

Cardinal Stefan Wyszyński University in Warsaw
Institute of Philosophy
Center for Ecology and Ecophilosophy

STUDIA ECOLOGIAE ET BIOETHICAE



21/2 (2023)

Modern Collective Transport. The impact of Public Policy on the Implementation of the EU Legislative Objectives on the Example of Poland

Nowoczesny transport zbiorowy. Wpływ polityki publicznej na realizację celów prawodawcy unijnego na przykładzie Polski

Stefan Akira Jarecki

Warsaw School of Information Technology – WIT, Poland

ORCID <https://ORCID.org/0000-0002-5738-3036> • jarecki@wit.edu.pl

Received: 07 Feb, 2023; Revised: 12 Apr, 2023; Accepted: 14 Apr, 2023

Abstract: Urban policy is driven by current trends and ideas. In the 20th century, it was mainly based on modernist views and the most important element of the transport planning policy at that time was the use of the private motor vehicle (car). As a result, transport policies in the 20th century were focused on large-scale road projects, while public transport was marginalized. However, this approach changed drastically at the turn of the 20th and the 21st centuries. Nowadays, the main emphasis is put on environmentally and user-friendly public transport. However, public urban transport often fails to meet the needs of the society. What are the reasons why urban public transport is still not as effective as it should be? The author of this article points in this respect to the poor policy of public bodies responsible for the provision of transport services for the society rather than to the poor quality of the transport law. There are two main areas for improvement – public service planning (defining the service) and cost-effectiveness of providing transport services. The author of the article proposes specific solutions in this regard.

Keywords: transport, collective public transport, regulation 1370/2007, urban public transport

Streszczenie: Polityka miejska kształtowana jest przez aktualne trendy i idee. W XX wieku opierała się na ideach modernizmu. Najważniejszym elementem modernistycznej polityki planowania transportu był prywatny pojazd mechaniczny (samochód). Dlatego też polityka transportowa w XX wieku koncentrowała się na wielkoskalowych projektach drogowych. Transport publiczny był natomiast marginalizowany. Podejście to zmieniło się jednak drastycznie pod koniec XX wieku i na początku XXI wieku. Obecnie kładzie się nacisk na przyjazny dla środowiska i użytkowników transport publiczny. Mimo to miejski transport publiczny w wielu przypadkach nadal nie odpowiada potrzebom społeczeństwa. Dlaczego komunikacja miejska wciąż nie jest tak efektywna, jak być powinna? Zdaniem autora artykułu, powodem tego jest raczej zła polityka organów publicznych odpowiedzialnych za świadczenie usług przewozowych społeczeństwu niż zła jakość prawa transportowego. Istnieją dwa główne obszary wymagające poprawy – planowanie usług publicznych (definiowanie usługi) oraz efektywność kosztowa świadczenia usług transportowych. Autor artykułu proponuje konkretne rozwiązania w tym zakresie.

Słowa kluczowe: transport, publiczny transport zbiorowy, rozporządzenie 1370/2007, komunikacja miejska

Introduction

According to the contemporary urban policy, transport of people over longer distances should take place primarily with the use of environmentally friendly collective public transport. Currently, therefore, great emphasis is put on the development of this type of transport. Ambitious (both in terms of scale and costs) investments in infrastructure and means of transportation are being made. The quality and availability of transport services is improving; however, public collective transport still fails to meet the needs of society not being sufficiently effective. The main factors influencing the choice of means of transport are the price, availability, quality of means of transportation, traffic conditions, and the possibility of meeting individual needs of citizens by a given type of transport. Therefore, to increase the share of public transport in the modal shift, it is necessary to provide society with numerous, affordable, and better-quality public transport services. The bar chart below shows the modal share of public transport in selected Polish cities in 2013-2015.

The aim of the article is to define the reasons for this situation, and in particular, to find out whether they rest with entities responsible for organizing transport services or with the imperfect law. For this purpose, the author analyses the current transport policy, Polish and European Union law, as well as solutions used by some organizers of public collective transport.

1. Political determinants

Public collective transport is a key element of a sustainable city (Świdarska 2022, 89). One of the key directions to be followed by modern urban policy is developing environmentally friendly public transport for all users. As stated in the EU Commission's Communication on *The European Green Deal*, transport is already responsible for a quarter of EU greenhouse gas emissions and this figure is still growing. To achieve climate neutrality, it will be necessary

to reduce emissions in the transport sector by 90% by 2050. All types of transport: road, rail, air and waterborne will have to contribute here. However, the way to sustainable transport is giving priority to passengers' needs: offering them cheaper, more accessible, healthier and cleaner alternatives than those they currently most often use. *The Sustainable and Smart Mobility Strategy – Putting European Transport on Track for the Future* states that increasing the public transport share will significantly reduce pollution and congestion in cities, contributing to the improvement of people's health and well-being. The document argues that cities should be at the forefront of the transformation towards more sustainable development. According to the position of the Commission, in order to implement the above assumptions, all large and medium-sized cities that are urban nodes in the TEN-T network should implement sustainable urban mobility plans by 2030. These should include implementation of new goals such as zero emissions and zero road fatalities. There is no doubt that the achievement of such ambitious goals in the area of transport and environmental policy requires developing public collective transport in cities.

