DROIT POLONAIS CONTEMPORAIN
POLISH CONTEMPORARY LAW
1993 N°1 -4 (97-100)
PL ISSN 0070 - 7325

APPROXIMATION OF THE POLISH LABOUR LAW TO EUROPEAN STANDARDS*

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I. Approximation of legal provisions as a result of Poland's association with European Union

In the democratic Republic of Poland of the 1990s, the genuine role of law and its proper application has been growing significantly. The constitutional amendment of 1989 brought about, as the first systemic transformation, the proclamation of Poland as a state ruled by law. This law, in its new shape, is becoming directed at supporting the mechanisms of full transition to social market economy and, on the other hand, at Poland's full integration with the European Union — Polish state's clearly specified aim of the last decade of the 20th century.

The Treaty on Association concluded between Poland and the European Community in December 1991 (European Treaty, known as Association Treaty in common parlance) entered into force on 1 February, 1994. The Treaty sets up a most extended network of mutual obligations between the European Community and Poland, a part of them asymmetric, in the areas of economy and law. The parties have decided (Art. 68 of the Treaty) that

''the major precondition for Poland's economic integration into the Community is the approximation of that country s existing and future legislation to that of the Community. Poland shall use its best endearours to ensure that future legislation is compatible with Community legislation".

What should be commented upon here is the notion of ''approximation of legislations" used in the Treaty: it is on the conception of that approximation that the very nature and extent of Poland's obligations depends. From the birth of the Rome Treaty, the Communities commented upon the vagueness of meaning of the terms used in it such as unification", ''equalization", ''harmonization", ''approximation" etc.[1] In sub-

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[1] See e.g. contemporary work by G. Lyon-Caen: ''L'harmonisation sociale dans la Communauté Européenne", (in:) *L'harmonisation dans les Communautés,* Bruxelles 1968; in Polish literature, see M. Matey: „O koncepcji i praktyce harmonizacji prawa pracy w krajach EWG" [The Conception and Practice of Harmonization of Labour Law in Countries of the EEC], *Państwo i Prawo,* 1972, № 8 —9.

sequent years, as the very essence of the European Community was crystallized, the notions of''harmonization" and ''approximation" became established in its official language, the latter distinctly prevailing. The Community's officious language also uses the term ''adjustment". Its correctness is not unquestionable; in the very least, there are no formal grounds for with respect to Poland's Association Treaty with the Community. The very notions of''harmonization" and ''approximation" are used in different meanings for that matter as there are different conceptions of such harmonization and approximation — from justifying the need for setting up and observing minimum standards (a criticized conception)[2] to a conception, found in Community's legal texts[3], of harmonization as ''approximation while the improvement is being maintained". Expressed in the ''Green Paper" on European social policy till the year 2000, published by the Commission of European Community late in 1993, are fears that the present stage of European integration (the recent accession of the less wealthy countries such as Greece, Spain, and Portugal, as well as the prospects of future accession of Central Europe countries) may result in a ''levelling down"[4] of social standards and, as a consequence, in a phenomenon of social dumping in Europe. In this situation, the Commission seems to revert to the conception of setting up European minimum social standards which is even among the leading theses of the ''Green Paper". Many serious European studies avoid involvement in semantic discussion in this sphere, finding such discussion futile which is aggravated by linguistic differences within the Community. In Poland, the circles of negotiators of the Association Treaty stress the following aspects: 1) the ''approximation" of legislations under Art. 68 does not mean a duty ''slavishly" to reproduce Community norms: merely a complete ''incompatibility" of Polish legislation with Community law should be avoided[5]; 2) Poland's obligation in this area is extended over 10 years in principle during which period both transitory legislative solutions as well as those of destination can be applied. The extent of obligation underArt. 68 depends also on the range of Community's legal regulation of a given branch of the law. In the sphere of labour and social law which is the present subject, Community regulations — although developed — focus on a few fragments of that law only; in general, labour and employment remain the domain of domestic law.[6]

Under the Association Treaty, Poland has undertaken to secure compatibility of its entire legal system with Community legislation; as specified in Art. 69, what is meant here are especially the branches mentioned in that article, the sphere of ''protection of workers at work" included. The scope ratione materiae of this formula has not been discussed so far in Polish labour law literature; it seems to be extremely broadly con-

[2] See R. Birkin *Europäischer Binnenmarkt und Harmonisierung des Arbeitsrechts*, Mannheim 1991, p. 16.

[3] Thus in Art. 117 of the Rome Treaty (after amendments), and also in the Community's Charter of Fundamental Social Rights of Employees (1989).

[4] Green Paper: European Social Policy — Options for the Union, Introduction of Padraig FLYNN, Brussels, November 1993, p. 9.

[5] Thus S. Sołtysiński: „Układ o stowarzyszeniu między Polską a Wspólnotami Europejskimi" [Association Treaty between Poland and European Communities], see preceding study in the present issue.

