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Social Dialogue of Employer and Employees in Poland

Abstract: The aim of this paper is to investigate the (potential) impact of social dialogue on the operation of enterprises, mainly on the basis of legal provisions accompanied by practical evidence drawn from case law. This publication starts with the general context of social dialogue in the Polish legal culture. In this regard, it shows how social dialogue is defined and, in addition, it provides an overview of legal bases for social dialogue under the national rules and regulations. The remainder of the paper is structured as follows. It continues with the presentation of legal solutions regarding complex relations between various representatives of employees. In short, it explains certain aspects of the right to freedom of association. Furthermore, the article presents the special protection of employment relationship durability of employees' representatives (as it has become a recognised field of research and scholarly enquiry) and the challenges in this area. The paper concludes with a short summary.

Keywords: dialogue between employer and employees, dialogue between social partners, social dialogue

1. Introduction

The point of departure for the research presented in our paper is the assumption that the practice of management of enterprises based on the “not more than profit” approach and considered as one of the most important causes of the outbreak of the financial crisis of 2008/09 – with its effects still felt by populations today – is incorrect. Previous negative experiences in this respect may be perceived to have contributed to a recent worldwide trend towards growing interest in the management model in which employees are empowered to participate in the operation of an enterprise. The

aim of this paper is to investigate and check out in case law whether legal provisions on social dialogue generate problems in the practical operation of enterprises and, if so, what these problems are. This is going to be done mainly on the basis of Polish legal provisions accompanied by practical evidence of the operation of enterprises in the market drawn from national case law. This publication will also refer to some of the most important Polish legal writings on the analysed topic. We will use a dogmatic method as a basis for legal analysis. Within the framework of this paper, firstly, we will investigate legal provisions and case law concerning complex relationships between various representatives of employees. Secondly, certain aspects of the right to freedom of association will be involved in one of the components of this publication. Further, the specific legal protection of employment relationships of employees' representatives will be explored.

2. Conceptual framework

Social dialogue can exist and develop properly if certain conditions of a systemic nature are met, such as the existence of a democratic system in which human rights and freedoms are respected, including the right to freedom of association, as well as the existence of market economy and the labour market in which social partners operate.¹

The respect for fundamental rights is a distinctive feature of the European Union (EU). One of the main pillars of the EU's protection of fundamental rights is the Charter of Fundamental Rights of the European Union, formally proclaimed by the leaders of the institutions of the EU on 7 December 2000 in Nice.² The Charter ideally combines fundamental principles for the protection of workers' rights. First, the Charter has adopted an open approach to the right to organise, declaring, in its Article 12(1), that everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. By the way, it is worth paying attention that Article 2 of the 1948 Convention No. 87 of the International Labour Organisation concerning freedom of association and protection of the right to organise states that workers and employers, without distinction whatsoever, shall have the right to establish and,

1 See, M. Pliszkiewicz, Warunki trójstronnego dialogu społecznego, (in:) Z. Hajn, D. Skupień (eds), *Przyszłość prawa pracy. Liber Amicorum. W pięćdziesięciolecie pracy naukowej Profesora Michała Seweryńskiego*, Łódź 2015, pp. 472-473.

2 OJ C 326, 26.10.2012, p. 391.

subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.³

Second, the Charter details the rights of collective bargaining and collective action, including strike action, and workers' rights to information and consultation within the undertaking as fundamental rights (Articles 28, and 27, respectively).⁴

In Poland, these rights are inherently inscribed in dialogue and cooperation between employers and employees' representatives, even though empirical evidence based on the analysis of collective agreements, press reports and internal union reports, as well as interviews with labour union representatives, proves that while public sector unions are capable of affecting the collective bargaining outcomes and welfare policies, in the private sectors, the course of changes is set mainly by the employers and there is little input from the side of the employee and/or state.⁵ It must be emphasised that the Poland's turbulent political history resulted in the fact that attempts to establish and institutionalise actual social dialogue were not enabled until the fall of communism.⁶

In Polish legal literature there are numerous proposals of definitions of social dialogue (Pol. *dialog społeczny*). Frequently, communication between particular social groups (social actors or social partners) is combined with the state's participation therein as a partner to the dialogue (dialogue?) or with the state inspiring or guaranteeing the role.⁷ Definitions emphasise *inter alia* that social dialogue has the

3 Journal of Laws 1958 No. 29, item 125. In English available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232 (accessed 04.03.2019).

4 Dialogue between social partners at the EU level referred to in Articles 152-155 of the Treaty on the functioning of the European Union is outside the scope of this paper; thereon see, W. Sanetra, Social Dialogue as an Element of Polish Socio-Political System in the Light of the Constitution of the Republic of Poland, "Studia Iuridica" 2016, vol. 60, pp. 188-189.

5 M. Bernaciak, A. Duman, V. Scepanovic, Employee welfare and collective bargaining in exposed and protected sectors: Evidence from Poland and Serbia, "Working Papers on the Reconciliation of Work and Welfare in Europe" 2010, No. 4, p. 7. See also, M. Pliszkiwicz, Warunki trójstronnego dialogu..., *op. cit.*, pp. 476.

6 On the developments of social dialogue in post-socialist Poland see, J. Gardawski, 20 Years of Social Dialogue in Poland, "Studia Iuridica" 2016, vol. 60, pp. 57-74; A. Ogonowski, Rada Dialogu Społecznego jako instytucja realizująca konstytucyjną zasadę "solidarności, dialogu i współpracy partnerów społecznych", (in:) A. Łabno (ed.), Państwo solidarne, Warszawa 2018, pp. 47-50; M. Szymański, Rada Dialogu Społecznego – w przededniu zmian?, "Praca i Zabezpieczenie Społeczne" 2017, vol. 7, pp. 23-24.