2. Legal environment of public collective transport

The rules for organizing and financing public collective transport in the European Union are set out in Regulation 1370/2007 of the European Parliament and of the Council on public services in the field of rail and road passenger transport. The document was later amended by Regulation 2016/2338 of the European Parliament and of the Council changing Regulation 1370/2007 on the opening of the market for domestic rail passenger transport services. This act forms part of the fourth railway package¹, therefore it mainly relates to rail

¹ The concept of railway packages is defined as sets of legislative acts (directives and regulations) concern-

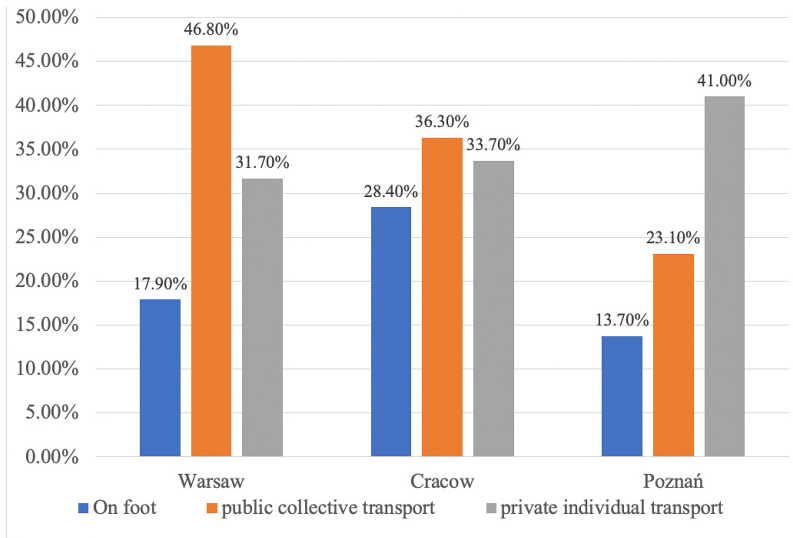


Figure 1. Modal share of public transport in selected Polish cities in 2013-2015 source: (Gadziński and Goras 2019, 84)

transport. This means that since the entry into force of Regulation 1370/2007, the legal framework of the public collective transport system has not undergone major changes. Regulation 1370/2007 provides for the functioning of public collective transport system, which, in general, assumes that the organizer entrusts the operator with the obligation to provide public services based on the agreement on the provision of such services for remuneration (usually in the form of compensation) (Skovgaard Ølykke 2008, 84-89; Rusche and Schmidt 2011, 249-263; Turek 2012, 43-44; Pedret Cuscó 2017, 30). The organiser, operator, public service obligation and an agreement for the provision of these services constitute inseparable elements of the system of organizing public collective transport in the European Union.

At the level of Polish law, the analysed issues were regulated by the Act of 16 December 2010 on public collective transport (Act 2010). This act lays down the rules for organizing and financing public collective transport in line with the provisions

of Regulation 1370/2007. In this respect, it adapts Polish law to the solutions provided for by this regulation and regulates issues which are not covered by the EU act. As indicated in the justification to the draft law, Regulation 1370/2007 does not establish institutional structures for managing public transport nor does it impose a single European mechanism to be applied in all Member States. This particular area was left to the discretion of the Member States. Regulation 1370/2007, on the other hand, provides a set of instruments that may be used by national authorities under European law in order to implement public transport systems chosen by these authorities. Therefore, the Act on public collective transport specifies in detail the provisions of Regulation 1370/2007 and together with it constitutes the legal framework for the provision of public collective transport services in Poland (Sejm paper No. 2916, 4).

The above legal acts, although not without some flaws and often criticized, regulate the system of public collective transport in a relatively transparent and modern way. They, moreover, do not pose major problems as regards their application, which is

ning the functioning of railway transport in the EU. So far, four such packages have been adopted – the first in 2001, the second in 2004, the third in 2007 and the fourth in 2016.

reflected by their only minor amendments.² Despite this, the functioning of public collective transport, including also public transport at the local level, is still far from satisfying. What is the reason for this? Before answering this question, it is necessary to provide an overview of the system of organizing public collective transport and explain the key concepts that this system is built upon. Without thorough understanding of the public collective transport system organization, it will be difficult to define the sources of the problems in its functioning – poor regulations, or perhaps the wrong policy of public authorities (organizers).

3. System of organizing public collective transport in Poland - key elements

As mentioned above, the key elements of organizing public collective transport system include: the organizer, the operator, the obligation to provide public services and the agreement for the provision of these services. The public collective transport system can be presented, after filtering out irrelevant aspects, by explaining these four elements (concepts).

The organizer (of public collective transport) is an entity ensuring the functioning of public collective transport in a given area. Depending on the area of operation or transport coverage, it is the competent local government unit or the minister competent for transport. At the local level, the organizer may be a commune, an inter-communal association, a poviats, an association of poviats, a poviats-commune association or a metropolitan association. The organizer's tasks include, in particular, research and analysis of transport needs regarding public collective transport; developing, implementing and updating the transportation plan, ensuring appropriate conditions for the functioning of public collective transport (including transport financing), defining the way

of marking the means of public transport; determining transport fees and other charges for the service provided by the operator; determining the method of ticket distribution and entrusting contracts for the provision of public services.

The operator is an entity providing public utility transportation services (a public service). The operator is a local government budgetary entity, or an entrepreneur authorized to conduct business activity in the field of passenger transport, that has concluded a contract for the provision of public services with the organizer. It can be noted here that the local government budgetary entity is considered an archaic form and, in reality, it is very rarely used to provide public collective transport services, among others, due to difficulties in obtaining external financing for means of transportation and infrastructure projects.