[6] See R. Blanpain, M. Matey: *Europejskie prawo pracy w polskiej perspektywie* [European Labour Law in Polish Perspective], 1993, p. 83.

ceived, though, and to include practically the entire sphere of labour law the whole of which is designed to protect employees first and foremost at workplaces. This is the interpretation given to this obligation by the bodies that prepare draft amendments and a general reform of Polish labour law, that is in particular the National Commission for Labour Law Reform, the Social Partners involved in that process (organizations of employers and the unions), as well as the competent agencies of the Government. Parliamentary works on preparation of a general amendment to the labour code, expected to be completed soon, will probably confirm the adoption by Polish legislative authority of the broad interpretation of the discussed formula of the Treaty.

It has to be stressed that the ''European standards" to which Polish labour law should be approximated include not only legal norms of the European Community but also those laid down by the Council of Europe, including in particular the European Social Charter which Poland is considering to ratify in not too distant future. Despite the differences in the systems of implementation of norms by the two European institutions, those norms together make a consistent ''corps of European labour law".

Finally, one should bear it in mind that Poland ratified as many as 78 Conventions of the International Labour Organization and fulfils its resulting obligations properly.

II. Approximation of Polish law to European standards: individual labour law

1. The right to work, employment and "decent " wages

In the years 1993 - 1994, during the preparation of a new Constitution of the Republic of Poland, the problem of including in it a provision on the right to work became the subject of fierce controversies in Poland. The right to work was contained in the old communist Constitution of 1952 which reflected the situation where, for many decades, the notion of unemployment was unknown in Poland (notion and not phenomenon: in fact there was extensive hidden unemployment characteristic of centralized socialist economy). The 1952 Constitution was quashed in 1992; yet a part of its provisions, particularly those pertaining to the fundamental rights and liberties of citizens the right to work included — remain in force until a new and complete Constitution of the Republic of Poland can be adopted on which works are in progress today. At present, in the face of a 14 % unemployment rate which the state is unlikely to get under control any too soon, some groups of public opinion treat the constitutional provision on the right to work as fictitious and thus detrimental and improper. This coincides with a broadly accepted opinion that the Constitution should be ''purified" of declarative norms whose implementation is obviously impossible and not qualifying to judicial protection. Widespread is also a belief that the right to work and a number of other social rights are incompatible with the principles of market economy and on the other hand, that Poland cannot ''afford" those rights in the country's present situation. Thus for example a draft of the so-called Charter of Rights and Freedoms, submitted by the Chancellery of President L. Wałęsa in 1993 and designed to become a compo-

nent of the new Constitution, does not provide for the right to work and merely secures freedom of work. However, the centrist and leftist factions of opinion refuse to resign the constitutional right to work. Quite rightly, they argue that this right, found in many legal systems of market economy, is not treated as subjective right (suable before the court) and was not treated as such in communist Poland; therefore, there are hardly any reasons to fear that it might be interpreted that way if contained in the new Constitution. The European standard to which Poland should adjust its legislation in this respect is the European Social Charter of the Council of Europe. The right to work has been formulated in the title of its Art. 1 (the Charter's hardcore). Further, para 1 of that Article considers it one of the fundamental aims and tasks of states to achieve and maintain the highest possible stable level of employment, the ultimate object being full employment. As all the other known normative acts, also the European Social Charter does not treat the right to work as suable. According to an interpretation of its Art. 1 provided by implementing bodies of the Council of Europe, the discussed provision obliges states to take steps and not to achieve results: all it requires is pursuit of planned employment policy. Even in a situation of considerable growth of unemployment, a country does not run the risk of being charged with a failure to observe the Charter provided it makes serious efforts towards improvement of the labour market situation.[7] The measures that are taken nowadays to that aim by European countries with both prosocial and liberal market economy are considered by the Council of Europe to meet the obligation that follows from Art. 1 of the Charter with which they are consistent even if governments fail, despite all efforts, to remove or at least reduce unemployment.[8] It seems that the interpretation of the contents of ''the right to work" developed on the grounds of European Social Charter should disperse the undue fears entertained by some groups of public opinion in Poland in relation to the preservation of that rights also in the new Constitution of the Republic of Poland.

The legal aspect of the decision as to preservation or resignation of the constitutional norm on the right to work is no doubt important; this decision, however, cannot solve the basic economic and social problem of the size of unemployment and means of its reduction. The European Community which has the unemployment index verging upon 12 % in 1994 developed a so-called ''Community-wide framework for Employment" in which the European Union's program in the social sphere till the year 2000 has been outlined.[9] Development of an effective program of unemployment control is also Poland's duty, one that stems not from legal norms but from Community practices. Such a draft program was prepared in Poland in 1993; it is in 1994 modified to some extent by the centrist-leftist Government. Also in preparation is a radical amendment to the 1991 act on employment and unemployment.[10], with consideration to the

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[7] See conclusions from the 2nd series of control (1971) conducted by Committee of Independent Experts of the Council of Europe for application of European Social Charter, Strasburg 1982.

[8] See Parliamentary Assembly, Buechner's Report, Strasburg 1977.

[9] See ''Green Paper" European Social Policy—Options for the Union, Commission of the European Communities, November 1993.