7 See L. Gilejko, Dialog społeczny jako czynnik rozwoju, (in:) D. Zalewski (ed.), Dialog społeczny na poziomie regionalnym. Ocena szans rozwoju, Warszawa 2005, p. 13; S.L. Stadniczeńko, Konstytucjonalizacja dialogu społecznego, "Studia Iuridica Lublinensia" 2014, vol. 22, p. 321, 331; M. Gładoch, Rada Dialogu Społecznego – nowe regulacje w zakresie trójpartnerstwa, "Monitor Prawa Pracy" 2016, vol. 11, p. 567; M. Mazuryk, Dialog społeczny w Polsce *sensu stricto i sensu largo*, "Ius Novum" 2009, vol. 4, pp. 99-100.

potential or is likely to lead to compromise solutions that allow to avoid open social conflicts.⁸

Social dialogue is classified as:

- classical social dialogue (social dialogue *stricto sensu*) comprising only relations of public authorities and representatives of labour and capital, and
- social dialogue *lato (largo) sensu* being a result of the development of civil society and democratic structures of the state, which highlights that employees' representatives are not the only social partners of the state.⁹

Dialogue between social partners (Pol. *dialog partnerów społecznych*) is understood as either social dialogue *stricto sensu*¹⁰ or dialogue only between employer and employees, as neither the government nor the state apparatus may be regarded as a social partner.¹¹

Social dialogue *lato sensu* is considered to comprise social dialogue *stricto sensu* and corporate dialogue,¹² religious dialogue¹³ and, in particular, civic dialogue (Pol. *dialog obywatelski*),¹⁴ which in general are outside the scope of this paper. The social dialogue in the field of labour/economic relations (social dialogue *stricto sensu*) may be compared to civic dialogue as open and flexible dialogue in other areas of social life,¹⁵ but there are things in favour of the former. The social dialogue *stricto sensu* is accompanied by a range of legal and institutional solutions whereas civic dialogue seems just a paper declaration rather than reality;¹⁶ currently, the only institution that enables the institutionalised civic dialogue is the Council for Public Benefit

8 S.L. Stadniczeńko, *Konstytucjonalizacja...*, *op. cit.*, p. 329; R. Słonec, *Pracowniczy dialog społeczny jako ochronna funkcja prawa pracy oraz skuteczna metoda zarządcza we współczesnym przedsiębiorstwie*, (in:) M. Bosak (ed.), *Funkcja ochronna prawa pracy a wyzwania współczesności*, Warszawa 2014, s. 155; S. Sternal, *Konstytucyjna aksjologia zasady dialogu społecznego*, (in:) M. Grzybowski, B. Naleziński (eds), *Państwo demokratyczne, prawne i socjalne. Studia historyczno-prawne i ustrojowo-porównawcze. Tom 2. Księga jubileuszowa dedykowana Profesorowi Zbigniewowi Antoniemu Maciągowi*, Kraków 2014, s. 495; A. Krzywoń, *Economic policy: social market economy*, (in:) J. Szymanek (ed.), *Polish political system. An introduction*, Warszawa 2018, p. 400.

9 M. Mazuryk, *Dialog społeczny...*, *op. cit.*, p. 99.

10 S.L. Stadniczeńko, *Konstytucjonalizacja...*, *op. cit.*, pp. 329-330.

11 W. Sanetra, *Social Dialogue...*, *op. cit.*, p. 198; but see, A. Ogonowski, *Ewolucja...*, *op. cit.*, pp. 60-66.

12 See i.a. Article 163 of the Constitution of the Republic of Poland of 2 April 1997.

13 See Article 25 of the Constitution of the Republic of Poland of 2 April 1997.

14 M. Mazuryk, *Dialog społeczny...*, *op. cit.*, p. 102-104.

15 See, S.L. Stadniczeńko, *Konstytucjonalizacja...*, *op. cit.*, p. 330. See also, A. Ogonowski, *Ewolucja instytucji dialogu społecznego w Polsce po 1989 roku. Studium ustrojowe*, Warszawa 2018, pp. 70-71.

16 Including public consultations. See, S.L. Stadniczeńko, *Konstytucjonalizacja...*, *op. cit.*, p. 330.

Organisations functioning at the Ministry of Family, Labour and Social Policy.¹⁷ To the contrary, the importance of social dialogue *stricto sensu* in the field of labour relations is unquestionable.

In Poland, social dialogue is a normative concept translated into positive law and seen by legal rules, legal language and in legal provisions, first and foremost in the Constitution of the Republic of Poland of 2 April 1997,¹⁸ whereas the constitutionalisation of social dialogue is not common in European countries.¹⁹ So, under Polish law, social dialogue has a special constitutional legitimacy. It can also be stated that social dialogue is encouraged by the Polish Constitution, so as to become a vital part of civil society and a more transparent state. First, social dialogue (*lato sensu*)²⁰ is listed in the preamble among values that the Constitution as the basic law of the Republic of Poland is based on (together with respect for freedom and justice, cooperation between the public powers, as well as the principle of subsidiarity in the strengthening the powers of citizens and their communities). However, it is uncertain whether provisions of the preamble are of a normative nature.

Second, the economic system of Poland is based on a social market economy which, in turn, is based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners (Article 20). It is therefore necessary to clarify and explore some of the issues surrounding the principle of dialogue between social partners as a constitutional principle fundamental for the economic system of Poland.

