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European Labour Law Conference – New forms of labour and new structures of enterprises – challenges for labour law (panel discussion).

I. General notes

The basic aim of the present elaboration in the context of new forms of labour is to introduce the new principles of the Act on Trade Unions in Poland. It should be noted that no provision of the Polish Act on Trade Unions before 2019 implied the right to organize for people working on the basis of civil law contracts and for the self-employed. The provisions were incompatible with the Constitution of the Republic of Poland and with the Convention No. 87 of the International Labour Organization.

II. Complaint to the Committee on Freedom of Association

In 2011 trade union NSZZ “Solidarność” filed a complaint to the Committee on Freedom of Association because in Poland the self-employed and other persons performing work on the basis of civil-law contracts could not join trade union. As the author of the NSZZ “Solidarność” complainant I indicated that the Polish version of Convention No. 87 uses the term “employees” (pracownicy) as a translation of the English term “workers” or the French term “travailleurs” used in the text of the Convention. Extremely important was the fact that the Polish term “employee” in the legal language has a narrower meaning referring only to workers as defined by the Labour Code. The Labour Code defines the term “employee” as a person employed on the basis of a contract of employment, appointment, election, nomination or a cooperative contract of employment. Polish legislation, in defining the scope of the right to organize as set forth in the Act on Trade Unions of 1991 grants the right to establish and join trade unions exclusively to “workers” as defined by the Labour Code, members of agricultural cooperatives, persons performing work on the basis of agency contracts, home-based workers, pensioners, unemployed, functionaries and those engaged in

the non-combatant military service. Therefore the complainant is of the opinion that by using a narrow definition of the term “employee” inspired by the Labour Code, the legislator denied freedom of association rights to persons employed on the basis of civil law contracts (contract for service), self-employed and other persons performing work who are not employers. According to the data from statistics in Poland work on this basis approximately 2.5 million people.

III. The ILO recommendation and judgment of the Constitutional Tribunal of Poland

In its recommendation from 2012 the Committee of Freedom of Association of the International Labour Organisation requested the Polish Government to take the necessary measures in order to ensure that all workers, without distinction whatsoever, including self-employed workers and those employed under civil law contracts, enjoy the right to establish and join organizations of their own choosing within the meaning of ILO Convention No. 87. Moreover, recalling that ILO Convention No. 98 protects all workers and their representatives against acts of anti-union discrimination and that the only possible exceptions from its scope of application are the police, armed forces and public servants engaged in the administration of the State, the Committee requests the Government to ensure that all workers and their representatives enjoy adequate protection against acts of anti-union discrimination regardless of whether they fall under the definition of employee under the Labour Code or not (see Case No. 2888, GB.313/INS/9, Geneva 15-30 March 2012).

It should be mentioned that Polish definition of an “employee” covers both blue collar and white collar workers. On the other hand, in the current legislation, there is no statutory definition of self-employment. The doctrine generally accepts that self-employment should be understood as performance of work or services by one-man undertakings. Besides common forms of non-employee employment are civil law employment. The most common is performance of work under such civil law contracts as a contract for provision of services to which provisions on the contract of mandate apply respectively, a contract of mandate and a contract for specific work.

After 7 years from the ILO recommendation (case 2888), with the beginning of the year 2019 for the first time in Poland, both self-employed and civil law contract workers have

the right of association in trade unions. The ILO recommendations issued on the basis of the complaint obliged Poland to amend regulations by extending the right of association to individuals working under civil law contracts and self-employed individuals, which was confirmed by the Constitutional Tribunal of Poland in a 2015 judgment (case K 1/13). The amended Act on Trade Unions entered into force on 1 January 2019. Since then, all workers, including people performing work on the basis of civil law contracts and the self-employed, have the right to organize into trade unions and to engage in collective bargaining and collective disputes, and to join strikes in particular.

IV. Collective rights

In addition, since the beginning of the year 2019, both self-employed and civil law contract workers are granted all collective rights including the right to collective bargaining and collective disputes. Thus finally collective rights not only employees but all workers are guaranteed. In this context, I must mention that in my opinion employee status cannot decide about collective rights. New forms of employment (e.g. platform work, digital economy) are generally based on civil law agreements in Poland. All persons engaged in paid work and not only those with employee status should be guaranteed trade union protection. We must promote collective bargaining particularly for the self-employed. It could be describes as a wide “protection umbrella”, and if we say that all workers should have the right to organize in trade unions, then the next step is to give them all collective rights.