[10] Act of 16 October 1991 (*Journal of Laws,* Nº 106, item 457) with subsequent modifications (*Journal of Laws,* Nº 21/1992, item 84, and Nº 78/1992, item 394).

recommendations that follow the Community employment program. Irrespective of domestic needs in this sphere, it seems that success of the unemployment control program will matter just as much for the cause of Poland's integration with Europe as success of the process of approximation of law to European standards.

Both the European Social Charter of the Council of Europe and Community Charter of Fundamental Social Rights of Workers lay stress on the guaranty of freedom of work and free choice of work. No explicit guaranty of this kind has been contained so far in Polish legislation (whether the Constitution or the still in force labour code of 1974[11]). Although such guaranty can be deduced from the labour code through interpretation, the fact has to be borne in mind that this very code was no obstacle in the past to the introduction of the notorious act on ''social parasites" which imposed the duty to work on individuals falling under that category. Therefore, a guaranty of freedom and free choice of work should be added both to constitutional norms and labour legislation.

The two social charters — the Community's as well as the Council's of Europe — formulate as the basic requirement the workers' right to fair, equitable, or decent wage. Poland as well as other post-communist countries encounter specific difficulties trying to meet this requirement. They result from the relatively low real value of average wages as compared to the situation in wealthy countries of the Community. Discussions have already started whether wages just above so-called social minimum would meet this requirement. Can it be assumed, basing on opinions recognized by OECD and the Council of Europe many years ago with respect to West-European countries, that the ''threshold of decency" of wages is about 70 % of the national average? The opinion on the Equitable Wage, issued by the European Commission on 1 September 1993 will surely contribute to making the situation clear in this respect.

2. *Bans on discrimination in employment; discrimination on account of sex and other features*

The two social charters — Council's of Europe and Community's — distinguish bans on discrimination according to the following criteria: 1) sex; 2) other criteria; 3) different treatment for nationals and foreign workers. It should be added that equal treatment for men and women in the sphere of employment is dealt with by several Community directives, [12] and equal treatment for nationals and foreign workers — by an extensive set of Community regulations and directives which will be discussed further on. Besides, in both of these spheres, there is already extensive jurisdiction of the European Court of Justice. Other criteria of discrimination in employment, such in

[11] With numerous subsequent modifications.

[12] See 1) Directive (1975) relating to the application of equal pay for men and women, Nº 75/111, *O.J.* Nº L 45/19, 2) Directive (1976) relating to the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, promotion and working conditions, Nº 76/207,*O. J.* Nº 139/40,3) Directive (1978) concerning the progressive implementation of the principle of equal treatment for men and women in matters of social security, Nº 79/7, *O.J.* Nº L 6/24; 4) Directive (1986) on the implementation of the principle of equal treatment for men and women in occupational social security schemes, Nº 86/378 *O J* N° 1225/40.

particular as origin, race, colour, political opinions, religion, are incessantly subject of interest of the Council of Europe and its agencies, the European Court of Human Rights included.[13]

In Poland a general ban on discrimination on account of sex, birth, education, occupation, nationality, race, religion, as well as social origin and status, is contained in Art. 67 of the former Constitution of 1952; the article remains in force although the Constitution as a whole was quashed in 1992. Additionally, equal treatment for men and women in the sphere of employment is laid down by Art. 78, also left in force in 1992, which mentions as the guaranty of a women's equal rights ''her right to work equal to the right of a man, right to remuneration based on the principle of equal pay for equal work, equal right to repose, to social insurance, to instruction, to honours and distinctions, and equal access to public offices". With the constitutional regulation being as extensive as that, the plan was relinquished in 1974 to add an anti-discrimination clause to the labour code as the clause was found redundant. At present, in the course of works on both a new Constitution and a radical amendment to the labour code, care should be taken to prevent an impairment of the ban on discrimination as a result of today's aversion to ''declarative" norms, not to mention the impact of conservatist opinions which attach little importance to equal rights of women, equality of views and religions, or equality of nationalities. A general ban on discrimination on account of all the above criteria should be included in the new Constitution of the Republic of Poland, and the principle of equal treatment in the sphere of employment should be reflected in the new wording of the labour code. The developments on today's labour market in Poland have even prompted the Commission for Labour Law Reform to suggest supplementation of the ban on discrimination in the sphere of employment with the criteria of age (concerned here is a rather widespread practice of specifying the upper age limit — e.g. 35 — in job offers).

It has to be stressed that despite the guaranty of equal treatment for men and women contained in Art. 79 of the former Polish Constitution, the practice in this sphere was not fully consistent with this principle. The average wages of women amounted to 70 - 80 % of men's wages; moreover, certain occupations (teachers, judges of lower instances, certain fields of medicine) became ''feminized" in Poland over the last decades, and wages were frozen in those professional groups at a level that was lower compared to ''male" occupations. The situation in this sphere in the 1990s has not been studied so far; we do not know whether it has deteriorated or improved (this latter hypothesis being rather doubtful).