The principle of dialogue between social partners is aimed at “the common good” provided for in Article 1 of the Constitution,²¹ viewed as a semantic addition to Article 20, and, therefore, dialogue is aimed at the protection of human dignity.²² The latter, according to Article 30 sentence 1 of the Constitution, constitutes a source of all the freedoms and rights of persons and citizens. The Constitution creates the social partners’ duty to act in a way that respects solidarity, dialogue and cooperation between social partners. At the same time, the Constitution obliges the state (public authorities) to build a legal infrastructure for the proper implementation of these three values.²³

17 M. Mazuryk, Dialog społeczny..., *op. cit.*, p. 103. But see, R. Słonec, Pracowniczy dialog społeczny..., *op. cit.*, p. 156.

18 Journal of Laws 1997 No. 78, item 483 as amended.

19 See, S.L. Stadniczeńko, Konstytucjonalizacja..., *op. cit.*, p. 322.

20 *Ibid*, p. 329.

21 “The Republic of Poland shall be the common good of all its citizens”.

22 S. Sternal, Konstytucyjna aksjologia..., *op. cit.*, s. 494.

23 See also, S.L. Stadniczeńko, Problematyka dialogowości w społeczeństwie obywatelskim, (in:) A. Łabno (ed.), Idea solidaryzmu we współczesnym prawie konstytucyjnym. Doświadczenia polskie i międzynarodowe, Warszawa 2015, p. 105; A. Ogonowski, Ewolucja..., *op. cit.*, pp. 59, 71.

In economic relations, the meaning of the said principle is strengthened by the constitutional principle of a democratic state ruled by law (Article 2 of the Constitution) and implementing the principles of social justice,²⁴ along with another constitutional principle guaranteeing that “work shall be protected by the Republic of Poland” (Article 24 sentence 1 of the Constitution). Last but not least, Article 59(2) of the Constitution is in essence a more detailed manifestation of the principle of dialogue between social partners and endows trade unions, employers and their organizations with a joint right to bargain, particularly for the purpose of resolving collective disputes, and to conclude collective labour agreements and other arrangements. The scope *ratione personae* of this literally interpreted right on the employees’ side (“trade unions”) is narrower than the scope of the concept of “social partners” that includes also other organisational forms and structures established within any enterprise for the purpose of expressing the will, interests and demands of its employees (non-union enterprise-level employee bodies); however, it is considered that the Constitution does not prohibit the legislature to endow the latter with rights equivalent to those provided for in Article 59(2) of the Constitution.²⁵

Traditionally, the Polish concept of social dialogue has belonged mainly to collective labour law.²⁶ However, in 2015 the Council of Social Dialogue was established.²⁷ It differs from its predecessor, the Tripartite Commission for Socio-Economic Affairs,²⁸ in its goals. The main goal of the Tripartite Commission was in securing peace in the labour context, whereas the Council of Social Dialogue: (1) conducts a dialogue to ensure conditions for socio-economic development and increase the competitiveness of the Polish economy and social cohesion, (2) acts to implement the principle of social participation and solidarity in the field of employment relations, (3) works to improve the quality of formulation and implementation of socio-economic policies and strategies, as well as to build a social understanding around them by conducting a transparent, substantive and regular dialogue between employees’ and employers’ organisations and the government side;

24 See point III.4 of the judgment of the Constitutional Tribunal of the Republic of Poland of 30 January 2001, Case K 17/00, Journal of Laws 2001 No. 11, item 90.

25 W. Sanetra, Social Dialogue..., *op. cit.*, pp. 188-189. See also, A. Ogonowski, Ewolucja..., *op. cit.*, pp. 46-49.

26 J. Wratny, Rada Dialogu Społecznego. Czy jeszcze instytucja zbiorowego prawa pracy?, “Praca i Zabezpieczenie Społeczne” 2016, vol. 10, p. 4. See also, M. Pliszkiwicz, Warunki trójstronnego dialogu..., *op. cit.*, pp. 192-193; W. Sanetra, Social Dialogue..., *op. cit.*, p. 194; S.L. Stadniczeńko, Dialog społeczny jako zinstytucjonalizowana forma współpracy podmiotów prawa w społeczeństwie obywatelskim, (in:) A. Łabno (ed.), Państwo solidarne, Warszawa 2018, p. 17; A. Ogonowski, Ewolucja..., *op. cit.*, pp. 26, 71.

27 Act of 24 July 2015 on the Council for Social Dialogue and other social dialogue institutions (consolidated text Journal of Laws 2018 item 2232 as amended).

28 Act of 6 July 2001 on the Tripartite Commission for Socio-Economic Affairs (Journal of Laws 2001 No. 100, item 1080 as amended).

(4) supports social dialogue at all levels of local government.²⁹ Social and economic goals have complemented goals relating to employment relationships, while the latter have ceased to be the foreground category of goals of social dialogue.³⁰ Therefore, it is considered that this new redefined formula of social dialogue amounts to weakening its connections with collective labour law and strengthening its connections with constitutional law.³¹

The constitutional principle of social dialogue is, however, still institutionalised, concretised and manifested to a certain extent in detailed provisions of collective labour law. These provisions confer specific rights and obligations on representatives of an employer and employees turning the constitutional principle that involves a high degree of abstraction into a source of specific legal consequences.