A public service contract is an agreement between the organizer and the operator of public collective transport, which grants the operator the right to and at the same time imposes on it the obligation to perform specific services related to the provision of public transport. Therefore, it constitutes a legal bond between the organizer and the operator, based on which the latter provides transport services. This concept includes not only a civil law contract, but also internal documents having no legal status of a contract, within the meaning of Polish law. Pursuant to the Act on public collective transport, contract for the provision of public services should also include internal documents specifying the conditions for the provision of services in the field of public collective transport by a local government budgetary entity. Such a document is undoubtedly not a contract, and certainly not a civil law contract. The adoption of such a solution was probably based on a very broad definition of a public service agreement contained in Regulation 1370/2007. Pursuant to the regulation, such an agreement is understood as one or more binding documents, legally

² Although the Act on public collective transport was amended several dozen times, these amendments did not change the general assumptions of the system of organizing public collective transport in Poland.

confirming the agreement concluded between the organizer and the entity providing public services (operator) on entrusting this entity with the management of public passenger transport services subject to public service obligations and the provision regulating these services. Depending on the legislation of individual Member States, the agreement may also take the form of a decision of the competent authority, which is an individual legislative or regulatory act, or contains conditions under which the competent authority itself provides the services or entrusts the provision of services to an in-house entity. Therefore, the definition of the agreement contained in Regulation 1370/2007 covers civil law contracts as well as non-contractual agreements.

The obligation to provide public services is an obligation to provide services in a non-discriminatory and continuous manner, the provision of which a given entity (operator) would not undertake at all or would not undertake under the same conditions or to the same extent without compensation due to its own economic interest. Those services should be characterised by greater safety, higher quality or lower price compared to services provided solely on the basis of the free play of market forces. It is therefore an obligation to provide public services. A public service is a special type of service that could not be provided in the same way by the market without state intervention. The Court of Justice of the EU stated that public services are services with specific, distinctive features that distinguish them from other economic activities (Nicolaides 2006, 575). A public service must serve citizens or be in the interest of the whole society (Dudzik 2005, 334; Szydło 2005, 138). Consumers should be guaranteed access to it both in the real sense (creation of conditions for real access) and in the legal sense (obligation to provide services to consumers who meet certain conditions). This service cannot be used to satisfy private interests. A public service is solely a service that is socially desirable that is not

provided by the market. In order to qualify a given service as a public service, it is necessary to prove that the society needs precisely this service and not another (there is a social demand for the service) and at the same time this service meets the expectations of that society (e.g. in terms of price and quality), a given service is not provided by the market (it cannot be provided on regular market terms, i.e. without the intervention of public authorities – compensation). A public service cannot be incidental, one-off, it must serve to satisfy the permanent transportation needs of the society. A public service can be considered a service which, could be provided commercially (on market terms), but not under the same conditions (safety, quality, price, etc.). The qualification of a service as a public service may be justified, for example, by imposing on the operator certain obligations by the organizer, such as applying social tariffs, maintaining prices at a certain low level or performing services with high frequency (not only in profitable but also in unprofitable time periods).

Public services are provided by the operator on the basis of a contract concluded with the organizer in return for compensation. According to Regulation 1370/2007, public service compensation can be remuneration, an exclusive right or a combination of both. However, Polish law (Act on public collective transport) excludes the possibility of granting an exclusive right to the operator. Thus, remuneration is the only form of compensation for public utility transport in Poland. Compensation means any benefit, in particular financial, granted directly or indirectly by the organizer from public funds during the period of performing a public service obligation or in connection with this period. The concept of compensation should therefore be understood as any benefit provided to the operator from public funds, and not only as transfer of funds. Compensation can take the form of both positive and negative benefits. A positive element of compensation, in addition to the transfer of funds (cash payment), may

be, for example, the transfer (provision) of means of transportation or other assets used to provide public utility transport. A negative element of compensation may be the organiser's refraining from enforcing its claims against the operator.

There are two main types of public service contracts, namely, gross cost contracts and net cost contracts. In the case of gross cost contracts, part of the cost risks are transferred to public authorities. That is because organizers of public collective transport keep the revenues from the sale of tickets, and the operator receives compensation at the level of operating costs. The gross cost contracts benefit operators because they do not bear the risks of revenue decreases. On the other hand, in the case of net cost contracts, revenues from the sale of tickets are kept by the public services provider. Moreover, operator public collective transport receives compensation payments established beforehand – at a fixed level or calculated periodically according to a specific formula. Under net cost contracts, nearly all the risks (costs and revenue risks) are borne by operators (Witting, Schimanek 2009, 75; Bauer 2010, 14; Poliak, Semanová, Varjan, Komačková 2015, 16-20). Under certain circumstances, this may have a negative impact on the quality of the services provided. There is also a higher risk that the operator will suddenly resign from delivering the services.