3. *Equal treatment for Polish and foreign workers*

So far, Poland does not face the need to adjust its national law to Community regulations and directives in this sphere.[14] First, the norms concerned clearly apply to

[13] See decisions in cases *Kosiek v. Federal Republic of Germany* and *Glasenapp v. Federal Republic of Germany*, discussed in the book by R. B1anpain, M. Matey: *Europejskie prawo pracy...*, op. cit., p. 269.

[14] See in particular: Regulation Nº 1612/68 of 15 October, 1968 on freedom of movement for workers within the Community, *O. J.* 1968, Nº L 257, amended by Regulation Nº 312/76,*0. J.* 1976, Nº 139; Directive Nº 360/68 of 15 October, 1968 on the abolition of restrictions on movement and residence within the Community for workers

relations between member states of the Community; approximating its legislation to them long before it actually becomes member, Poland would have to apply Community norms concerning freedom of movement of workers towards nationals of member states of the Community while those states would not be obliged to apply those norms to Polish citizens. Besides, it seems that not even Poland's accession to the Community will result in its prompt inclusion in the Community's specific regime of free movement of workers. This will probably only take place after a prolonged period of transition as was the case with accession to the Community of Spain and Portugal. Second, as long as Poland has the status of associate member, the problem of movement of workers is regulated by the Association Treaty (Art. Art. 37 - 42) and it is to that Treaty that Polish provisions should be adjusted for the period of association. The Treaty lays distinct stress on regulation of this sphere by way of bilateral agreements (preservation of concluded bilateral agreements, encouragement of the remaining member states to consider and possibly accept bilateral agreements). Finally, what Poland is beginning to face is a need for dichotomous regulations: one which would relate to movement of workers between Poland and member states of the European Union, and another one pertaining to the mass legal and illegal inflow of labour force from East-European countries and even from the Far East; beside its aspects relating to employment, this latter phenomenon also gives rise to a complex of social, economic, health, and criminal problems (Eastern organized crime). Specific are also the problems of illegal immigrants from the East and South who treat Poland as a stage in the realization of their plans to get to the territory of a West-European state. However, Poland is also an attractive destination of profit-seeking migrations from the East and South, non-European countries included.

The problem of employment of Polish citizens abroad by foreign employers and employment of foreigners in Poland is regulated by a special chapter of the act of 16 October, 1991 on employment and unemployment (see Note 10 above). In its Art. 42 the act provides that employment of Polish citizens abroad by foreign employers should take place on the grounds of: 1) international agreements; 2) contracts concluded by Polish citizens with licensed employment agencies; 3) contracts concluded by Polish citizens with foreign employers. Poland is party to a number of bilateral international agreements in this sphere, including the most recent ones concluded in 1990 with the Federal Republic of Germany and France, as well as those of 1994 with the Russian Federation and Ukraine.

Art. 50 of the act of 1991 on employment and unemployment provides that to employ a foreigner, companies and individuals in Poland need a permission issued by a provincial employment authority which is guided by the situation in the labour mar-

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of Member States and their families, *O.J.* 1968, Nº L 257; Regulation Nº 1251/70 of 29 June, 1970 on the right of a worker and the members of his family to remain in the territory of a Member State after having been employed in that state, *O.J.* 1970, Nº L 142/30; Directive Nº 221/64 or 25 February, 1964 on the coordination of special measures concerning the movement and residence of foreign nationals that are justified on the grounds of public policy, public security, or public health, *O.J.* 1964, Nº L 56/4; three Directives of 28 June, 1990 on the right of residence of European citizens, nationals of Member States, of employees and self-employed persons who have ceased their occupational activity and of students, Nº 362/90, 365/90 and 366/90, *O.J.* 1990, Nº L 180/26 - 28.

ket when granting or refusing the permission. The permission is issued on motion of the employer; it pertains to a specified foreigner and a job with a specified employer. In its present wording, Art. 50 of the act is not exactly consistent with the principle of the free movement of workers. So far, Polish law has not taken into account the consequences of Poland's obligation under Art. 52 of the Association Treaty which pertains to employment in Poland of foreign key staff (managers and experts).

Generally, the discussed sphere still remains unsettled in Poland because of its recent emergence, and the principle of equal treatment for nationals and foreign workers is far from being implemented in practice. Besides, in the case of foreigners from so-called ''Western" countries, the differences in treatment are much to their advantage (which is true especially with respect to wages), while illegal workers from the East and South are treated worse than Polish workers.

4. *Employment law in the period of transformation*

Employment law contained in the 1974 labour code which is still in force today in but a slightly modified form requires a radical reform whose framework has already been prepared by a specially appointed National Commission for Labour Law Reform, working since 1990 and headed by Prof. Tadeusz Zieliński. The Commission has been inspired in its work by norms of the International Labour Organization and by Community standards (this was so even before the conclusion of the Association Treaty). The fact considered that Community norms in this sphere are not too developed — employment law being chiefly a domain of national law — it is the Commission's aim generally to adjust Polish labour law to the requirements of market economy and to the general systemic and economic principles on which modem European democracies are based. Thus conceived, the ''philosophy" of works on labour law reform requires three basic steps: 1) genuine freedom of contracts and legal equality of parties have to be secured or at least the former superior legal position of the (state) employer eliminated as a relic of the authoritarian system; 2) Polish labour law has to be reoriented from the centralized state economy to private companies; and 3) Polish labour law should be designed to heed the needs and possibilities of medium-size and small companies rather than the former ''socialist industrial giants".