The Polish legal provisions relating to social dialogue are heavily influenced by rules, provisions and policies of the European Union; little changes here without the EU initiative. Pursuant to these provisions, social dialogue operates at two basic levels. One of them is the company/workplace level (micro-level) and the other is the macro-level (national, sectoral, regional level, etc.). However, depending on the internal and external conditions of the enterprise, these provisions may result in problems of various kinds. Therefore, Polish courts and the Constitutional Tribunal have repeatedly ruled on the issues relating to various aspects of social dialogue. They include organisations (freedom of association in trade unions and employers' organisations, trade unions' rights, equality and representativeness of trade unions), non-union employees' representation as a form of employees' involvement in the operation of enterprises (in particular, consultation rights and the right to obtain information), collective disputes, collective labour agreements and other specific sources of labour law. From the perspective of fundamental rights in business, the significant issue is certainly the legally defined scope of the forms of employees' involvement in the operation of enterprises and principles of their application. This paper reviews case law in the most interesting and/or important aspects of social dialogue *stricto sensu* that are reflected in Polish and/or EU legal provisions.

3. Relations between employees' representatives

The scope *ratione personae* of social dialogue refers to entities being social partners who are properly organized and representable for particular social groups.³²

29 Article 1(2)-(5) of the Act of on the Council for Social Dialogue and other social dialogue institutions.

30 See also, M. Szymański, Rada..., *op. cit.*, p. 28.

31 J. Wrątny, Rada..., *op. cit.*, p. 6.

32 P. Skuczyński, Instytucjonalizacja dialogu społecznego w sądownictwie i zawodach prawniczych, "IUSTITIA" 2014, No 1, p. 25.

The legal bases for collective representations of employees' rights and interests have been evolving in the EU law.³³ As a result, the term "employees' representation" is not defined and Member States are entitled to freely determine which entities are granted this status.

It is important to stress that at the present legal status quo, both in the EU and in Poland, we deal with a rich variety of entities representing employees and employers.³⁴

The variety of collective entities on the part of employees undoubtedly aims at providing employees with a possibility to be involved in the economic affairs of the enterprise to a higher degree than before. The differentiation in employees' representation occurs not only at the micro-level (company level) but also at the macro-level (supracompany level).

According to the Polish law, on the employees' part, there may be trade unions, as well as employees' councils operating in state enterprises³⁵ and employees' councils appointed on the basis of the Act of 7 April 2006 on informing employees and consulting them.³⁶ At the supracompany level the employees' involvement in the affairs of the enterprise may occur through European Works Councils,³⁷ special negotiating teams in a European company,³⁸ a European co-operative³⁹ as well as in a company created as a result of a cross-border merger.⁴⁰ Moreover, employees are entitled to be members of boards of trustees of the companies created as a result of commercialization.⁴¹ The aforementioned extensive catalogue of entities representing employees appeared in the Polish law largely due to the implementation of the EU law.

33 For more see: M. Tomaszewska, *Przedstawicielstwo pracownicze w prawie europejskim*, (in:) A. Wypych-Żywicka, M. Tomaszewska, J. Stelina (eds.), *Zbiorowe prawo pracy w XXI wieku*, Gdańsk 2010, p. 291 et seq.

34 For more see: G. Goździewicz, *Pozycja prawna podmiotów w zbiorowym prawie pracy*, (in:) A.M. Świątkowski (ed.), *Ochrona praw człowieka w świetle przepisów prawa pracy i zabezpieczenia społecznego. Referaty i wystąpienia zgłoszone na XVII Zjazd Katedr/Zakładów Prawa Pracy i Zabezpieczenia Społecznego*, Kraków 7-9 maja 2009 r., Warszawa 2009, p. 225 et seq.

35 Act of 25 September 1981 on workers' self-management of the crew of a state undertaking, consolidated text Journal of Laws 2015, item 1543 as amended.

36 Journal of Laws 2006 No. 79, item 550 as amended.

37 Act of 5 April 2002 on European works councils, consolidated text Journal of Laws 2018, item 1247 as amended.

38 Act of 4 March 2005 on European grouping of interests and the European company, consolidated text Journal of Laws 2018, item 2036 as amended.

39 Act of 22 July 2006 on the European Cooperative Society, consolidated text Journal of Laws 2018, item 2043 as amended

40 Act of 25 April 2008 on the participation of employees in a company being a result of a cross-border merger of companies, Journal of Laws 2008 No. 86, item 525.

41 Act of 30 August 1996 on commercialization and certain employee rights, consolidated text Journal of Laws 2018, item 2170.

One of the key problems emerging in the context of the entities of social dialogue, which is decided on in Polish case law, is the relation between particular representative bodies of employees.⁴²

Before Poland entered the European Union, trade unions were monopolists as regards the representation of employees before the employer. The transfer of representation rights towards other entities occurred because of the necessity to implement many EU legal provisions, which provide for cooperation with representatives of employers and not with trade unions.⁴³ In practice this change of approach in Poland proved to be somewhat disquieting.

A very important judicial decision for the shape of social dialogue in Poland was the judgment of the Constitutional Tribunal of 1 July 2008,⁴⁴ questioning the legality of provisions determining the procedure of appointing a representation of employees on the basis of the Act on informing employees and consulting them.⁴⁵ It is the only ruling of the Constitutional Tribunal regarding the procedure of appointing a non-union representation of employees. It has been discussed in detail in the literature.⁴⁶

In its original wording (in force as of 8 July 2009) the Act transferred the right to elect members of employee councils to representative union organizations. If these organizations failed to achieve an agreement, the members of employee councils were elected by the employees from candidates proposed by trade unions. Moreover, the Act provided that the council elected by employees would be dissolved, and the term of its members would expire after 6 months from the day on which the employer, at whose enterprise a union organization had yet to become active, was informed about being subject to the scope of activity of a representative union organization.