The public transport organization system described above constitutes a certain whole, consisting of clearly related, ordered elements. There are no doubts who is responsible for what and how parties perform their duties. So where do the problems arise? Looking closer at the above observations, it is easy to notice critical points in the organization of public collective transport, which may cause problems because the law fails to provide ready-made solutions or such solutions that would fully address a given issue. These critical points are proper planning and defining of public collective transport services as well as rational management

of financial resources (appropriate level of financing). Naturally, also in this area the law provides some suggestions, proposals or ready to use solutions. However, the law leaves the organizers such a degree of freedom that the final outcome depends not so much on the content of the law, but rather on how the law is applied in individual and specific cases. The legislator cannot be blamed in this regard. It is not possible for the law to casuistically regulate the issues of defining specific services or the appropriate level of their financing by means of general and abstract norms. This can be done only in relation to a specific city, carrier, local geographical and spatial conditions, the instruments and sources of financing services to be used, or the needs of the local community. Therefore, this takes place at the stage of applying the law by the organizers. That is where problems should be sought in the organization of urban public transport in Poland. The problems, therefore, are primarily related not to the content of the law, but to its application. The key issue in this regard is insufficient awareness and knowledge on the part of public authorities. This translates into inappropriate decisions made by them. To justify public authorities, it can be argued that issues related to the organization and financing of public collective transport are not simple.

It should be noted here that problems related to financing transport (problems of an economic nature) and transport planning (especially with the provisions on transportation plans) are also noticed by other authors (e.g., Kamiński 2022, 115-120), but, they point to other issues. At the same time, those authors believe that the problems can to a large extent be solved through legal changes, and not the practice of applying the law. In the present author's opinion, it is more important to change the approach towards law application rather than its content. The author is of the opinion that excessively detailed, casuistic regulations may bring more harm than benefits.

4. Service planning and definition

When defining the scope of the public service, the organizer should first identify the social demand for public collective transport services. As the Court of Justice of the European Union observed, if there is no user demand for all or some of the parts of a given service, its scope cannot be considered necessary and proportionate (case T-454/13, SNCM, point 134). Appropriate research should be carried out based on historical data, a forecast of changes and public consultations. At the same time, it should include those factors that are covered by the public service obligation (frequency, regularity, price of the service, etc.). In the next stage, it must be determined whether there is a market failure due to the lack of private initiative, in other words, whether there arises a need for public intervention. It is necessary then to analyse whether public demand can be met by operators already existing on the market, if there is no a public service obligation imposed by the organizer. In the case when user demand can be met without the organizer's intervention, there is no justification for introducing a public service. Finally, if there is public demand, and if it cannot be met through the normal operation of market forces, then it is justifiable to implement a public service. However, when establishing public service obligations, national authorities still need to choose such an approach that implies as little interference as possible with the freedoms associated with the proper functioning of the internal market. In other words, the organizer should apply the optimal intervention measure (taking into account the interests of all market participants) (case T-454/13, SNCM). The above issues should be analysed at the stage of creating planning documents for public collective transport and be reflected in their content. As stated in Art. 2a of Regulation 1370/2007, the organizer defines the specifications of public service obligations in the field of passenger transport and the scope of their application in accordance with the definition

of public service obligations. When defining those specifications and their scope, the organizer must duly respect the principle of proportionality, in accordance with the EU law. The specifications must be consistent with the policy objectives that are set out in public transport policy documents of the Member States. However, the Regulation does not address the manner in which such documents are created or their precise content. As indicated therein, the content and format of public transport policy documents and procedures for consulting relevant stakeholders are determined in accordance with national laws.

The basic planning document in public collective transport is the so-called transport plan. The procedure for developing transport plans is regulated in the Act on public collective transport, in which such plans are referred to as plans for the sustainable development of public collective transport. The obligation to draw up transport plans, depending on transport coverage, rests with the local government or government administration (minister competent for transport). At the commune and poviats levels, the obligation to draw up transport plans depends on the number of inhabitants. Such plans must be prepared by communes with at least 50,000 inhabitants and poviats with at least 80,000 inhabitants. In the case of agreements and associations, these figures are higher and amount to 80,000 inhabitants at the commune level and 120,000 inhabitants at the poviat level. At the same time, competent organizers in an area with a smaller number of inhabitants may develop a transport plan. In the case of other levels, no such exemptions from the obligation to develop transport plans have been introduced – the plan must be prepared regardless of the number of inhabitants.

The transport plan adopted by the competent authorities of local government units is an act of local law. The published transport plan developed at the higher level should be taken into account in the plan developed at the lower level. There

is, therefore, a hierarchical relationship between plans drawn up at different levels of administration.

The transport plan specifies, in particular, the communication network on which public utility transport is planned, the assessment and forecasts of transport needs, the anticipated financing of transport services, preferences regarding the choice of means of transport, rules for organizing the transport market, the desired standard of transport services in public utility transport, envisaged way of organizing the passenger information system. A public service contract may be concluded only on the basis and to the extent specified in the applicable transport plan.

Other important planning documents implemented in relation to public collective transport are the so-called SUMP – Sustainable Urban Mobility Plans. SUMP is a long-term strategy focused on ensuring good access to destinations and services, including its implementation plan. This document is to be a signpost, indicating the right way to implement the mobility policy. According to the position of the European Commission, expressed in the guidelines *Development and Implementation of a Sustainable Urban Mobility Plan*, the basic features of SUMP are: a long-term vision and a clear implementation plan; participatory approach; balanced and integrated development of all means of transport; horizontal and vertical integration; assessment of current and future effectiveness; regular monitoring; review and reporting as well as taking into account external costs for all means of transport. The plans under review should pursue the following objectives: providing all citizens with transport options that allow access to destinations and services; improving safety; contributing to the reduction of air and noise pollution, reducing greenhouse gas emissions and energy consumption; improving the efficiency and cost-effectiveness of transporting people and goods, and having a positive impact on the attractiveness and quality of the urban

environment for the benefit of residents, the economy and the community as a whole.