Apart from unemployment, the most painful problem of Polish labour law of 1993 - 1994 is a spreading tendency of both private employers and persons seeking a job to pass over to the so-called ''grey zone of employment", that is unregistered employment, without social insurance and taxation, not based on any legally identifiable contract and thus completely lacking the protection that is offered by labour law. This ''grey zone of employment" — most extensive already and still growing — pertains both to Polish nationals and to foreigners, especially those from Poland's eastern and southern neighbour countries. Such practices are difficult to control as in the situation of high unemployment rate and poor economic condition of many employers, the discussed solution is advantageous to both parties who tolerate it unanimously. In some cases, workers employed legitimately before switch, by mutual agreement, to the ''grey zone" principles of employment with one and the same employer.

The control mechanisms existing in Poland in the shape of the State Labour Inspectorate are far from sufficient to reveal and curtail such practices. At the same time, opinion's are voiced by some publicists that however condemnable, those practices also play a specific positive role securing paid work to a number of persons who would have otherwise been unemployed. But, on the other hand, many ''grey employees" do not hesitate to take abusively advantage of the unemployment allowances thus impoverishing scanty public fonds.

This situation adds to the importance for Polish labour law of Community norms contained in Directives on individual employment relationship, especially Directive Nº 553/91 on an employer's obligation to document employment relationship.[15] The Directive requires that within two months of entering a job all employees should be provided with a written document containing the basic elements of their contract of employment. The still valid provisions of the Polish labour code fail to meet to the full the Directive's requirements with respect to the number and kind of such basic elements of a contract of employment that have to be documented; the prepared draft general amendment to the code, however, fully satisfies those requirements.

The ''grey zone of employment" is also manifested in Poland in the employers' practice of using temporary contracts of employment for a definite period which are repeatedly renewed. This way, employers avoid the obligations related to the legal regime of contracts of employment for undefinite period (in the sphere e.g. of procedure of dissolution of the contract of employment). The amendment to the labour code will limit the possibility of circumventing the law through such practices. However, the problems of contracts for a definite period — which are ''atypical" in the wording of Community norms — have acquired much importance in Poland in many aspects. Admittedly, even in its present wording, the labour code secures the right to safe and hygienic working conditions to all workers irrespective of the grounds of employment; yet the practice in this field no doubt leaves much to be desired, with respect to workers with ''atypical" contracts in particular. The labour code amendment takes into account all suggestions that follow from Directive Nº 383/91 on the conditions of health and safety at ''atypical" work.[16]

Also the remaining two Directives relating to ''atypical" employment to be passed in the future (now in the shape of proposals) will be just as useful for Polish law and practice. It has to be mentioned, though, that the form of temporary (intérimaire) employment in Community understanding — employment relationship between temporary employment agencies (here: employers) and their employees whom the agencies hire out to companies (users) — has not developed in Poland so far. Community protection of''atypical" employment concerns particularly this very type of employment.

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[15] Directive Nº 553/91 on an employer's obligation to inform employees of the conditions applicable to the contract of employment relationship, *O. J.* 1991, Nº L 288/32.

[16] Directive Nº 383/91 of 25 June, 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, *O. J.* 1991, Nº L 206/19.

5. *Employees' rights in the course of restructuring and privatization of companies*

In the years 1990 - 1994, what was the basic problem of Polish labour law were the consequences for employees' rights of the extensive restructuring and privatization of companies (most of them still state-owned). These operations resulted and still result in so-called mass layoffs of employees, unknown in Poland in the period of communist economy. Polish legislation met the needs involved in such transformations to the necessary extent, largely inspired in so doing by norms of the International Labour Organization and by Community standards: owing to this inspiration, the process of approximation of Polish law to those standards is much advanced today in this particular sphere.

Thus a labour code amendment introduced in April 1989 yielded a new provision — Art. 23 — relating to a change of employer, or to be more exact — to mergers and divisions of companies or to their taking over, fully or in part, by other companies (which approach reflects the absolute prevalence of state economy characteristic of those days). Under that article, in the case of a merger, division, or taking over of a company or a part of a company, the company or companies that emerge from such operations become party to employment relationships with the staff employed before organizational changes. Thus employment relationships continue automatically (but can be dissolved later in accordance with general principles which will be discussed further on). Under that same provision, responsibility for the obligations towards the employees that have emerged before the change of owner falls on the new owner (if the entire company has been taken over) or solidarily by the old and new owner if the transformation consisted in division or taking over of a part of the company. This regulation is fully Consistent in principle with Community Directive Nº 183 of 1977 relating to the safeguarding of employees' rights in the case of transfer of undertakings, businesses, or parts of businesses.[17] The labour code regulation so far in force does not contain a provision included in the Directive which deals with a situation when the contract of employment is terminated (by the employee, as can be presumed) because the transfer has resulted in radical changes in the working conditions that are to that employee's detriment: in this situation, the termination is assumed to have been made by the employer. A similar provision has already been introduced by the Commission for Labour Law Reform into the draft general amendment of labour code (draft of 1993 - 1994). The draft uses the notion of "a company being taken over wholly or in part by another employer" which is tantamount to the ''transfer" used in the Directive.