42 See i.a. K.W. Baran, Komentarz do ustawy z dnia 7 kwietnia 2006 r. o informowaniu pracowników i przeprowadzaniu z nimi konsultacji, (in:) K.W. Baran, *Zbiorowe prawo pracy. Komentarz*, Warszawa 2007, pp. 43-44; K.W. Baran, *Ogólna charakterystyka ustawodawstwa anty kryzysowego na tle funkcji prawa pracy*, "Praca i Zabezpieczenie Społeczne" 2009, No. 9, p. 19; M. Gładoch, *Ustawa o informowaniu pracowników i przeprowadzaniu z nimi konsultacji. Komentarz*, Toruń 2007, p. 57; G. Goździewicz, *Pozycja rady pracowników w stosunku do związków zawodowych*, (in:) A. Sobczyk (ed.), *Informowanie i konsultacja pracowników w polskim prawie pracy*, Kraków 2008, pp. 93-102; M. Wojewódka, *Kompetencje rady pracowników a uprawnienia innych reprezentacji pracowników w zakładzie pracy*, "Praca i Zabezpieczenie Społeczne" 2007, No. 10, p. 21 et seq.

43 K. Walczak, *Równość czy równowaga w zbiorowych stosunkach pracy*, (in:) A.M. Świątkowski (ed.), *Ochrona praw...*, *op. cit.*, p. 254.

44 K 23/07, *Journal of Laws* No. 120, item 778.

45 With this Act, Poland implemented Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, *OJ EU L* 80, 23.03.2002, p. 29.

46 See i.a. A. Sobczyk, *Zmiany w ustawie o radach pracowników*, "Monitor Prawa Pracy" 2009, No. 9, p. 459 et seq.; K. Walczak, *Nowy model zbiorowych stosunków pracy w Polsce w kontekście wyroku TK z 1.7.2008 r.*, "Monitor Prawa Pracy" 2008, No. 8, p. 398 et seq.; J. Wrątny, *Głosa do wyroku TK z 1.07.2008 r. K 23/07*, "Praca i Zabezpieczenie Społeczne" 2008, No. 10, pp. 32-36.

The Constitutional Tribunal observed that the aforementioned procedure of appointing an employee council, resulting in a privileged status of representative union organizations, contradicts the principle of negative union freedom provided for in Article 59(1) of the Constitution of the Republic of Poland. This provision indicates a fundamental human and civil right, to which every person is entitled, which is the use of the right to association in a trade union. The questioned provision causes employees who do not belong to a union organization to be deprived of the right to elect and dismiss members of employee councils, which in practice means excluding those employees from the possibility to influence the council's actions. In this way, according to the Tribunal, there occurs an "indirect" limitation of the voluntary nature of their association.

The Tribunal also decided that the rule of equal treatment and indiscriminability expressed in Article 32 of the Constitution was infringed because unequal treatment occurs between employees belonging to representative union organizations and those who don't. Non-union employees remain in a worse situation because they bear the consequences of consultations conducted with the employer by the entity concerned, over which they have no influence.

As a result of the Tribunal's judgment, the employees' council is currently elected by the employees from among candidates proposed by groups of employees, as the Tribunal decided that the Act is addressed to employees and employers, and not to trade unions.

The problem which still needs solving is determining the influence of the Tribunal's judgment referred to above on the current legal status quo in Poland referring to a European company, a European cooperative society, a company created as a result of a cross-border merger, as well as European works councils. Polish statutes referring to the aforementioned economic entities still introduce a mixed procedure of electing employees' representative bodies, providing for the participation of both trade unions and the workers. At the same time representative union organizations in the company are still in a privileged situation. It is important to stress that this is in compliance with European standards. The directives referring to a European company, a European cooperative society, a company created as a result of a cross-border merger, as well as works councils in Community-scale undertakings inform about the procedure of electing or appointing representatives of the employees. The legal framework in the directives results in the EU legislature clearly allowing employees to either elect or appoint representatives to establish a particular representative entity.

Under Polish law it is still important to ask if the Polish statutes implementing EU directives are in compliance with the Constitution of the Republic of Poland. Polish literature on the subject lacks an unambiguous answer to this question. Specific deliberations often note the difference between national dialogue and cross-border dialogue. It is pointed out that the fundamental issue, still unsolved, is whether

we should promote dialogue as such, or dialogue with trade unions in collective cross-border work relations.⁴⁷ The literature usually stresses positive sides of each initiative leading to establishing collective relations between the employer and the employees, especially in large undertakings.⁴⁸ What is also observed is a positive impact of these relations on stabilizing the situation of employees as well as in resolving problems during economic crisis (within the framework of corporate social responsibility).

4. Freedom of association

One of fundamental human rights provided for by international treaties is freedom of association of persons in organizations established in order to protect rights and represent professional, economic and social interests. Hence the right to establish and join trade unions is inseparably connected with the aim of joining this type of organization; to protect interests. It is implemented through, for example, conducting a collective dispute with the employer by virtue of negotiations, mediations, arbitration and, as a last resort, taking strike action.

The problem visible, among other things, in the context of the Polish Act on solving collective disputes⁴⁹ constitutes determining an entity entitled to exercise the freedom of association in trade unions.