The provisions of law concerning the development of planning documents only generally and indirectly refer to the need to include in them the issues discussed in the opening section of this paper. Whether they prove useful depends primarily on the awareness of the organizers, the decisions they make, and their approach to the preparation of such documents. Mistakes made in this regard will have their consequences in the future. Such mistakes made at the stage of defining the scope of public collective transport will translate into inadequate performance of services in relation to the needs. To avoid such a situation, transport planning documents should be created with the common good in mind, and not just to meet yet another obligation. Public transport planning should start with relevant analyses, however, the organizers may not have the necessary resources to conduct them. Thus, they should not refrain from seeking advice. However, it must be ensured that the criteria for choosing advisors should be quality and not the lowest price. Finally, it is necessary to carry out genuine social and market consultations, which can provide valuable information regarding the need and scope of public intervention, as well as the level public demand. It is probably not possible to avoid difficulties or emerging irreconcilable, conflicting interests in this respect. Nevertheless, the benefits of such a process clearly outweigh the problems it may cause. Consultations of this type not only enable better planning of public collective transport, but also limit the possibility of conflicts and social dissatisfaction in the future (at the stage of providing transport services).

5. Rational financing

Provision of public collective transport services is extremely cost-intensive. As the scope of services increases, and their quality improves, the costs also become higher. Investments in the means

of transportation and infrastructure made in recent years, e.g., due to external financing, will be settled over many years in the future. This is why, it is necessary to seek financing from the organizer. Modern means of transportation and infrastructure entail higher expenses for their maintenance. In addition, passengers already become accustomed to high-quality services and expect constant improvement in this respect. The increase in the wealth of the society translates into higher expectations in terms of travel comfort. The available EU funds encourage investments in the means of transportation and infrastructure. However, they entail the need to seek funds to cover their own contribution. The deteriorating economic situation, with the war in Ukraine, only increases the scale of the challenges. The costs of fuel and energy, as well as building materials and parts of the means of transportation, are increasing, which translates into higher operating and investment costs. Labour costs are also rising, for example due to inflationary pressure or the outflow of some workers who returned to Ukraine to defend their homeland against Russian aggression. The financial resources at the disposal of the organizers are limited and are even depleting. Modern, high-quality public collective transport should result in increasing the number of passengers. However, the increased number of passengers does not mean that less public funding is needed. To a large extent, the indicated costs cannot be passed on to passengers at the same time maintaining affordability of collective public transport and its competitiveness in relation to other types of transport. What is more, the financing of such transport in order to be effective, must be ensured at a stable and predictable level in a long-term perspective. Therefore, the key issue is to ensure optimal public financing of transport services taking a rational approach to spending public funds. Regulations on public collective transport address this issue, however, they

are fragmentary and only indicate a certain direction of actions that can be taken by the organizers, rather than providing ready-made solutions. The level of cost-intensity and magnitude of financial expenditure required by public collective transport services can be seen on the example of Warsaw. According to the data provided in SUDOP, the total amount of support for the provision of public services in 2008-2027 is PLN 16.9 billion for Warsaw Trams, PLN 8.8 billion for Metro Warszawskie, and PLN 14.1 billion for Miejskie Zakłady Autobusowe.

The crucial issue in this respect is adequate determination of the amount of compensation for the provision of public services made by the organizer to the operator. The law regulates this issue in a variety of ways depending on the manner of selecting the operator. Selection of the public collective transport operator can be made in a competitive procedure (basically by tender, applying the provisions on public procurement or concession contracts for construction works or services) or by the so-called direct entrustment, i.e. bypassing the competitive procedure (primarily in the case of the so called in-house entities, i.e. entities under the organizer's control similar to that which it exercises over its own departments and performing the essential part of their activities for the organizer) (Hartung 2007, 33; Hartung 2008, 45; Sampławski 2009, 44; Szydło 2008, 99; Jarecki 2011, 110-122; Jarecki 2019, 7-12; Witaszczyk-Woda 2015a, 12-20; Witaszczyk-Woda 2015b, 14-18; Witaszczyk-Woda 2016, 4-7; Bogdanowicz 2014, 58-61; Arrowsmith 2014, 438; Kekeleki and Rusu 2010, 205; Skovgaard Ølykke 2008, 86; Wolański 2011, 139).

In the case of contracts for the provision of public services entrusted directly, i.e., without a competitive procedure, the compensation may not exceed the net financial result related to the provision of the service. The detailed method of calculating the net financial result is specified in the appendix to Regulation 1370/2007. According to this document, in a certain simplification,

the compensation may not exceed the difference between revenues and costs related to the provision of services increased by the so-called reasonable profit (a rate of return on capital that is considered normal in the transport sector in a given country). Regarding contracts entrusted in a competitive procedure, appropriate calculation of compensation is to a large extent enforced by the market competition itself (competition). For this reason, the above appendix does not apply to this type of contract (at least according to EU law).

However, the above in itself does not guarantee that the level of compensation will be optimal. There may be cases where the costs included in the calculation of the compensation will be higher than necessary, and that the operator will not attempt to minimize them (or maximize revenues). In order to determine optimal level of compensation, it is necessary to meet additional conditions.