V. The 2019 report of the ILO Committee of Experts and Recommendations

On the other hand, in the 2019 Report of the ILO Committee of Experts and Recommendations (see pages 135-136; ILC.108/III(A)) in case of Poland notes with satisfaction that the personal scope of application of the anti-union discrimination provisions covers new categories of workers and is therefore no longer restricted to employees. The Committee notes that the draft Act on Trade Unions was signed on 25 July 2018. It was noticed that the right to establish and join trade unions will be extended to “persons working for money”, which includes not only employees but also any person providing work for remuneration irrespective of the legal basis of contractual relationship. Furthermore, the Government indicates that the new definition

of “a person working for money” means that membership in trade unions is open to persons hired under a mandate, contract for provision of service, contract to perform specific tasks, as well as self-employed (i.e. sole traders and persons running a one-person business, other than in agriculture). Volunteers, interns and other persons who work without receiving remuneration will also be granted the right to join trade unions on the terms and conditions specified in the trade unions’ by-laws.

“The Committee also notes the observations from the National Commission of the Independent and Self-Governing Trade Union (NSZZ) “Solidarność” and the All-Poland Alliance of Trade Unions (OPZZ), received respectively on 9 and 27 August 2018 and the related comments from the Government. The Committee recalls that the Committee on Freedom of Association (CFA) (Case No. 2888) had requested the Government to ensure that all workers and their representatives enjoy adequate protection against acts of anti-union discrimination, regardless of whether they are or not considered an employee under the Labour Code or not. The CFA had referred the legislative aspects of this case to the Committee. In this regard, the Committee notes that the Act on Trade Unions was amended on 25 July 2018, and the amendments entering into force on 1 January 2019. “Persons who work for money” as long as they do not employ any other person to perform this type of work and irrespective of the legal characterization of their employment; paragraphs 5–7 also extend the right to establish and join trade unions to pensioners, persons on disability pension, unemployed persons, volunteers, interns, and other persons who work in person without being paid as well as to persons delegated to employers in order to complete substitute service, officers of the police, border guards, custom-fiscal service employees, prison service employees, firefighters and employees of the Supreme Audit Office; new articles 3 to 5 of the Act on Trade Unions extend the prohibition of unequal treatment based on trade union membership and trade union activities to the above-mentioned categories of workers. New article 32(1) of the Act on Trade Unions extends the special protection against termination and unilateral modification of remuneration or employment conditions to “persons working for money” who are trade union representatives; and article 26(2) of the amended Act on Trade Unions establishes that trade union organizations shall have the right to take a position in matters related to the collective interests and rights of persons who work for money. The Committee notes with satisfaction that the personal scope of application of the Act

on Trade Unions anti-union discrimination provisions covers new categories of workers and therefore is no longer restricted to employees.”¹

VI. Workplace-based trade union model

Finally, I would like point out that Poland adopted a workplace-based trade union model. This means that the membership in a trade union is possible through membership in the “enterprise” or “inter-enterprise” trade union organization. The legislature granted trade union rights only to enterprise and inter-enterprise trade union structures (not to sectoral or national structures). Undoubtedly, such a legal construction will not encourage persons working on the basis of civil law contracts and the self-employed to join or establish trade unions. It could be a problem to associate in trade unions for workers in new forms of employment, in particular temporary workers who cannot be directly linked to one workplace. They have the right to associate only in the agency who is the real employer but their interests with the user-employer.

VII. Conclusion

The main conclusion to be drawn is that in Poland the Act on Trade Unions applies to “all persons engaged in paid work” defined as “employees or persons performing work on the basis other than employment relationship, who work on an own-account basis and who have rights and interests related to performing work that can be represented and defended by a trade union”. A worker has the right to be a trade union member but the Act requires that worker to have interests related to performing work that can be represented and defended by a trade union. In addition, an employer cannot dismiss or terminate the contract with the worker who is a board member of the organization without the consent of the trade union organization. All trade unions with new category of workers have right to collective rights. In my opinion new principles for the self-employed and other persons performing work on the basis of civil law contracts now guarantee as required by the ILO Conventions 87, 98 and 135. Collective rights are

¹ Application of International Labour Standards 2019, Report of the Committee of Experts on the Application of Conventions and Recommendations, REPORT III (Part A) International Labour Conference, 108th Session, 2019, pp. 135-136; ILC.108/III(A).

granted to all workers, not only employees. Also, employee status is not prerequisite to collective bargaining.