Parallel to restructuring operations, Polish economy aims towards mass privatization. The act of 13 July, 1990 on privatization of state enterprises[18] provides in its Art. 9 para 1 that ''employees of a privatized enterprize shall become employees of the new company by force of law". According to an established practice, in the event of

[17] Directive Nº 183/77 relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of businesses, *O.J.* 1977, Nº L 61.

[18] *Journal of Laws,* Nº 51, item 298.

involvement in privatization of so-called strategic investors, the foreign capital in particular, included in the negotiated agreements is the new owner's undertaking to preserve full composition of the staff for a definite period of time, e.g. for 18 months. A draft of a new act on so-called Pact on State Enterprise in course of Transformation, can be expected to confirm this practice.

Despite the Polish guaranty of automatic continuation of employment relationship in cases of restructuring or ownership transformations, the rules of market economy require that employers should be given the possibility reduce the staff for economic reasons against the principle of job protection formerly observed in state-owned economy. In the sphere of individual redundancies, employers's situation has already been made easier by the labour code amendment of April 1989; the possibility of mass layoffs for economic reasons was introduced by the act of 28 December, 1989 called the ''group dismissal act".[19] The act was inspired by Community Directive of 1975[20] on collective redundancies, amended in 1992.[21] It is consistent with that Directive and proves even more advantageous to employees in some of its aspects (for example, a broader category of redundancies in Poland fall under the legal regime of ''mass layoffs"; the required notification of labour administration agencies previously to such redundancies has to be made earlier in advance; and payment of discharge money is obligatory of which the Directive makes no mention at all).

Finally, the act on protection of employees' claims in the event of employer's insolvency was negotiated in 1993 within the Pact on State Enterprise in course of transformation and duly passed by the Parliament; it is modelled after Convention Nº 173 of the International Labour Organization and on the Community Directive of 1980[22]. The act[23] appointed a Fund of guaranteed employees' benefits. Under the Polish act, however, the Fund itself can become insolvent as it lacks state guarantees (due to the country's weak financial condition). Thus, in spite of the doubts as to success in fully adjusting Polish legislation to Community norms, a most serious step has been taken in that direction; in the future, it should be submitted to further necessary improvement.

6. *Hours of work and annual leave*

Polish regulation of working time and annual leaves is contained in the labour code of 1974 and since has not been subject of major improvements. The duration of working time is maximum 8 hours per day and 48 hours per week. The annual leave is

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[19] Act of 28 December, 1989 on special rules of termination employment relationships with employees for reasons relating to the workplace and on amendment of selected statutes (*Journal of Laws*, 1990, Nº 4, item 19, with subsequent changes).

[20] Directive Nº 129/75 of 17 February, 1975 on the approximation of laws of the Member States relating to collective redundancies, *O.J.* 1975, Nº L 48.

[21] Directive Nº 56/92 of 24June, 1992, *O.J* Nº L 245.

[22] Directive Nº 987/80 of 20 October, 1980 on the protection of employees in the event of the insolvency of their employer, *O.J.* 1980 Nº L 283, amended by Directive Nº 164/87 of 2 March, 1987, *O.J.* 1987, Nº L 66.

[23] Act of 29 December, 1993 on protection of employees' claims in the event of insolvency of their employer (*Journal of Laws*, Nº 1/1994, item 1).

14 working days after 1 year of employment, 17 working days after 3 years of employment, 20 working days 6 years of employment and 26 working days after 10 years of employment. A substantial amendment to the labour code prepared by the National Commission for the Labour Law Reform in 1992 - 1994 and being in 1994 - 1995 in course of parliamentary legislative procedure, is aiming at establishing a new regulation of annual leaves, adapting its provisions to the ILO Convention No 132 concerning annual holidays with pay (1970) which Poland intends to ratify soon, that means providing for minimum three weeks annual leave. This drafted regulation is considered to be the utmost social effort in the Polish present economic situation.

The Community Directive No 104 adopted in 1993 on working time[24] goes further than ILO Convention No 132 and than the Polish draft of the labour code amendment: it requires at least four weeks annual leave. Also, some minor discrepancies exist between the Directive and the Polish regulation existing and drafted as well. It seems that four weeks annual leave required by the Directive will remain to be introduced in Poland at the end of the decade, by the entirely new Labour Code.

