislator retains the discipline of the obligation to notify the wider market of its intentions in relation to both procedural paths. The obligation to give such announcement is provided for in Article 7(2) [6] and covers both the market-oriented mode and the direct mode. At this point, the question should be asked as to the purpose of such a regulation. It appears that, although the provision covers both contracting regimes, it pursues different objectives for the two cases. As a basic procedure based on competition, the public authority's intentions need to be made known to the public sufficiently in advance so that potential interested parties can take certain preparatory steps to be able to participate effectively in the planned tender.

Such logic is in no way compatible with a regime of direct public service award. With regard to this group of actions, the objective is quite different. It seems that the intention of the legislator was to provide tools thanks to which business entities can control not so much the correctness of the procedural conduct, but the legitimacy of the choice of the direct award mode. Indeed, the supreme principle of the common market and free movement is the basis on which the European Union is founded, and the direct award of contracts is merely an exception to this principle, and appropriate tools must be provided to check that this procedure is not misused.

It seems that when incorporating (in Art. 23 [9]) the provisions of European law, also at the national level, it is necessary to take into account the objectives of certain tools – here: in the form of the obligation of the public transport authority to announce its intentions and the scope of admissibility of the claim procedure. As the provisions of the Regulation [6] are substantially reproduced, the above remarks concerning the divergence of the objectives of advance announcement, depending on the chosen procedure, also apply to announcements within the meaning of Article 23 [9].

6. The preparatory phase course in the present case

The subject matter of the case in question is the action of the authority, dated 18.02.2015, which undoubtedly belongs to the preparatory phase in the actions of the public transport authority. In order to understand the substance of the case, however, it is necessary to illustrate the circumstances in which the announcement under claim was issued.

Based on the analysis of documents available in the Public Information Bulletin of the Świętokrzyskie Voivodeship [3, 10], it is possible to reconstruct the course of the preparatory phase, at least as far as the actions of the authority, which preceded the issuance of the document which is the subject of the claim, are concerned. Thus, the original announcement of intention to organise services (without specifying the mode) was published on 8 November 2013, thus 2 years, one month and 5 days before the expected commencement of services. This announcement was revised on 28 February 2014 (3 months and 20 days

after the original announcement), with the revision not referring to the matter of the case. A further revision of the announcement was made on 16 December 2014, therefore 362 days before the expected commencement of services [3]. The document that is the subject of the claim (described by the authority as an "announcement") was dated 18.02.2015 and published in the Bulletin of Public Information the following day [10]. The individual actions are presented chronologically in the Figure 1.

The conceptual division of the last claimed action to an announcement and a statement of reasons for the announcement are dictated by the fact that the legal basis cited in that document does not contain information which would in itself constitute grounds for action before the courts. In addition, in the case at hand, it should be noted that the reasoning in the statement of reasons does not refer to the legal basis cited in the announcement.

Based on the documents cited above, it is possible to follow the entire course of proceedings and try to answer at what point an entity interested in obtaining a contract with an authority becomes entitled to effectively claim the authority's actions. The case also prompts a debate on the expected and possible effects of an effective claim regarding the procedure related to the provision of public transport services to passengers based on a contract with a public transport authority (here: voivodeship local government).

7. Original announcement

The paradox of the described situation is most clearly visible in the fact that the original announcement of the authority, on the one hand, was flawed and, on the other hand, in practice appears to be unclaimable under the regulations [9]. The original announcement, published in the Public Information Bulletin, provided for the authority to use one of two alternative modes of award, i.e. a competitive mode or a direct mode. What is important at this point is that Article 23(4)(2) [9] provides that the announcement should include "an identification of the intended mode of contract award". The intention of this provision, deriving from the purposes of the announcements, requires the authorities to indicate the mode as precisely as possible and not to duplicate the possible alternatives allowed by the Act. It seems that if the authority has not yet made a decision on the mode of award, then it should refrain from publishing the announcement.