According to Article 59(1) of the Constitution, this entity is the employee. However, the Constitution does not define the term “employee”. Furthermore, Article 2 of the Labour Code⁵⁰ states that an employee is a person with whom an employment relationship was established on the basis of an employment contract, choice, nomination, appointment and cooperative employment contract.

The question arises if the term “employee” in the Constitution should be defined in the same way as in Article 2 of the Labour Code. In this context the judgment of the Constitutional Tribunal of 2 June 2015 is the only such ruling, albeit one that is very fundamental in terms of Polish collective labour law. Therein, the Constitutional Tribunal stated the incompatibility of Article 59(1) 1 of the Constitution in conjunction with Article 12 of the Constitution, Article 2(1) of the Act of 23 May

47 S. Adamczyk, B. Surdykowska, *Rokowania zbiorowe w Unii Europejskiej: trudne czasy, niejasna przyszłość*, (in:) J. Czarzasty (ed.), *Rokowania zbiorowe w cieniu globalizacji. Rola i miejsce związków zawodowych w korporacjach ponadnarodowych*, Warszawa 2014, p. 494.

48 A. Boguska, *Europejskie porozumienia ramowe na poziomie przedsiębiorstwa – w poszukiwaniu ram prawnych. Zarys problematyki*, (in:) Z. Hajn, M. Kurzynoga (eds), *Demokracja w zakładzie pracy. Zagadnienia prawne*, Warszawa 2017, p. 494.

49 Act of 23 May 1991 on solving collective disputes, consolidated text *Journal of Laws* 2018 item 399.

50 Act of 26 June 1974 The Labour Code, consolidated text *Journal of Laws* 2018 item 917 as amended.

1991 on trade unions,⁵¹ within their scope the aforementioned regulations limit the freedom of establishing and joining trade unions by persons who pursue profit-gaining work but who are not employees in the meaning of Article 2 of the Labour Code.⁵² According to the Tribunal, the status of an employee should be, constitutionally, evaluated through reference to the criterion of profit-gaining work. In this context the Tribunal pointed at three premises determining the legal frames of the constitutional understanding of the term “employee” used in Article 59(1) of the Constitution. The term includes all persons who, first, pursue a particular profit-gaining work; second, remain in the legal relationship with the entity for whom they provide their work, and, third, have such professional interests connected with performing their work, which may be collectively protected.⁵³

The need for the right of association in trade unions to include not only employees with whom an employment relationship was established but also other persons who pursue profit-gaining work, provided for by the Tribunal, has rightly received general approval in legal writings on labour law.⁵⁴ In our opinion, it seems convincing that the Tribunal is inspired by the EU law; based on it, the concept of an employee is interpreted by the Court of Justice of the European Union ‘filtering’ it not through the type of legal relationship between employee and employer, but through criteria such as pursuing work for another person and under the direction of the employer and for remuneration. Furthermore, a similar broad understanding of the term “employee” is adopted under Article 2 of the 1948 Convention No. 87 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise.⁵⁵ It is widely accepted in the literature that the term “workers” (Fr. *travailleurs*) used in the Convention means not only employees in the legal sense of the word (*stricto sensu*), but also any persons who work

51 Journal of Laws 2015, item 1881 as amended.

52 K 1/13, Journal of Laws 2015, item 791.

53 A.M. Świątkowski, Prawo do wolności zrzeszania się i uprawnień pokrewnych, „Monitor Prawa Pracy” 2015, No. 9, p. 457.

54 See i.a. J. Unterschütz, Podmiotowy zakres swobody koalicji – uwagi na marginesie wyroku TK w sprawie K 1/13, „Monitor Prawa Pracy” 2016, No. 3, p. 130 and literature quoted therein. A few critical remarks have concerned the concept of the constitutional definition of an employee. According to A.M. Świątkowski, there cannot be two different legal definitions of an employee in the legal provisions, i.e. the long-established definition in Article 2 of the Labour Code and the alternative one presented by the Tribunal in relation to Article 59 of the Constitution. Cf. A. M. Świątkowski, Konstytucyjna koncepcja pracownika, „Monitor Prawa Pracy” 2016, No. 1, p. 14.

55 Journal of Laws 1958 No. 29, item 125. In English see https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232 (accessed 04.03.2019).

professionally.⁵⁶ The discussion between commentators of labour law in Poland,⁵⁷ also inspired by the Tribunal judgment, has resulted in amendments in the Act on trade unions. The changes have come into force on 1 January 2019. They are revolutionary amendments, because trade unions can be established and those that already exist can be joined not only by employees tied to an employment relationship in the meaning of Article 2 of the Labour Code but also persons working on the basis of civil law agreements, such as fee-for-task agreements or contracts for specific work. This also means broadening the circle of employed persons who are entitled to take strike action.

5. Special protection of the employment relationship durability of employees' representatives

A social dialogue *ratione materiae* extends to forming work relations, work conditions, payments, social benefits, as well as other issues of an economic nature, which are the subject of interest and competence of all parties along with relations between the partners and their mutual obligations. Thus, the subject matter of social dialogue may also include the rights and freedoms of employees' representatives.

Reviewing the case law on the right to social dialogue, it is worth noting the problems of the protection of employment relationship durability of employees' representatives. This issue is one of the key problems faced by entrepreneurs throughout the European Union. Hence the mechanisms of this protection may be found in EU directives implemented in Polish law.

Those who are entitled to the protection of employment relationship and work conditions are, among other persons, representatives of trade unions, members of employees' councils, members of European works councils and special negotiating teams, representatives of employees in a European company, a European cooperative society as well as in a company created as the result of a cross-border merger.

