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NON-UNION COLLECTIVE EMPLOYEE REPRESENTATION IN POLAND – FAILED HOPES?¹

1. In 1989 deep transformation of the political and economic system was started in Poland, exerting impact on almost all spheres of the country's social life. Also the system of collective employee representation underwent profound changes. Those resulted mostly from the restoration of trade union liberty, as well as privatization and the ensuing alterations of the organizational forms of business. After 1989 the employees were given freedom to form trade unions again and made gladly use of it, at least in the initial years of the transformation. It thus seemed that from 1990 on the role of trade unions in the system of collective employee representation would be strengthened. What is more, the union-based model of the representation was viewed as the best one. At that time trade unions in Poland were granted vast rights to represent the employees, some of them being conferred exclusively on the trade unions (e.g. the right to collective bargaining or instituting and conducting labour collective disputes). Rather soon it turned out, however, that after its initial growth, the trade union movement in Poland started losing momentum, and later on, in a relatively short time, the trade unions were even faced with a decline. While in 1990 as many as about 8 million people were trade union members (over 30% of the employed), according to current estimates the number is about 1.5 to 2 million (ca. 15%). The ratio would be even less (about 7%), if the number was referred to the general number of the working people, regardless of the legal basis of their employment.

The existing situation means, in fact, de-unionisation, the reasons for which are not quite clear. The most often quoted one is the changes related to the establishment of the market economy system, i.e. the abandoning of the central planning and gradual elimination of state-owned enterprises. The privatization

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of the latter, started in 1990, has led to a far-going transformation of the economy. The huge state work establishments have been replaced by small and medium-sized enterprises, now dominating in the country. These are mostly private or commercialized entities (the latter being enterprises still owned or co-owned by the state, but run in accordance with the market system rules, in the legal form of commercial law companies). To the above mentioned issues massive unemployment should be added, as well as the widespread application of flexible forms of employment, which makes those working much more dependent on the employment establishments. The decline of trade unions is also caused by the changes in the nature of employment (replacement of the contracts of employment with civil law agreements), and a marked rise of the level of education among the employees. The individual providence principle, once widespread among the employees, is now withering away, people believing that their interest can be effectively taken care of by themselves, entirely on their own. They recall trade unions only when in a situation of danger. Usually it is too late then.

This is why, in the system of collective representation of the employees, ever greater role is now being played by all kinds of non-union representation, filling the gap created by the weakening trade union movement. Initially, they took on non-institutionalized forms (staff delegates elected *ad hoc* to deal with a specific issue). Institutional representations (works councils) started emerging with time.

2. At present the following types of non-union employee representation can be found in Poland: a) employee councils in state-owned enterprises, b) employee representatives in information and consultations bodies or participation bodies within transnational business entities, c) works councils in non-state owned enterprises, d) *ad hoc* representatives and occupational safety and health representatives (the forms of so-called non-formalised representation) and e) bodies of professional (trade) self-government. It should be remembered, though, that the catalogue in question is not a closed one, as it includes only the entities whose legal status is provided for by universally binding legal regulations. Meanwhile, certain pieces of legislation allow for the creation of alternative systems (like the Act on European Works Councils) or sanction the systems that were called to being earlier (e.g. the Act on Informing and Consulting Employees).

Not all of the above mentioned forms play an essential role in the system of collective employee representation. First of all, the bodies of employee self-government (employee councils) at state-owned enterprises have very limited scope of operation. Although they enjoy very wide participation (actually co-managing) powers, given the processes of privatization there have been just a few tens of such business entities operating in the country now, and their number permanently grows smaller. As far as the bodies of professional self-government are concerned, these can be regarded as employee representation bodies only to a very narrow extent, as their primary task lies in exercising supervision and taking care of due and reliable performance of the profession by the members of

a specific business (trade) corporation. By far the most important are the works councils operating under the Act of 7 April, 2006 on Informing and Consulting Employees implementing provisions of 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.

3. As regards Poland's legal system the works council operating under the Act of 7 April, 2006 is the employee representation within the meaning of the provisions of Directive 2004/14. The councils can be established, at the employee initiative, only at entrepreneurs (employers involved in business activity) with at least 50 employees. The Act is thus not applicable to the employers not running business activity, the fact meaning that, in practical terms, almost all employers from the public (budget) sphere are exempt from its provisions.

In the initial years of the operation of the Act in question, the mode of establishment of the works council depended on whether there were representative trade union organization operating at the employer's or not. Where there existed such organizations, works councils were appointed by the organizations themselves; only where consensus between them on the issue could not be reached, the council was elected by the staff from among the candidates nominated by the organizations. In its decision of 1 July, 2008, the Constitutional Tribunal found the union-dependent mode of works council establishment unconstitutional, which resulted in the need to amend the Act on Employee Informing and Consulting. At present, works councils are elected by the staff of the workplace under a democratic election scheme, from among candidates nominated by groups of employees. The works council is composed of 3 to 7 persons, depending on the size of the company. The costs of the elections and operation of the works council are borne by the employer.