This type of action (announcement) is not merely the fulfilment of the duties of a public authority, but performs certain functions in the economic environment. It allows potentially interested parties to realise that there may be opportunities in a certain future to win a contract for specific transport services. The announcement, which was published in November 2013, more than two years ahead of the commencement of

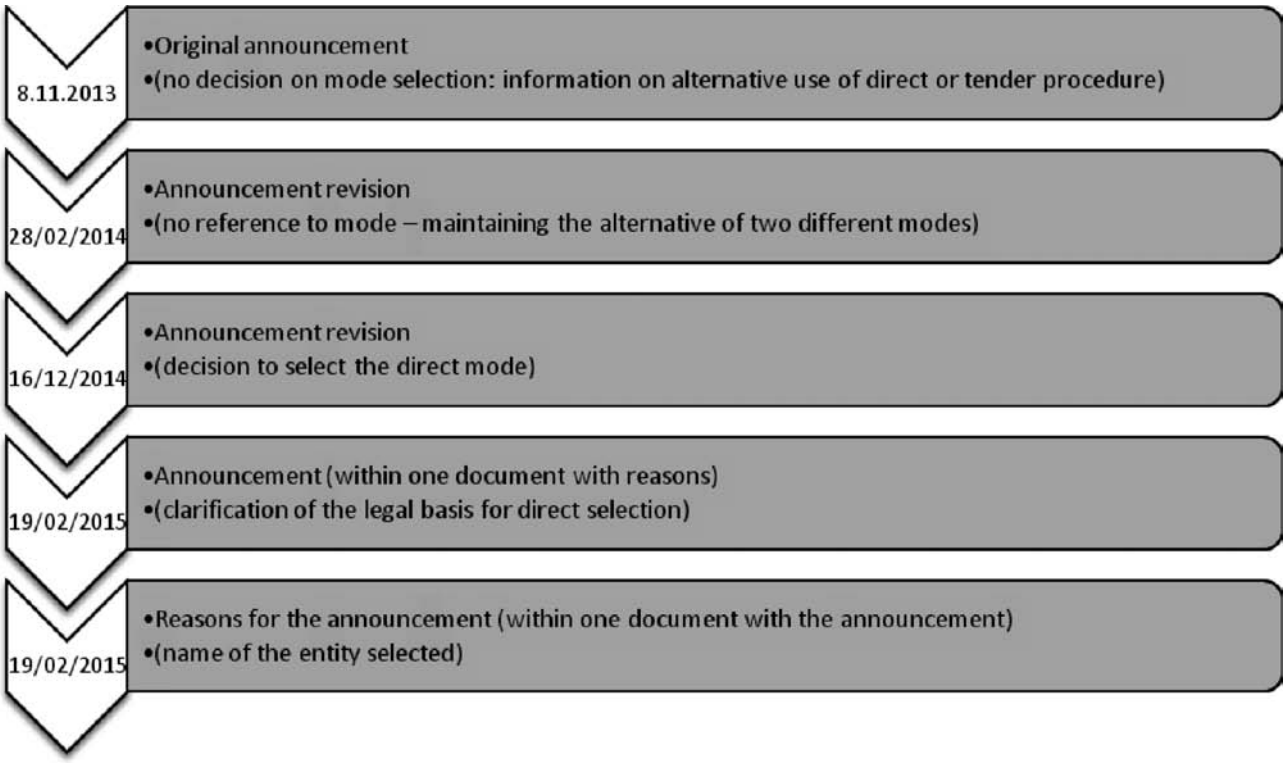

Fig. 1. Schedule of events preceding the claim to the action of the public transport authority in the regional rail services [author's study]

the services, gave an unquestionable indication that there might be a possibility in which every interested party would be able to compete for a contract with the authority based on the same criteria (or at least it did not rule out such a situation). It can therefore be concluded that the procedure could not be successfully claimed against, as nobody was unjustifiably a priori excluded at that stage.

8. Announcement revision

The turning point of the procedure at the preparatory stage is the revision (second) of the announcement, which followed on 16.12.2014. On that date, the organiser specified that the award of the transport network operation it organised would be performed in the direct mode, i.e. without a tender procedure. In the court's view, it is this announcement (this "action" – the revision of the announcement or rather the announcement with the revised content) that would be subject to an effective claim. According to the reasoning of the court, it was on this date that the interested parties could have become aware that the authority intended to award the contract directly, so that the period for admissibility of the claim procedure should be calculated from this date. In addition, the court of cassation [4] shared the opinion that the first action that prejudged the admissibility of the implementation of the claim procedure was the revision of the content of the original announcement, published on 16.12.2014.