In the case of directly entrusted contracts, cost optimization can be achieved by the so-called incentives. The requirement to use them results from the provisions of Regulation 1370/2007. These are mechanisms that enforce a certain level of effectiveness (efficiency) of the operator in the event when a contract for the provision of public services has been entrusted without a competitive procedure (directly). They are supposed to ensure a similar level of operator's efficiency to that which it would be forced to meet by competitive pressure if it was selected in the course of a competitive procedure. They consist in specifying such a method of calculating compensation that would promote maintaining or developing an effective system of the public service provider management, which could be objectively evaluated, as well as provision of passenger transport services of a sufficiently high quality. Therefore, service organizers should, in the case of directly entrusted public service contracts, encourage service providers to increase effectiveness (efficiency) by providing services at a required level and of expected quality using the least resources

possible, by means of an appropriate method of compensation. Regulation 1370/2007 leave the organizers a lot of flexibility in this respect, however, the method of compensating for the costs of providing the service must be set in such a way as to ensure at least some improvement of efficiency over time (Jarecki 2017, 19-30).

As the European Commission points out, given the difficulties in meeting performance targets, incentives for performance improvements should be proportionate and remain within reasonable limits. For example, this condition can be met by a balanced sharing of any gains resulting from the increase of efficiencies between the public service provider, public authorities or users. In all cases, it is necessary to establish a mechanism ensuring that the company cannot keep for itself any gains above the expected level resulting from increased efficiency. Additionally, the parameters of such systems must be fully and specifically defined in the public service contract. At the same time, the use of incentives should not pose an obstacle to the provision of high-quality services. As noted by the European Commission, in the context of Regulation 1370/2007, efficiency should be understood as the relationship between the quality or level of public services and the resources used to provide such services. The method of rewarding efficiency improvements should therefore focus both on reducing costs and on improving the quality or level of the service (Communication from the European Commission *on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road*, point 2.4.5.). In the light of the regulation, an incentive system must take into account both of these elements in a balanced way, or it will be unacceptable.

Whether real incentives will be applied and to what extent depends on the decision of the organizers of public collective transport. Taking into account the large scope of freedom left to the organizers in this area,

as well as the general and relatively complicated nature of the legal provisions and solutions proposed by the European Commission, in practice, the mechanisms implemented in this matter can hardly be considered satisfactory, and such a situation should therefore be assessed negatively. The use of incentives allows to minimize the costs of providing public collective transport services, which in the context of the increasing cost of transport and the current economic situation becomes particularly important. The existence of incentives is evident in the case of net cost contracts. However, they should also be included in gross costs contracts.

In the case of selecting operators based on the competitive procedure, the minimization of costs is to be ensured by entrusting the contract to the entity that has submitted a proposal offering the best balance between the expected level of compensation and the proposed level of service quality. The competitive procedure will bring such effects only if real competition among many entities can be achieved at the stage of selecting the operator. This depends mainly on two factors – the current state of the market and the procedure for entrusting the service. A competitive procedure is not the right method to optimize the costs of providing a service if it does not involve real competition among many potential operators. In addition, organizers may not be willing to use such procedures as they may already own an in-house entity providing such services (usually a municipal company). An interesting and beneficial solution here could be selection of several operators to provide the service, including both an in-house entity and operators selected in a competitive procedure. Warsaw is a good example in this respect. In Warsaw, a significant part of services is provided by a municipal company (Miejskie Zakłady Autobusowe), while the rest of services are entrusted to various private operators in a competitive procedure (e.g., Arriva Bus, Michalczewski, Mobilis, PKS

Grodzisk Mazowiecki). This approach brings two benefits. Foremost, there is a certain level of market competition, resulting in cost minimization. Moreover, it enables market verification of the costs of running transport activity by the organizer's own in-house entity (municipal company) and keeping control over its financial policy at the same time. This is especially important because while it is easy to set expectations on the introduction of incentives, it is difficult to define the appropriate cost levels that could be adopted to make appropriate comparisons by organizers who usually do not have such data. The real costs incurred by entities selected in a competitive procedure (through market competition) can become an ideal source of such data. Knowing such costs may therefore allow the organizer to adequately influence the activities of its own in-house entity.

Conclusions

Both the national and EU transport policy assumes increasing the importance and share of public collective transport in the whole passenger transport area, which is necessary to reach ambitious climate goals (reduction of harmful gas emissions). Public collective transport is one of the most important elements of a modern, "sustainable" city. The principles of organizing and financing public collective transport are regulated at the EU level by Regulation 1370/2007, and at the national level by the Act on public collective transport. These acts are relatively modern, and their application does not in practice create any major discrepancies or doubts. This is confirmed by the fact that since their introduction, they have remained practically unchanged in their basic structure and main assumptions. Despite this, there are problems in the proper organization of public collective transport services, that are primarily related to those aspects of the organization of public collective transport where the law does not provide ready-made solutions or leaves the organizers with a large degree

of flexibility. In particular, it is the issue of proper planning and defining the public collective transport services as well as rational management of financial resources (appropriate level of financing the services). The analysed problems are therefore related not so much to the content of the law as to its application by the organizers. The key issue in this regard is insufficient awareness and lack of appropriate knowledge on the part of public authorities, which translates into wrong decisions taken by them.

When planning public collective transport services, it is necessary first of all to identify the social demand for this type of service. To achieve this, both analytical methods and tools as well as public consultations should be carried out. The next step should then be to determine whether and to what extent there is a market failure (clarifying whether the existing public demand cannot be met by private initiative). Finally, the public service obligation should be defined and the optimal intervention measure (serving to provide public collective transport services to the public in a way that does not interfere excessively with the market) should be selected. It must be remembered that transport planning documents should be created with the common good in mind, and not just to meet yet another obligation. It is recommended to use advisors in this regard, however, it is necessary to ensure that they will provide high quality consulting services.