The works council is a body which, acting on behalf of the staff, has the right to seek information from the employer on company matters and to express opinion (be consulted) on some of the issues. It can be thus rightly stated that the council is a sort of an intermediary between the employer and the employees hired by him. The information received by the council from the employer should be made available to the employees.

The scope of the matters on which information must be passed to the council includes: 1) the operation and business standing of the employer and the changes forecasted in that respect, 2) the numbers, structure and forecasted changes of employment at the company and actions aimed at maintenance of the level of employment, 3) actions that may have essential impact on work organization or the basis of employment. The information is provided by the employer if the changes are forecasted or actions are planned and where the works council's motion to receive the information has been filed in writing. In addition, the matters mentioned at 2) and 3) above have to be the object of consultation.

As far as guarantees for the right of access to information are concerned, it is important that the information duty of the employer should be duly met. The information has to be passed at the time, in the form and scope allowing the works council to get themselves acquainted with a specific issue, analyse the information and prepare themselves to the consultations. The above mentioned elements, taken together, form the employer's legal duty. The said means that informing the employees – as the employer's action - does not consist in mere passing the data, but in doing it in a way that would enable the council to make themselves acquainted with the issue. Hence passing the data too late for the council to analyse them does not mean informing the body within the meaning of the Act. In such a situation it is possible to bring the employer or a person acting on behalf of the latter to criminal liability (a fine).

Also as far as consultations are concerned a number of formal requirements are stated. The Act requires that the consultations should be conducted at the time, form and scope allowing the employer to take actions on the consulted matters, and should take place at a due level of management. It is also essential that the works council should be able to meet with the employer in order to learn what his standpoint is and what the reasons quoted in reaction to the council's opinion are. The works council and the employer are supposed to conduct the consultations in good faith, the interests of both parties being respected.

The outcome of the consultations may lie in an agreement concluded between the works council and the employer, although conclusion of such an agreement is not required by law; due efforts to arrive at it are expected, though.

Under an agreement concluded by the works council with the employer detailed rules for the passing of the information and conducting the consultations can be laid down and other related matters provided for.

Interests of employers connected with the disclosure of the information about the enterprise to the works council are secured by the employee representatives' duty to keep the information confidential. In addition, the Act allows the employer, in particularly justified cases, not to reveal to the works council the information the disclosure of which could, according to objective criteria, seriously disturb the operation of the enterprise or plant concerned or pose a threat of a serious damage to it. The duty to provide information is, in fact, lifted in such case.

Works council members enjoy legal protection. Unless the works council consents to it, the employer is not allowed to give notice, terminate nor unilaterally make an unfavourable change in terms and conditions of the employment relationship of an employee sitting on the works council as long as the person concerned remains a member of the council. In addition, the employee being a works council member has the right to a release from his/her work-related duties (the entitlement to remuneration being retained) for the time needed to participate in the activities of the works council.

4. The right to information and consultation in European transnational companies has been guaranteed by the Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. In Poland the directive was implemented by means of the Act of 5 April, 2002 on European Works Councils having become effective on 1 May, 2004. The Act conforms quite well to the provisions of Directive 94/45.

5. Besides the above discussed institutional forms of employee representation, Polish labour law provides for non-institutionalised representation forms, resorted to by both parties in certain cases. In practice, that type of representation takes the shape of a staff delegate. Delegates like that are appointed if, despite lack of trade unions, the opinion (or, more rarely, the consent) of staff representatives has to be sought on certain issues. That type of representation is only applicable where there is no trade union organisation at the employer's at all. The delegate is thus a substitute to the trade union representation at the workplace (the principle of subsidiarity). The rules for the appointment of the representation in question are not laid down by law, but left to custom and local practice. The scope of the matters the delegate deals with is strictly limited to those explicitly provided for by law (the *numerus clauses* principle). Examples include, for instance, opining on the rules for mass redundancies or issues of occupational safety and health.

6. The now observed growth of importance of the institutional forms of union representation is a result of, first of all, the ever stronger de-unionisation. As it has already been mentioned, it is very difficult to precisely indicate the reasons for the phenomenon. I would go, however, so far as to say that the weakening of the trade union movement results also from the development of the non-union representations. Sometimes the employees – having the possibility to form the work's council - drop the idea of establishment of a trade union organisation at all.