It is worth noting at this point that the use of the procedure of direct contracting of transport does not imply the elimination of (any) particular entity which, as a result of the choice of such a procedure, is entitled to bring a claim before an administrative court. As proved by P. Bogdanowicz [1], the procedure of advance announcement of intent by the public transport authority, which is included in Regulation 1370/2007, is an expression of attributing the significance of the EU in relation to the entire railway market. The purpose of the announcement is therefore to allow potentially interested parties (implicitly those established in another Member State) to inform the announcing party of their interest in being awarded a contract. Therefore, since this provision was incorporated into domestic law, the intention was to allow domestic operators to react accordingly.

Additionally, W. Szydło [7] emphasises the necessity of considering the direct award procedures in close connection with the treaty provisions. Thus, even when deciding on direct awards, the authority should apply the possibilities under the general rules to admit the widest possible range of entities potentially interested in the contract. In this light, referring to Article 22 (1) of the Act on Public Transport by the public transport authority does not (yet) exclude any entity from participating in the tender for a public transport contract.

It should be stressed that the court's position on the potential eligibility to claim of the action of 16.12.2014, which consisted in revising the announcement by eliminating the non-tender procedure, does not specify whether the effectiveness of such a claim would be based on the issue of the procedure selection itself, or on the fact that the revisions are inadmissible within less than a year after the planned commencement of the services.

9. Legal nature of the announcement

The actual object of the claim in the case was the announcement dated 18.02.2015. The claimant's argument was based on the logic that the announcement was, in fact, the first announcement in which the non-tender procedure of the public transport award was clearly set out. The claimant's argument that the announcement should be treated as an announcement appears to be incorrect. While the pre-contractual conduct as a whole raises significant concerns, it would defy logic not to link the announcement to the claiming authority's previous actions. It is difficult to say that the claiming party did not associate the announcement with the authority's earlier actions, since – as the court ruling shows – it informed about the willingness to provide transport services for it, in particular, it sent a letter to the authority dated 29.12.2014.

At the same time, however, it was indeed only as a result of the authority's actions of 18.02.2015 that the claimant could have become aware that it had been eliminated from the contract award process at the pre-contractual stage. In the light of the cited opinions of P. Bogdanowicz and W. Szydło, the revised announcement that followed in December 2014 could have been treated by the claimant as a desire to conduct a procedure that would not a priori eliminate any entity, taking into account the general treaty provisions, albeit with the use of the provision of Article 22(1)(3) [9].

In this view of the matter, it is important to highlight the fact that the claimant correctly and logically responded to the announcement which followed on 16.12.2014. In view of the authority's announcement of intent to directly award public transport services, the obvious response was to inform the authority of the willingness and readiness to provide transport services – which followed on 29.12.2014. At that stage, the claimant could not have been aware that the award would be made to an internal operator (the revised announcement referred only to Article 22(1), without

specifying that the provision at issue was paragraph 2) and could therefore have regarded such an announcement as a kind of call for tenders, or at least an invitation to indicate an interest in providing the services.

The claimant's argument that the announcement should be treated as an invitation appears to be incorrect and far-fetched here. It is difficult to say that the authority announces new intentions without explicitly referring to the previous actions undertaken in relation to rail transport services. It is relevant that the party claiming the announcement, while claiming that it was a 'new announcement', did not claim that this 'new announcement' did not contain the elements required by law for an announcement, in particular as regards the transport connections, pursuant to Article 23(4)(3) [9].

Lack of unified classification of the document the announcement of 18.02.2015 published by the authority to the applicable regulations leads to own proposal. The content of this claimed announcement correspond to Article 7(4) Regulation [6]. In this case, however, the justification for the decision to award the contract directly (which was de facto the essence of the announcement) was made on the authority's own initiative and not on request, and was of a public nature and not addressed to the specific entity requesting the justification.

