IMPLEMENTATION OF EUROPEAN UNION LABOUR LEGISLATION VIA COLLECTIVE BARGAINING IN POLAND

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ABSTRACT

The 1987 Single European Act and the Union Treaty signed in Maastricht on February 7, 1992, brought to light the idea of social dialogue and its potential within two areas: the regulation and the implementation of European labour law. As an effect of this legislative development, collective agreements became an important part of the effective enforcement of the EC legal order. It is quite clear that newly developed legislative measures, called “bargaining in the shadow of legislation” by European labour lawyers, were adopted with the sole purpose of overcoming the regulatory crises caused by member states of the European Union trying their best to develop two speed limits within the European social space. European collective bargaining was discovered to be an alternative technique for implementing those secondary sources of European labour law which the governments of the member states of the European Union were reluctant to implement. The collective bargaining process is perceived by the European Community as an important alternative to the legislative process.

This paper deals with the major question of whether or not the post-socialists' current collective bargain procedures are effective as a means to implement European labour law in one of the prospective member states - Poland.

II. Collective agreements as a normative alternative to state legislation in the process of implementing European labour law.

According to article 249 of the Treaty on European Union, “A directive shall be binding, as to the result to be achieved, upon each Member state to which it is addressed, but shall leave to the national authorities the choice of forms and methods”. It is then up to the Member state to choose the more preferential method, legislative process or collective bargaining, for the introduction of the directives into its internal legal order. Collective bargaining is treated by the primary European legislation on this topic as the more favourable way to implement European labour law. Article 137 sec.4 of the Treaty of European Union allows a member state to entrust management and labour (social partners) with the implementation of directives issued in areas of social security and social protection of workers, protection of workers when their employment contract is terminated, collective representation of the interests of workers and employers, including co-determination in the decision making process within a corporate undertaking, the conditions of employment for third-country nationals legally residing within the European Union, and financial contributions

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for the promotion of employment and job-creation, without prejudice to the provisions relating to the Social Fund. The process of implementing European labour law within a national legal system should be based on a joint request submitted by social partners to the relevant state authority. The state government takes legal responsibility for the full and proper implementation of European labour law into its national system of labour law. The state government, however, shall ensure that, no later than the date on which a directive must be transposed in accordance with article 249 of the Treaty of European Union, the social partners will have introduced the necessary measures by collective agreement.

Under European labour law, implementation and enforcement of directives via the collective bargaining process is one of four models of interaction, between European labour law and the national labour laws of the Member states, presented by Ruth Nielsen in her latest book on European Labour Law. According to Ruth Nielsen, there are legal requirements under which social partners may introduce directives into the domestic system of labour law. Collective agreements ought to be empowered with mandatory normative effect which has been extended so as to have erga omnes effect as the sole instrument for implementing directives. It must be noted that in article 3 sec.1 of the Agreement appended to the Union Treaty, which encourages labour and management to carry on a dialogue at the Community level, leading to contractual relations, including collective agreements, does not mention the mandatory and erga omnes requirements of collective agreements as a legal prerequisites for the implementation and effective enforcement of European labour law within the domestic legal systems of the Member states of the European Union. However, the United Kingdom’s collective agreements, considered gentlemen’s agreements, are ruled out by legal scholars as a legal possibility for implementing European labour law. They are considered an inadequate legal means for implementing directives due to their lack of mandatory normative effect, which is identified with the power to legally bind social partners. Mandatory normative effect - the binding legal power of collective agreements - is the most important condition for using the collective bargaining process as an alternative tool for implementing European labour law. This conclusion could be reached regardless of the official position of EC institutions. In the Council Resolution of March 27, 1995, on the transposition and application of Community social legislation, the Council advocated social dialogue, through collective bargaining agreements or through agreements concluded at a national level, as a legal mean for the transposition of Community social legislation into domestic labour law. The resolution of March 27, 1995 did not mention any further requirements, notably mandatory normative effect of collective agreements, as legal prerequisites for effective implementation of directives. It left to the Member states to take whatever steps are necessary to ensure that, at all times, the outcome required by the relevant directive can be guaranteed (art.4 sec.b). The directive also invites the Member states to encourage management and labour to play a full and active part in the implementation of Community legislation at the national level, in accordance with the procedures proper to each Member state.

The invitation to use collective agreements as the sole and exclusive legal tool for the implementation of directives was reinforced by a provision which states that the Member state bears legal responsibility for lack of implementation, or non-compliance with, European labour law.