7. *Protection of safety and health of workers*

a) General protection of safety and health of workers

Protection of workers' health and safety is a sphere in which Community norms are much developed. Most generally, two specific ''generations" of those norms can be distinguished. The first one includes over a dozen directives adopted in the years 1975 — 1989 in the course of implementation of the Community social program of 1974. The other group implemented the Community Charter of Fundamental Social Rights of Workers and a social program based on that Charter of 1989; it is a system of norms composed of the so-called Framework Directive of 12 June, 1989 Nº 391 concerning the introduction of measures to encourage improvements in the safety and health of workers at work[25] and a complex of special directives, also called the individual or ''daughter" directives. The process of their completion has not been completed yet: by 1994,12 special directives were passed, several draft directives are processed by Community legislature. Besides, the complex of norms of the second ''generation" also includes important Recommendations such as e.g. Recommendation of 22 May, 1990 on the list of occupational diseases. The abundance of Community norms relating to protection of safety and health results both from importance of this sphere for competitive value of separate European states (elimination of so-called social dumping), and from procedure: under the Treaty of Rome, required to pass norms in the spheres of safety and health is qualified majority of votes which was attainable as opposed to unanimity obligatory with respect to other spheres of labour and social law.

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[24] Directive Nº 104/93 of 23 November 1993 concerning certain aspects of the organization of working time, *O.J.* 1993, Nº L 307.

[25] The Framework Directive № 391/89 concerning the introduction of measures to encourage improvements in the safety and health of workers at work, *O.J.* 1989, Nº L 183.

The legal regulation of safety and hygiene of work still in force in Poland is contained in Section X of labour code and the related or executory provisions. The regulation is quite extensive; its quality has not been criticised in principle so far, also from the viewpoint of consistence with international norms, those of the Community included. Nevertheless, it requires formal adjustment which step has been made in the draft of a new wording of the labour code, negotiated within the Pact on Enterprise and submitted to the legislative process in 1994. Beside the discussed need of formal adjustment, the major problems of Polish regulation of the sphere of protection of safety and health of workers consist in: 1) its qualitative ''outdateness" — inadequacy to Western technological standards (technological gap); only a specialistic extra-legal study, now in progress, of consistence of Polish technical norms in different branches especially with technical standards of ''second generation" Community directives will provide a complete picture of the needs related to adjustment; 2) low culture of observance of the norms of safety of work by workplaces, especially by the new small business and also by larger companies in critical economic situation; 3) weakness and inefficiency of the Polish system of supervising the observance of those norms, b) Protection of women and young workers

Protection of women's work is dealt with by one of the most recent social regulations of the Community: the Directive of 19 October, 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.[26] The present wording of the Polish labour code meets the requirements of that Directive in principle. The Directive goes farther, however, e.g. in the sphere of protection of the health of a pregnant or breastfeeding employee: if her work threatens her health, the employer should transfer her to another job or grant her a leave for the whole of that period if transfer is impossible. Polish law does not provide for this kind of measure. What also needs to be verified is consistence of Polish lists of jobs prohibited to women with the lists that form an appendix to the discussed Directive.

Protection of the work of young people is subject of the quite recent regulation by the Directive No 39/94 on the protection of many people at work[27]. After thorough examination of the Directive certain adjustment needs can be expected to arise: the Directive contains rather far-reaching norms of protection and organization while the Polish regulation of this sphere by the labour code seems to be rather outdated — especially with respect to the system and organization of young people's employment — and the recently prepared amendment to the code does not provide for any significant improvement (which is due to the present shortage of financial means and situation in the labour market). What can already be stated today is incompatibility of the Polish solutions with the European Social Charter of the Council of Europe which in

[26] Directive Nº 85/92 of 19 October, 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, *O. J.* 1992, Nº L 348/1.

[27] Directive Nº 33/94 of 22 June 1994 on the protection of young people at work, *O.J.* 1994, Nº L 216/12.

its Art. 7 para 5 recognizes the young people's and apprentices' right to decent wages or another adequate pecuniary remuneration (interpreted by the Council's competent agencies as one-third to two-thirds of the average adult wages). Polish provisions, instead,[28] define the amount of remuneration of young people in vocational training as 4 to 15 % of average adult wages. The discrepancy in this sphere is indeed glaring. It results from a belief which is deeply rooted in Poland that young people should work to train in a profession and not to earn money. In today's situation, this opinion needs to be verified. On the other hand, Polish law can be considered consistent with European standards with respect to definition of the minimum age limit of employment. The Directive No 33/94 prohibits the employment of ''children" or — according to the Directive — persons aged under 15. A similar ban is contained in Polish labour code. Moreover, in the conditions of growing unemployment in Poland, the government program for unemployment control prepared in 1993 provided for extension of obligatory education to the age of 18 and for other measures to shift the lower age limit of employment far beyond the age of 15.