New, optimal financial solutions should be sought in the area of financing public collective transport services – not only technical (e.g., energy-saving), but also of legal and organizational nature. It is not sufficient only to comply with the rules for calculating compensation set out in law (calculation of compensation as the difference between costs and revenues related to the provision of transport services plus the so-called reasonable profit). It is also necessary to put pressure on the operator so that it is interested (within reasonable limits) in reducing its own costs and increasing revenues. Such pressure can be exerted by

selecting the operator in a competitive procedure. However, such a method will only be justified if the characteristics of a given procedure and the current state of a particular market will allow for real competition of multiple operators. In the absence of such a procedure, other solutions should be used – the so-called incentives. These are mechanisms that enforce a certain level of effectiveness (efficiency) of the operator in the event that a contract for the provision of public services has been entrusted without a competitive procedure (directly). An interesting and useful solution here may be combining both mentioned options. On the one hand, it is associated with a certain level of market competition (competitive pressure), on the other hand, it provides the data necessary for setting up adequate incentives.

The current problem is the increased amount of legislation and its excessively casuistic character. The law of collective public transport is not perfect. Problems are noticeable, particularly in rail transport, for example, regarding the application of public procurement regulations to the selection of operators. Nevertheless, the existing regulations are sufficient to realise the aims indicated in the article. It is not to be expected that there will be any significant changes in EU law in the nearest future. Moreover, it is more important to change the approach of public collective transport organisers. Changing the law does not necessarily imply changing people's behaviours.

Road transport is responsible for a significant part of greenhouse gas emissions. Therefore, the lack of proper development of public collective transport negatively impacts the natural environment. To increase the share of public transport in the modal shift, it is necessary to provide society with numerous, affordable, and better-quality public transport services. Implementing this goal is only possible by changing the approach of the organisers of public collective transport, especially concerning the efficiency of public spending.

Funding: This research received no external funding.

Institutional Review Board Statement: Not applicable.

Conflicts of Interest: The author declares no conflict of interest.

References

- Arrowsmith, Sue. 2014. *The Law of Public and Utilities Procurement*. Volume 1. *Regulation in the EU and UK*. London: Sweet & Maxwell.
- Bauer, Kurt. 2010. "Najlepsze praktyki w przetargach na regionalne usługi pasażerskie" [Best practices in tenders for regional passenger services]. *Rynek Kolejowy* 1: 14-17.
- Bogdanowicz, Piotr. 2014. "Co ma znaczenie (unijne)? I jakie? Rozważania w świetle art. 5 rozporządzenia nr 1370" [What matters (for EU)? And how does it matter? Considerations in the light of Art. 5 of Regulation No. 1370]. *Internetowy Kwartalnik Antymonopolowy i Regulacyjny* 7(3): 57-67.
- Dudzik, Sławomir. 2002. *Pomoc państwa dla przedsiębiorstw publicznych w prawie Wspólnoty Europejskiej. Między neutralnością a zaangażowaniem* [Public aid for state-owned companies in European Community law. Neutrality versus responsibility]. Kraków: Zakamycze.
- Gadziński, Jędrzej, Ewa Goras. 2019. *Raport o stanie polskich miast. Transport i mobilność miejska* [Report on the condition of Polish cities. Transport and urban mobility]. Instytut Rozwoju Miast i Regionów.
- Hartung, Wojciech. 2007. "Zadania własne jednostek samorządu terytorialnego a zamówienia in house" [Own tasks of local government units and in-house orders]. *Prawo Zamówień Publicznych* 2007(1): 29-37.
- Hartung Wojciech. 2008. "Zamówienia publiczne a podmiot wewnętrzny" [Public procurement and in-house entities]. *Samorząd terytorialny* 5: 37-51.
- Jarecki, Stefan Akira. 2011. "Powierzenie świadczenia usług podmiotowi wewnętrznemu" [Entrusting the provision of services to an in-house entity]. *Kontrola Państwowa* 2: 110-122.
- Jarecki, Stefan Akira. 2017. "Pozakonkurencyjne mechanizmy motywujące na rynku pasażerskich przewozów kolejowych" [Non-competitive incentive mechanisms on the market of passenger rail transport]. In *Rynek kolejowy – prawne i ekonomiczne aspekty funkcjonowania*, edited by Mirosław Pawełczyk, 19-31. Warszawa: Ius Publicum.
- Jarecki, Stefan Akira. 2019. "Wielka rewolucja, czy nic nowego – problemy z podmiotami wewnętrznymi w komunikacji miejskiej?" [A great revolution or still the same – problems with in-house entities in public urban transport]. *Prawo pomocy publicznej* 5: 7-12.
- Kamiński, Marcin. 2022. "Wskazanie problemów prawnych w rozwoju zrównoważonego transportu miejskiego" [Legal problems in the development of sustainable urban transport]. In *Zrównoważone miasto. Stan faktyczny i wyzwania prawne realizacji Agendy 2030*, edited by Marcin Sębelski, Adam Szafranski, Paweł Wojciechowski, 115-119. Warszawa: C.H. Beck.
- Kekeleki, Mihalis, and Ioana Eleonora Rusu. 2010. "The Award of Public Contracts and the Notion of 'Internal Operator' under Regulation 1370/2007 on Public Passenger Transport Services by Rail and by Road." *Public Procurement Law Review* 6: 198-216.
- Nicolaidis, Phedon. 2006. "The economics of services of general economic interest." In *The EC state aid regime – Distortive Effects of State Aid on Competition and Trade*, edited by Michael S. Rydelski, 575-591. London: Cameron May.
- Pedret Cuscó, Vicenç. 2017. "EU transport and EU transport policy." In *Regulation and Competition Law in the Transport Sector*, edited by Luis Ortiz Blanco and Ben Van Houtte, 3-35. Croydon: Oxford University Press.
- Poliak, Miloš, Semanová, Varjan Peter Štefánia, Lenka Komačková. 2015. "Providing Transport Services Based on the Gross Cost and Net Cost Contracts." *Transport and Communications* 1: 15-21.
- Rusche, Tim Maxian and Schmidt Silvia. 2011. "The post-Altmark Era Has Started: 15 Months of Application of Regulation (EC) No. 1370/2007 to Public Transport Services." *European State Aid Law Quarterly* 10(2): 249-263.
- Sampławski, Kacper. 2009. "Europeizacja prawa w gospodarce komunalnej w Polsce w aspekcie instytucji podmiotu wewnętrznego" [Europeanisation of law in the municipal economy in Poland regarding in-house entities]. *Prawo Zamówień Publicznych* 2: 44-54.