III. National practices for implementing directives by means of collective agreements

Collective agreements as legal tools for implementing directives are more frequently used in those Member states of the European Union, such as Belgium, Denmark, Italy and Sweden, where national labour systems are based on a strong tradition of agreement-based regulation. In these Member states, collective agreements are binding upon parties.

The Erga omnes effect of collective agreements is a legal term used to describe the general coverage of the legal outcome of a collective bargaining process. In order to comply with the other legal requirement of effective implementation and enforcement of directives within the national labour system of a Member state of the European Union, a collective

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agreement must cover all individuals defined as beneficiaries by the relevant directive. This General coverage provision of collective agreements is the other legal prerequisite for the effective usage of collective agreements as the sole and exclusive legal tool for implementing European labour law. In various decisions of the European Court of Justice, the general coverage requirement was examined. In Commission v. Belgium the European Court of Justice approved Belgium’s collective agreement process as a legal tool for the implementation of directive 75/129/EEC on protection of workers' rights during the process of collective redundancies. In other case, Commission v. Kingdom of Denmark, the European Court of Justice did not accept the way Danish social partners decided to implement, through collective agreements, the Equal Pay Directive 75/117/EEC. The Erga omnes effect of collective agreements should guarantee all workers, both union and non-union members, equal protection - to draw the same salary for the same work performed. In several cases brought by the Commission against the Italian Republic, The European Court of Justice decided that collective agreements which cover specific branches of industry or commerce and create legal obligations between social partners (members of trade union and employers who belong to relevant employers' confederations), are not considered adequate legal means for the implementation and effective enforcement of European labour law within the national legal systems of the Member states.

Examining the legal requirements set by the European Union’s legislative and judicial bodies for the full and effective implementation and enforcement of directives through collective agreements requires an examination of the legal nature, the binding effect and the general coverage of Polish collective agreements. This evaluation is necessary in order to pass a judgment on the ability of Polish collective agreements to implement directives into Poland’s domestic system of labour law.

IV. Are Collective Agreements Considered a Legal Source of Labour Law in Poland?

Legal sources derive from both the Polish Constitution and the Labour Code. There is discrepancy between these two statutory regulations. Art.87 of the Polish Constitution does not list collective agreements as legal sources. They are, however, listed in art.9 of the Labour Code. If collective agreements can not be treated as sources of labour law, it would be impossible to use them as a legal means for the implementation of European labour law into the national system of labour law in Poland. It’s a question as to why collective agreements, which are binding upon parties, may be based on separate legal theories. Are collective agreements mandatory because the legislative power in their statutory regulations decides so, or are collective agreements binding due to the fact that the social partners are willing to obey them. The latter explanation is based on the theory of contracts and does not have any thing in common with the mandatory concept of generally binding legal regulations. Polish legal scholars are aware of the fact that collective agreements, lacking legal status as sources of labour law, could be used only for regulating the terms and conditions of the work of trade union members whose representatives negotiated the terms. On the side of industry, the only employers bound by collective agreements would be those who belong to the employers' federations which signed the collective agreement.

Terms and conditions of employment contracts negotiated by individual employees, less favourable than those negotiated in a collective agreement, could not be declared null and void and replaced by the more favourable provisions of the collective agreement. Therefore, legal scholar faced sudden pressure to come up with some solution which accorded collective agreements status as legal sources of prime value.

Although, the problem of implementing European labour law though collective agreements,

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1 Case 215/83 (1985) ECR 1039
2 Case 143/83 (1985) ECR 427
3 Case 91/81 (1982) ECR 2133; Case 131/84 (No.2) (1985) ECR 3531; Case 235/84 (1986) 2291.
4 Kaczynski L. Wpływ art.87 Konstytucji na swoiste źródła prawa pracy (Influence of art.87 of the Constitution upon specific sources of labour law), Państwo i Prawo (State and Law), 1997, No.8, p.61 ff; L.Florek, Zgodność przepisów prawa pracy z Konstytucją (Conformity of labour law provisions with the Constitution), Praca i Zabezpieczenie Społeczne (Labour and Social security), 1998, N.3, p.40 ff.
agreements is not touched upon by Polish legal scholars who mostly are debating a limited area of collective labour law regulation at the European Union level. Those lawyers who were advocating contract theory as legal base for collective agreements a few years ago, have changed their opinions and recently found support for collective agreements in the Constitution. The most representative paper on this topic was published by the Polish minister of justice Lech Kaczyński. He distinguishes between “common types of legal norms” and “internal types of norms”. The latter are treated as legal rules only by those parties which are subordinate to legislators. Due to the fact that the status of legislator is held by various bodies of the state government, ”internal norms” create legal obligations on those parties which have to obey rules established by the state government. A catalog of “common types of legal norms” is listed in art.87 of the Constitution. Collective agreements are not listed in this catalog and, therefore, can not be considered as a “common type of legal norms”. Since collective agreements are the product of negotiations between social partners, they can not be listed among the ”internal norms” issued by the state government.