10. Concerns about the possibility of an effective claim against the actions of the authority

The complexity of the matter raises questions about the ability of potentially affected rail market operators to defend their interests effectively. Indeed, if one were to treat the announcement (of 18.02.2015) as an action described in Article 7(4) of the Regulation [6], then indeed such an announcement should not be claimable (as an action) as it is merely informative. At this point, it is necessary to return to the revision of the announcement of 16.12.2014, in which the authority informed for the first time about the desire to apply the direct award procedure in the contracting of the railway service. How the claimant's position of 29.12.2014, in which it communicated its readiness and willingness to provide services on the authority's transport network, was treated is crucial for this case. As the entire pre-contractual procedure is subject to administrative proceedings, it was the authority's duty to consider the letter in the sense of Article 7 [8], especially according to accuracy of activities of public transport authority. The authority's failure to reply could therefore be a ground for bringing a formal reminder on the grounds of lengthy proceedings or failure to act of a public authority.

The fact that the authority did not announce its intent to award directly in the EU publication until 27.02.2015 is symptomatic at this point. This action – if only by virtue of the failure to provide one year's announcement in advance of the time when the services were provided – appears to be effectively claimable. However, it is difficult to judge how a successful claim of the announcement in the EU publication could affect a situation where the authority had already decided to award a direct contract and named the selected entity, of which it had already given announcement before the EU publication.

It must also be questioned whether the authority exercised due diligence in the pre-contractual procedure. According to the original announcement, the contract award procedure (irrespective of the mode) should start no earlier than one year after the announcement – so no earlier than 8 November 2014. Meanwhile, the signing of the agreement in October 2014 (referred to in the announcement) shows that certain steps were taken by the authority before the expiry of the period indicated in the original announcement. It is also questionable that the announcement revision, following the October agreement, was not made until mid-De cember 2014 – it is difficult to speak then of immediate actions and increased trust in public institutions. However, it is difficult to expect a claim against the signing of the agreement by the authority in October 2014 – in the light of the wording of the original announcement, which specifies the annual period after which the actions aimed at the contract award will be taken, the reasoning that the agreement is not an action in a matter related to the original announcement is not groundless.

11. Conclusions

The II SA/Ke 329/15 Case is part of a certain canon of decisions of administrative courts rejecting appeals against the actions of authorities other than the mere announcement of the intention to directly award contracts. Be it as it may, the grounds for rejection are not adequate (the Act does not limit the possibility of a claim only to announcements), and in this case the authority's proceedings were very complicated and lengthy. On the other hand, the claimant also based its argumentation on a rather specific logic, which is very difficult to defend. It is clear that market operators interested in winning contracts are not adequately protected – the obligations of the authorities to publish information about their intentions are not clearly defined and the provisions of the Act on Public Transport do not correspond to the economic practice of the passenger transport market. In addition, the subsequent actions of the authority may signifi-

cantly reduce the capabilities of market operators and preserve the situation of the local market to a greater extent than was intended by the legislators.

At the same time, the restrictions make it excessively difficult to bring an effective claim as it is difficult to identify a specific moment and a specific action which, in itself, could be the subject of a claim, since it is only the entire chain of actions in the preparatory phase that reveals actions which excessively restrict the market. In the context of the adoption of the Fourth Railway Package, which aims to increase the impact of market forces on passenger railways, more attention should be paid to the actual transparency of the entire procedure for selecting service providers.

Probably described case improved the legal awareness of passenger railway undertakings, especially among public transport authorities. The authorities improved the process of announcing their intentions during pre-contractual stage. The most important issue is to avoid juridical continuation of rejecting claims against public transport authorities in cases when the subject of claim is not sole announcement of intention of public transport authority. Another basic need is to change the rules which would result in enforcing market participants to claim activities of public transport authorities also in case of unclear (undefined) scheme of awarding public service contract (instead of current rules limiting the ability to claim to direct awarding scheme). All activities undertaken by public transport authority in case of choosing direct awarding scheme should be claimable, as well as inactivity of public transport authority causing the lack of information about chosen awarding scheme a year before start of providing services.Facing the need of more protection on market participants new rule has been introduced in 2020. The Article 23a of Act [9] determines that each undertaking endangered with detriment caused by the decision of public transport authority to award the public service contract in the direct scheme is entitled to gain opinion of the President of Office of Rail Transport on the compatibility of awarding authority activities with European and national rules. Nevertheless the protection of railway undertakings remains too weak, as the legal role of the opinion of President of Office of Rail Transport is not defined. The duality of possible actions to be taken by market participants (claiming at administrative court versus gaining opinion of President of Office of Rail Transport) does not support efficiency of passenger railway market protection as well.

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