56 See i.a. Z. Hajn, Prawo zrzeszania się w związkach zawodowych – prawo pracowników czy prawo ludzi pracy?, (in:) A. Wypych-Żywicka, M. Tomaszewska, J. Stelina (eds.), Zbiorowe prawo pracy w XXI wieku, Gdańsk 2010, p. 177, 178; E. Podgórska-Rakiel, Rekomendacje MOP dotyczące wolności koalicji związkowej i ochrony działaczy, "Monitor Prawa Pracy" 2013, No. 2, p. 68 et seq.

57 See i.a. E. Podgórska-Rakiel, Konieczność nowelizacji prawa polskiego w kwestii wolności związkowych z perspektywy Międzynarodowej Organizacji Pracy, "Monitor Prawa Pracy" 2014, No. 10, pp. 510–514; M. Seweryński, Problemy statusu prawnego związków zawodowych, (in:) G. Goździewicz (ed.) Zbiorowe prawo pracy w społecznej gospodarce rynkowej, Toruń 2000, pp. 110–112; J. Unterschütz, Wybrane problemy ograniczenia swobody koalicji w świetle prawa międzynarodowego i Konstytucji RP, "Praca i Zabezpieczenie Społeczne" 2013, No. 10, pp. 21–26.

The Polish legal framework for the protection of employees' representatives was usually interpreted by the judiciary in relation to representatives of trade unions.⁵⁸ Presenting rulings related to this group is justified also by the fact that the provisions concerning the other representatives of employees are mostly based on the model of protecting union activists. This results in the fact that the following rulings referring to the protection of employment relationship durability of a union activist may be *mutatis mutandis* also referred to the remaining representatives of the employees. This also concerns employees' representatives in European economic entities, such as Community-scale entrepreneurs and groups of entrepreneurs, a European company, European cooperative society and a company created as the result of a cross-border merger.

The aim of protecting employees' representatives is to secure employment stability for persons, who, because of their representative positions are exposed to conflicts with the employing entity. Normative safeguards for the durability of the employment relationship of employees' representatives is necessary so as to enable these persons to be independent in exercising the activities required of their position.⁵⁹

The protection of a union activist consists in the employer being forbidden to dissolve the employment relationship during the term of office. The protection also includes a prohibition of terminating work and payment conditions during the employment relationship. These prohibitions are of relative nature because they may be lifted by consent from the management of the union organization in the enterprise.

An infringement of the prohibition of dissolving an employment agreement of a union activist entitles them to file a claim in the labour court. As the Supreme Court has ruled, the provisions determining the scope of the protection are of the nature of specific provisions and must be strictly interpreted.⁶⁰ This means that union activity cannot be a pretext for the special treatment of an employee in areas which are not related to their position.⁶¹ This leads to the conclusion that the protection of the employment relationship durability of a trade union activist is not absolute. Every case of infringement of the protection of a trade union activist's employment relationship needs to be examined individually, including the circumstances of a particular situation.

58 See i.a. J. Stelina, *Przywrócenie do pracy działacza związkowego w orzecznictwie Sądu Najwyższego*, "Praca i Zabezpieczenie Społeczne" 2005, No. 1, p. 30 et seq.

59 M. Madej, *Nadużycie prawa ochrony trwałości stosunku pracy działacza związkowego*, (in:) Z. Hajn (ed.), *Związkowe przedstawicielstwo pracowników zakładu pracy*, Warszawa 2012, p. 553.

60 The judgment of the Supreme Court of 26.11.2003, I PK 616/2002, "Prawo pracy" 2004, No. 6, p. 34.

61 Judgments of the Supreme Court of: 19.09.2018, II PK 242/17, *Legalis*; 27.02.1997, I PKN 17/97, OSNP 1997, No. 21, item 416; 11.09.2001, I PKN 619/00, OSNAP 2003, No. 16, item 376.

This results in that the question of reinstating a dismissed union activist has to be resolved by Polish labour courts and the number of court rulings in this regard, serves to indicate that this frequently occurs in practice. It is also worth noting that in the rulings presented below, the issue of protection of a trade union activist has been subject to comprehensive assessment.

Polish literature critically assesses the extensive scope of protection afforded to persons representing employees. Here, doubts are expressed especially in cases involving the dismissal of an employee without notice due to a breach of employment conditions. Where this occurs, it is important to note the special nature of the premises for dissolving the employment relationship, which has no bearing on the representative position (for example, where a serious infringement of fundamental employment obligations has taken place, Article 52 of the Labour Code).⁶² In this situation another problem to arise is that of an employees' representative treating the protection from dismissal as an instrument to further their own interests.

Polish courts establish the limits of using the protection of the employment relationship durability of a union activist through the clause of socio-economic purpose of law as well as the rules of social coexistence, regulated in Article 8 of the Labour Code. According to this provision, one cannot make use of their right in a way that would contradict the socio-economic purpose of such right or the rules of social coexistence. In its resolution of 30 March 1994, the Supreme Court decided that the clause useful for the evaluation of whether the union activist's claim for reinstatement is unjustified, is primarily the one which expresses contradiction with the socio-economic purpose of the right.⁶³ The Supreme Court assumed that the socio-economic purpose of the right to reinstatement contradicts the restitution of employment in cases where dismissal was obviously justified.