Involvement of the state within the collective bargaining process is limited. The state, its government and its administration, is allowed to register collective agreements only.

In labour law collective agreements established a reputation as a “specific type of legal norma long time ago. “If they are specific only in a particular branch of law, are 'specific types of legal norms' recognizable by the Constitution?,” is a rephrased version of the question L. Kaczyński pointed out earlier. Instead of asking whether or not art.87 of the Constitution considers collective agreements as legal sources of labour law, he started to look in the Constitution for a theoretical basis for the legitimization of collective agreements. Articles of Polish Constitution vital to the search for legitimization of collective agreements are numbers: 2,12,20 and 59. According to article 2, Poland is a democratic, legal, state which realizes the principles of social justice. Based on this article, several legal principles, such as the protection of acquired legal rights and the stability of legal regulation, were constructed by the Constitutional Tribunal. One of effects of being a democratic state is the connection between the bargaining process and legal methods for the democratic construction of labour law. So far, nobody in Poland has gone as far as to say that bargaining, as a legal method of constructing labour law, could be drawn from article 2 of the Constitution. L. Kaczyński did not get that far in his legal reasoning either. Article 12 of the Constitution guarantees workers freedom to form and enter trade unions. Trade unions are associations established for the propose of protecting workers’ rights and promoting their interests. Collective agreement is considered by labour law as a major legal device invented by social partners to provide trade unions, as workers’ representatives, with the legal opportunity to influence the decision making process concerning terms and conditions of employment. This legal interpretation does not lead L. Kaczyński to a conclusion which allows the legitimization of collective agreements either. He points also points out articles 20 and 59 sec. 2 of the constitution as having a bearing on the status of collective agreements. Art.20 lists solidarity and social dialogue as bases of economic order. ,Art 59 sec. 2 explicitly mentions collective agreements. These two provisions of the Constitution do allow social partners to conclude collective agreements. The Polish Constitution recognizes the process of collective bargaining and defines collective agreements as the legal result of that process, but does not list them as legal sources in the field of labour law. Even though the Polish Constitution does not list collective agreements as legal sources of labour law, they are being treated by legal scholars as "intermediary" legal sources of labour law. They do not bind erga omnes, but only among the social partners who are party to the collective agreement. This explanation is different from the contract theory of collective agreements. According to the latest explanation, collective agreements are binding, not because social partners decide to obey

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1 Zielinski T., Pojęcie i przedmiot zbiorowego prawa pracy (Notion and scope of collective labour law) [in:] Zbiorowe prawa pracy w społecznej gospodarce rynkowej (Collective labour law in social market economy), ed. G.Goździewicz, Toruń 200, p. 30–33.

A major deficiency of the above presented legal reasoning is a shortage of clear constitutional regulations which accord collective agreements the status of legal sources of labour law. Poland ought to change its system of labour law, found in article 87 of the Constitution, in favour of clear regulation that makes collective agreements legal sources of labour law equal to generally bound statutory regulations.

V. Do collective agreements in Poland provide general coverage?

Polish labour law recognizes two types of collective agreements: those negotiated at the plant level and those bargained on a broader basis. The latter type of collective agreements include industry or profession associations. Collective bargaining units are not determined by the Labour Code and may include one industry or one profession or several branches of industry. Any collective agreement, concluded by social partners negotiating the terms and conditions of employment for a larger group than the employees working at given plant, is considered as concluded on a broader scale than the plant level. Collective agreements concluded at the plant level cannot be considered, for obvious reasons, as suitable for implementing European regulations into a national system of labour law. They cover only the employees at a given plant, regardless of their trade union membership. Other types of collective agreements do not guarantee common coverage either. Evaluation of these two types of collective agreements, which are used in Poland, may lead to the conclusion that they are unfit for implementing European labour regulations. After all, the only difference between these two types of collective agreements is the scope of personal coverage. In both types of collective agreements, coverage is not general. The European Court of Justice cases, cited in first chapter of this paper, show quite clearly the requirements established at the European Union level for the coverage of collective agreements. The lesson drawn from the Italian experience is clear: in order to fulfill requirements set up by the European Court of Justice, collective agreements must enjoy general coverage.