- Skovgaard Ølykke, Grith. 2008. "Regulation 1370/2007 on Public Passenger Transport Services." *Public Procurement Law Review* 3: 84-89.
- Szydło, Marek. 2005. *Regulacja sektorów infrastrukturalnych jako rodzaj funkcji państwa wobec gospodarki* [Regulation of infrastructural sectors as one of state functions towards the economy]. Warszawa: Prawo i Praktyka Gospodarcza 2005.
- Szydło, Marek. 2008. "Zasada przejrzystości w zamówieniach publicznych, do których nie stosuje się lub stosuje jedynie częściowo przepisy wspólnotowych dyrektyw o zamówieniach publicznych" [Principle of transparency in public procurement not regulated or only partially regulated by the provisions of the EU directives on public procurement]. *Samorząd Terytorialny* 7-8: 76-100.
- Świdarska, Monika. "Uwagi wstępne" [Preliminary remarks]. In *Zrównoważone miasto. Stan faktyczny i wyzwania prawne realizacji Agendy 2030*, by Marcin Stębel, Adam Szafranski, Paweł Wojciechowski, 89-92. Warszawa: C.H. Beck.
- Turek, Tomasz. 2012. "Związek międzygminny jako organizator usług publicznego transport zbiorowego – uwagi ogólne na tle ustawy o publicznym transporcie zbiorowym" [Association of communes as an organizer of public collective transport services – general remarks in the light of the act on public collective transport]. *Finanse Komunalne* 4: 43-51.
- Witaszczyk-Woda, Agnieszka. 2015. "Spółki wewnętrzne typu in-house – analiza zagadnień od A do Z" [In-house companies – analysis of issues from A to Z]. *Prawo pomocy publicznej* 3: 12-20.
- Witaszczyk-Woda, Agnieszka. 2015. "Spółki wewnętrzne typu in-house analiza zagadnień od A do Z – z uwzględnieniem pytań gmin – część II" [In-house companies – analysis of issues from A to Z including questions from communes – part 2]. *Prawo pomocy publicznej* 4: 14-18.
- Witaszczyk-Woda, Agnieszka. 2016. "Zastrzeżenia dotyczące powierzenia zadań spółkom typu in house" [Reservations regarding entrusting tasks to in-house companies]. *Prawo pomocy publicznej* 3: 4-7.
- Witting, Oliver, Peter Schimanek. 2009. "Szczególna regulacja w zakresie zamówień publicznych na usługi komunikacyjne. Nowe rozporządzenie wspólnotowe dotyczące usług publicznych w zakresie kolejowego i drogowego transportu pasażerskiego" [Special regulation on public procurement for passenger transport services. New Community Regulation on public services for rail and road passenger transport]. *Prawo Zamówień Publicznych* 2(21): 69-83.
- Wolański, Michał. 2011. "Estimation of Losses Due to the Existence of Monopolies in Urban Bus Transport in Poland" [Title in English]. *Yearbook of Antitrust and Regulatory Studies* 4(5): 133-156.
- National legal acts
- Act 2010 – Act of 16 December 2010 on public collective transport (Dz.U. 2022 item 1343) (Dz.U. – Journal of Laws of the Republic of Poland).
- Sejm paper No. 2916 of 24 March 2010 – the government draft act on public collective transport.
- European Union legal acts
- Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail (OJ L 354, 23.12.2016, p. 22–31).
- Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1–13).
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Sustainable and Smart Mobility Strategy – putting European transport on track for the future (COM/2020/789 final).
- Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions The European Green Deal (COM/2019/640 final).
- Communication from the Commission on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road (OJ C 92, 29.3.2014, p. 1–21).

Jurisprudence

Judgment of the General Court of 1 March 2017, case T-454/13, *Société nationale maritime Corse Méditerranée (SNM)*.

Other sources

Guidelines for Developing and Implementing a Sustainable Urban Mobility Plan, second edition, https://www.eltis.org/sites/default/files/sump_guidelines_2019_interactive_document_1.pdf.

SUDOP – System Udostępniania Danych o Pomocy Publicznej [Public Aid Data Disclosure System], <https://sudop.uokik.gov.pl/search/aidBeneficiary>.