62 See, for example, K.W. Baran, O ochronie trwałości stosunku zatrudnienia związkowców na poziomie zakładowym – uwagi *de lege ferenda*, "Monitor Prawa Pracy" 2018, No. 4, p. 8; K. W. Baran, Normatywne gwarancje stabilizacji zatrudnienia działaczy związkowych, "Monitor Prawa Pracy" 2004, No. 3; A. Dral, Problem liberalizacji, deregulacji i uelastycznienia ochrony trwałości stosunku pracy w polskim prawie pracy, "Praca i Zabezpieczenie Społeczne" 2009, No. 5, p. 16; M. Majchrzak, Rozwiązywanie stosunku pracy z członkami międzyzakładowej organizacji związkowej, "Monitor Prawa Pracy" 2008, No. 4; M. Latos-Miłkowska, Szczególna ochrona trwałości stosunku pracy a ochrona interesu pracodawcy, (in:) G. Goździewicz (ed.), Ochrona trwałości stosunku pracy w społecznej gospodarce rynkowej, Warszawa 2010, p. 249; B. Rutkowska, Szczególna ochrona trwałości stosunku pracy przedstawicieli pracowników – uwagi *de lege ferenda*, (in:) G. Goździewicz (ed.), Ochrona..., *op. cit.*, p. 268; H. Szewczyk, Dyskryminacja w zatrudnieniu ze względu na przynależność związkową, "Praca i Zabezpieczenie Społeczne" 2013, No. 4, pp. 21 i 22; G. Wolak, Szczególna ochrona trwałości stosunku pracy działaczy związkowych a klauzule generalne z art. 8 k.p., "Monitor Prawa Pracy" 2015, No. 3, p. 132.

63 I PZP 40/93, Legalis.

However, it is important to stress that the application by the court of the construction of the abuse of a right is acceptable in exceptional situations only and must be, in accordance with the established case-law and commentators' standpoint, justified in detail.⁶⁴ This justification has to demonstrate that in the particular, individual and concrete situation, a typical behavior of the entity exercising their right determined by the legal rules in force is unacceptable for moral reasons which establish the rules of social coexistence, because in certain "untypical" circumstances it might threaten fundamental values on which the social order is based and to which the law should be seen to serve.⁶⁵

There is no doubt that the practical verification of the accuracy of the adopted scope *ratione materiae* of the special protection depends on the objectivity of the entity making a decision on consent to dissolve the employment relationship.⁶⁶ As case law demonstrates, instances where the aforementioned entity defends the employees' representative who is undeserving of protection given the circumstances involved, are not isolated. This shows that the legal regulation of special protection is imperfect and requires legislative changes.⁶⁷

6. Conclusions

This article has attempted to map the existing "state of the art" of Polish case law directions within the field of social dialogue. The substantial experience of Polish courts in the field of social dialogue shows that legal provisions are somewhat distant from being totally comprehensive and offering no room for different interpretations.

The application of legal provisions protecting social peace lies in the interest of employers. Abandoning the model of negotiations between social partners might negatively affect the level of investment, hinder establishing and developing enterprises and, as a result, negatively influence the shape the nation's economy. Therefore, the parties engaged in social dialogue should act within the standards of law introduced by the legislature.

64 Judgments of the Supreme Court of: 18.01.1996, I PRN 103/95, OSNAPiUS 1996 No. 15, item 210; z 27.02.1997, I PKN 17/97, OSNAPiUS 1997 No 21, item 416; 20.08.1997, I PKN 225/97, OSNAPiUS 1998 No 10, item 305; 17.09. 1997, I PKN 273/97, OSNAPiUS 1998 No 13, item 394; 26.03.1998, I PKN 571/97, OSNAPiUS 1999 No 5, item 168; 16.01.1998, I PKN 475/97, Legalis; 15.10.1999, I PKN 306/99, OSNAPiUS 2001 No 5, item 146; 2.08.2000, I PKN 755/99, OSNP 2002, No 4, item 88; 6.04.2006, III PK 12/06, Legalis; 20.01.2011, I PK 112/10, Legalis and 10.03.2011, II PK 241/10, Legalis; 4.02.2015, III PK 68/14, Legalis; 3.08.2016, I PK 227/15, Legalis.

65 The judgment of the Supreme Court of 7.06.2018, II PK 90/17, Legalis.

66 W. Sanetra, Dylematy ochrony działaczy związkowych przed zwolnieniem z pracy, "Praca i Zabezpieczenie Społeczne" 1993, No. 3, p. 34.

67 B. Cudowski, Zgoda na rozwiązanie stosunku pracy z działaczem związkowym, "Przeгляд Sądowy" 1998, No. 7-8, p. 168.

A review of Polish case law demonstrates, however, that they cannot be established in a way which limits the scope of negotiations. Thus, there are doubts caused by the regulations which allow only one type of employees' representatives in the social dialogue. In this context, it is doubtful whether the Polish statutes implementing EU directives concerning a European company, a European cooperative society, a company created as a result of a cross-border merger, as well as European works councils, are in compliance with the Constitution of the Republic of Poland.

Achieving the above goal also requires that the right to exercise the freedom of association and related rights resulting from this freedom, is vested in all employed persons and not just those employees falling within the meaning of Article 2 of the Labour Code. The Polish legislature proved responsive to this drawback of Polish law and launched a legislative effort to broaden the scope *ratione personae* of this freedom resulting in the amendments that are in force as of 1 January 2019.

Another important consideration is that in order to guarantee benefits for both employees and employers, it is essential to establish mutual trust among the social partners involved. Therefore, the legislation providing too extensive protection of employees' representatives from the dissolution of the employment relationship requires to be relaxed. It may seem a bit quirky that the amendments broadening the circle of the employed persons entitled to the freedom of association do not coincide with any attempts to relax the protection of employees' representatives.

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