There are two legal methods by which the coverage of collective agreement may be extended to other social partners. Both of them are regulated by the Labor Code. The first is for social partners, not yet covered by any collective agreement, to enter as parties into an already concluded collective agreement. Art.241 of the Labour Code allows social partners, qualified to bargain over terms and conditions of work, to come to an agreement where they accept as their own any collective agreement concluded by other social partners in Poland at the plant level or on a higher level. The original parties of an agreement, whose scope of coverage was extended by the free will of another group of social partners, are notified of the expansion of coverage by the administrative body responsible for maintaining a registry of collective agreements in force. The Labour Code does not provide the original social partners with any legal power to veto the decision made by the social partners to accept the pre-existing collective agreement as their own. Theoretically, any type of collective agreement (plant-, industry-, profession-level or branches of an industry or profession) may be extended. There is a remote possibility that a particular collective agreement, concluded at a plant level, becomes so popular that it is adopted in other plants all over Poland. In practice, there has never been a collective agreement concluded at the plant-level that was taken as a model to shape collective labour relations in other plants. Thus, the only solution for extending the scope of collective agreement coverage is found in art.241 of the Labour Code of the Ministry of Labour and Social Policy. The legal condition for extension of coverage reads as follows:

- only a collective agreement concluded at a broader level than the plant level may be extended to other parties;
- the extension of a collective agreement may be made at request of any social partners entrusted with the authority to enter into a collective agreement on a broader level than the plant level;
- The Ministry of Labour and Social Policy may use its administrative power to act only
in case of "an important social justification" which requires the extension of the scope of a particular collective agreement’s coverage.

Article 241\textsuperscript{18} of the Labour Code contains a “generalization clause” which allows the Ministry of Labour to issue an administrative decision by which a particular type of collective agreement, concluded at a level, higher than the plant level, may be extended to employees not covered by any kind of collective agreement. From this provision the following conclusions may be drawn:

– the Ministry of Labour and Social Policy is not in the position to extend the scope of coverage of a collective agreement concluded at a level, higher than plant level, to employees covered by a plant level collective agreement.

– a collective agreement can not be imposed upon employees already covered by another collective agreement concluded at a level, higher than the plant level.

– a collective agreement concluded at the plant level can not be extended to include employees not covered by any type of collective agreement.

An extension of the coverage of a collective agreement may be done only at the request of a trade union representative at a level higher than the plant level or at the request of an employers’ organization. If an employer does not belong to an employers organization, he or she can not submit a request to the Ministry of Labour and Social Policy for the extension of an existing collective agreement’s coverage.

Request may be made by either social partner. It may be made by one of the social partner already bound by the collective agreement which is about to be extended, or by social partners willing to submit regulation of their interests to a pre-existing collective agreement concluded by other social partners. Collective agreements may be extended exclusively to employees employed by a single employer associated with a employers’ organization. An employer not a member of any employer’s organization can not take part in any proceedings which would extend an already concluded collective agreement to regulate the terms and conditions of employees employed at his or her plant.

Before issuing any administrative decision concerning the extension of a collective agreement, the Ministry of Labour and Social Policy is legally obligated to present the request for the extension of a pre-existing collective agreement to that party which is empowered to negotiate collective agreements for the employees who would be effected by the proposed expansion. Article 241\textsuperscript{18} of the Labour Code does not require the Ministry of Labour and Social Policy to ask for the opinions of the social partners who are parties to the collective agreement considered for extension. The social partner, whom the Ministry of Labour and Social Policy notified of the request to extend a collective agreement, should provide an opinion concerning the pending request.

The Ministry of Labour and Social Policy is not bound by opinion submitted. It makes an administrative decision based on the importance of the social interest involved in the process of extending the collective agreement. Neither an affirmative decision by the Ministry of Labour and Social Policy, nor a denial of the submitted request can be challenged by either social partner. The Ministry’s decision in the matter is final and binding for all parties involved. In case of an affirmative decision, the extended collective agreement is binding on the social partners and regulates the terms and condition of all employees employed by employers who are members of the employers’ organization which decided to extend the coverage of particular collective agreement.

The proceedings mentioned above are applicable to the extension of an entire collective agreement or a part of it. They also apply to reversed proceedings, proceedings introduced in order to limit the coverage of a previously extended collective agreement.

Polish regulations for extending the coverage of collective agreements combine cooperation between social partners with administrative action by the Ministry of Labour and Social Policy. Polish regulations may be accepted by primary sources of European law due to the fact that the state government of any Member state bears the sole responsibility for the correct implementation of directives. Poland, as a prospective Member state of the European Union, may encourage management and labour to implement European labour law into the national labour law system through collective bargaining, the submission of requests for the
extension of pre-existing collective bargains, or the issuing statutory regulations. All of them are within the limits regulated by European law.