It comes thus as no surprise that certain increase of the role of non-union representation is ever more often proposed, including a suggestion to confer on such types of representation certain powers exclusively enjoyed by trade unions so far. The rights in question include, for instance, collective bargaining and concluding collective labour agreements or even conducting collective disputes (with the right to proclaim strikes). Such evolution of the employee representation seems rather natural. Hardly can a situation in which the employees have no collective representation at all be accepted.

Attention should be, however, drawn, to two issues that should not be neglected. Firstly, the change of the nature of the collective representation, i.e. a shift from trade unions' dominating role to that subsidiary, entails certain dangers. Trade unions, as organizations of the working people, organized vertically to form trade and territorial structures, have a potential which can hardly

be achieved by any kinds of bodies operating in the enterprises, where the staff gets active only on a cyclical basis, when the election time comes. Between the elections the employees remain passive. I do not believe that works councils, as non-union representation, based on the idea of an all-company employee representation, might counterweight the role of trade unions, founded on the concept of an association supported by regional or national structures. This is why I find it more reasonable to have a system with trade unions retaining a vast array of representative powers, including the right to bargain collectively, to conclude collective labour agreements and to conduct, on behalf of the employees, collective disputes, bodies of the non-union representation being entitled only to receiving information and being consulted on. This would, of course, require a support to the trade union movement from the state, to an extent much greater than that current. It can be finally stated that once the employees give up creating trade union organisations, they also forgo the protection which the organizations can extend on them. Conferral of the trade union powers onto works councils would, in fact, lead to replacement of a genuine social dialogue with a kind of its crippled, substitutive form.

There is, however, also a second issue which comes a result of the observations of the practical functioning of Poland's non-union employee representation schemes. As it turns out, only a very small number of employees have actually decided to establish that form of representation. Starting in 2006, when the law providing for works councils came into force, the bodies were formed at as few as about 10% of the employers. After the initial term of office of the councils the ratio dropped down dramatically, however, and the operation of the bodies was prolonged, for a further period, only at about 2% of the employers. At present the idea of works councils has completely failed. And while the reasons for the situation are many, the shortcomings of the law not being excluded, it seems that the key reason is simply the employees' lack of interest in the form of representation, and sometimes also the employers' unwillingness to support it.

Can thus any high hopes be set on the institution being, in fact, dead? A much better solution seems to lie in supporting the most traditional forms on representation, based on the trade union principles.

Jakub Stelina

POZAZWIĄZKOWA ZBIOROWA REPREZENTACJA PRACOWNIKÓW W POLSCE – ZAWIEDZIONE NADZIEJE?

W artykule omówiono sytuację prawną i faktyczną pozazwiązkowych przedstawicielstw pracowniczych w Polsce. Od początku transformacji ustrojowej obserwujemy

stopniową desyndykalizację, polegającą na spadku uzwiązkowienia, które obecnie wynosi ok. 7%. W miejsce tracących na znaczeniu związków zawodowych pojawiły się tzw. przedstawicielstwa pozazwiązkowe. Obecnie w Polsce wyróżnić można następujące ich rodzaje: a) rady pracownicze w przedsiębiorstwach państwowych, b) przedstawiciele pracowników w ciałach informacyjno-konsultacyjnych lub organach partycypacyjnych podmiotów gospodarczych mających zasięg ponadnarodowy, c) rady pracowników w przedsiębiorstwach niepaństwowych, d) przedstawiciele *ad hoc* i przedstawiciele w sferze bezpieczeństwa i higieny pracy (tzw. przedstawicielstwa niesformalizowane) oraz f) organy samorządów zawodowych. Spośród wymienionych wyżej przedstawicielstw pracowniczych główną rolę w systemie reprezentacji przypisuje się radom pracowników działającym w oparciu o przepisy ustawy z dnia 7 kwietnia 2006 r. o informowaniu pracowników i przeprowadzaniu z nimi konsultacji, implementującej postanowienia dyrektywy 2002/14/WE Parlamentu Europejskiego i Rady Unii Europejskiej z dnia 11 marca 2002 r. ustanawiającej ogólne ramowe warunki informowania i przeprowadzania konsultacji z pracownikami we Wspólnocie Europejskiej.

Niestety, w praktyce liczba rad pracowników jest niewielka. Początkowo rady takie powołano w ok. 10% przedsiębiorstw, natomiast po upływie pierwszej kadencji odsetek ten drastycznie zmalał. Na kolejną kadencję przedłużono działalność rad pracowników już tylko u ok. 2% pracodawców. Jest to w chwili obecnej całkowita porażka idei rad pracowników. Można więc zaryzykować tezę, że zdecydowanie lepszym rozwiązaniem byłoby po prostu wspieranie najbardziej tradycyjnych form reprezentacji, opartych na formule związków zawodowych.