VI. Is the scope of coverage of Polish regulation of collective agreements an important matter in the process of implementing European labour law?

As far as employment law is concerned, there are no legal limits to regulation at the European level whatsoever. At the national level, though, collective agreements cannot regulate those areas listed in article 240 § 3 of the Labour Code. This article states that collective agreements cannot regulate rules concerning special employment protections in the case of termination of an employment contract, the legal rights of wrongfully discharged employees by employers, the rules of disciplinary proceedings, maternity leave and child care leave, and the protection of wages. These items are already regulated by European labour law and are subject to legal regulation at the European Union level. Therefore, any legal obstacle to the European Union’s regulation of these matters ought to be treated as an unlawful impediment in the process of implementing European labour law into the national system of labour law.

There are two ways to deal with this problem. One is to change the provisions of article 240 § 3 of the Labour Code. The second is to strike down limitations established by this provision on the grounds they are contradictory to provisions of the Polish Constitution. In the decision of December 7, 1999 (I PKN 438/99, OSN Zb.Urz. 2000, Nr 12, item 475), the Supreme Court ruled that provisions of collective agreements, which contained more favourable rules of special protection of an employment contract, than those rules established by the Labour Code, are valid. The Supreme Court claimed that constitutional provisions do guarantee social partners the ability to establish rules more favourable than those stipulated by the Labour Code.

Taking into account what was written, one may conclude with the remark that collective agreements may be used in Poland for the purpose of effectively implementing European labour law into the national system of labour regulation, on the following conditions: that they enjoy the status of constitutionally supported sources of labour law, that they have general coverage and that their scope of power is unlimited. In order to achieve this, it is necessary to make some changes in the present regulations of national employment law. Collective bargaining enjoys a long tradition in Poland. Collective agreements enjoy the legal status of special (specific) sources of labour law. They perform five important functions,1 helping to reach and secure social peace in industrial relations. After minor adjustments they can serve as important legal tools for the implementation of European labour law into the national system of labour law.

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Europos Sąjungos teisės normų Lenkijoje įgyvendinimas per kolektyvinius susitarimus

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SANTRAUKA

Straipsnyje autorius nagrinėja Lenkijai, kaip būsimai Europos Sąjungos (ES) narei, aktualių klausimą: ar Lenkijos įstatymų numatytos kolektyvinių derybų ir susitarimų procedūros yra tinkama teisinė priemonė, taikyti įgyvendinant ES darbo teisės normas ir perkelti jas į Lenkijos nacionalinią darbo teisės sistemą.

Straipsnio pradžioje aptariau ES susiklostęs darbo teisės normų įgyvendinimo modelis, kur

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kolektyvinės sutartys tapo svarbia ES teisės normų įgyvendinimo mechanizmo dalimi. Pateikiamos tam priežaidas sudariusi Vienios Europos akto ir ES sutarties nuorodos. Šis aktas į sutartis iškėlė socialinio dialogo ir jo pritaikymo reguliuojant ir įgyvendinant reformas ir metodus. Analizuojami pagrindiniai kolektyvinės sutarties, kaip tinkamos ES darbo teisės normų įgyvendinimo valstybėje nareje priemonės, reikalavimai: 1) būti oficialiai pripažįstamų darbo teisės šaltinių valstybėje nareje, ir 2) turėti erga omnes efekto, t. y. norminę galimybę tapti bendrai privaloma plačiam subjektų ratui.

Toliau, siekiant išsiaiškinti ir pagrįsti kolektyvinių sutarčių pripažinimą darbo teisės šaltiniu Lenkijoje, pateikiamas kompleksinė kelis Lenkijos Konstitucijos, kuris neįvardija kolektyvinių sutarčių kaip teisės šaltinio, straipsnių analizė, siūlomos atitinkamos Konstitucijos pataisos.

Straipsnyje nagrinėjamos Lenkijos darbo įstatymų kodekso normos, reglamentuojančios kolektyvines sutartis, ir galimybės išplėsti jų galiojimą kitų subjektų atžvilgiu (erga omnes).

Paskutinė straipsnio dalis skiriama Lenkijos darbo kodekse numatytienų kolektyvinių sutarčių reguliavimo sferos aprbojimams, siūlomos to kylančioms problemoms spręsti reikalingos Darbo kodekso pakeitimai.

Autorius daro išvadą, kad, nepaisant nedidelų trūkumų, kolektyvinės sutartys Lenkijoje iš esmės yra taikytinos įgyvendinant ES darbo teisės normas.