III. Approximation of legislations in the sphere of collective labour law

7. *Directions and range of European standards in collective labour law*

The problems of national collective labour relations is neither regulated by European Community in its acts or draft acts, nor discussed in decisions of the European Court of Justice, with the following exceptions: 1) the spheres of so-called information and consultation of workers in national enterprises which are touched upon by several Directives; 2) employee representation in enterprises on Community level which is dealt with by a most recent Directive on European Works Council;[29] and 3) a budding plan to establish European Collective Agreements.[30] In principle, however, the problems of collective labour relations is a domain of autonomous actions of so-called Social Partners. The Treaty that set up European Community (in the wording adopted in Maastricht) does mention in Art. 118 the freedom of association and collective bargaining between employers and employees among the spheres in which the Commission should support close cooperation between the Member States. Yet as opposed to the Commissions powers granted by Art. 118 a of the Treaty, to legislative actions on other social issues, its engagement in collective labour relations does not go beyond to that very support of close cooperation between the Member States. The Agreement on

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[28] See Ordinance of the Council of Ministers of December 1 1990 on vocational training of young people at socialized enterprises and their remuneration (*Journal of Laws,* Nº 56, item 332, with amendments of 1990 and 1992).

[29] Directive Nº 45/94 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 purpose of informing and consulting employees, *O.J.* 1994, Nº 254/64.

[30] In its wording of 1986, Art. 118B of the Treaty of European Communities speaks of a ''dialogue between employers and employees at the European level which might — should both parties to it consider this desirable — lead to relations based on agreements". Similar relations based on agreements — if both Social Partners find it desirable — are mentioned in Art. 4 of the 1991 Maastricht Agreement on Social Policy.

Social Policy, concluded in December 1991 together with the Maastricht Treaty by Community's Member States, Great Britain excluded (reverting to the Protocol on Social Policy of Maastricht, also concluded by 11 Members States) states in its Art. 2 point 6 that its provisions do not apply to wages, right of association, right to strike, and right to lock-out. In the opinion of the doctrine of European social law, this is a distinct confirmation of Community's lack of competence in the above spheres. The separate Directives, however, often refer to actions of Social Partners, especially encouraging them to resolve problems by way of negotiations or co-decision. This was the case e.g. of a norm which is likely to be of fundamental importance for the future shaping of social relations within European Union —Art. 2 point 4 of the Maastricht Agreement on Social Policy which authorizes the Member States to bestow Social Partners — on their joint motion — with the competence in the sphere of implementation of Directives (normally, this competence belongs to the Member States themselves).

It has to be mentioned that both Social Charters — Community's and Council's of Europe alike — treat the freedom of association and collective bargaining as the fundamental rights of employees;[31] while Community Charter is not normative in nature, the European Social Charter will become binding for Poland once it is ratified; this concerns also its two articles 5 and 6 which belong to the Charter's hardcore, as well as Art. 2 of the Additional Protocol on workers' rights to information and consultation. What will also become binding for Poland is the interpretation of those articles developed by implementing bodies of the Council of Europe (Independent Experts Committee for European Social Charter),[32] which concerns also the right to strike and lock-out. Already binding for Poland as a result of the recent ratification of the European Convention on Human Rights is its Art. 11 on freedom of assembly and association and the right to unionize together with the jurisdiction of the European Court of Human Rights developed on the grounds of that provision.

It has to be stressed that the moderation shown so far in defining European Community's legislative competence in the national sphere of collective labour relations results largely from the general recognition in modem civilized world of the Conventions of International Labour Organization: Nº 87 on freedom of association and protection of the right to organise (1948) and Nº 98 on the right to organise and collective bargaining (1949); the two Conventions were ratified by Poland a long time ago.

It has to be stressed as well that — though the most recent and very important Directive No 45/94 on European Works Councils applies to European-scale enterprises only — the idea of works councils and procedures of information and consultation the employees is deemed to have direct impact on the situation of national-scale enterprises in the European Union countries and thus — to shape a new and general model of collective labour relations in Europe.

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[31] See Art. Art. 11 - 14 of the Community Charter of the Fundamental Social Rights of Workers and Art. Art. 5-6 of the European Social Charter of the Council of Europe.

[32] In Polish literature, discussed in the book by R. Blanpain, M. Matey: *Europejskie prawo pracy w polskiej perspektywie*, Warszawa 1993, p. 281 ff.

2. The state of collective labour law in Poland in mid-1990s

The legal regulations of collective labour law that are in force in Poland can be divided into two groups: 1) new regulations passed in democratic Poland which fully reflect the European trends; according to some opinions, they even go too far and verge on syndicalization and anarchization of public life. This group includes the trade unions act[33], the act on settlement of collective labour disputes[34], the act on employers' organizations[35] and, eventually, the quite recent act on collective agreements[36]; 2) regulations dating from before the systemic transformations in Poland — this concerns, for instance, the act on workers' self-management of 1981[37].

The new group of regulations: on trade unions, employers' organizations, settlement of collective labour disputes and on collective agreements fully corresponds with European standards. Even if the acts of 1991 require modification after three years of operation, such modification would aim not at making them more ''European" but at a greater effectiveness and rationalization of the Polish system of industrial relations. Thus it is argued that legal solutions should be improved relating to the formation and registration of trade unions and employers' organizations, the shaping of criteria of ''representativeness" of professional organizations, development of legal mechanisms conducive to cooperation of the pluralist structures of both Social Partners, simplification and de-formalization of procedures relating to strikes (which are often neglected in practice), solution of the problem of right to lock-out etc.

The range and form of employee participation in market economy is a separate problem. Since the 1981 act on workers's self-management has applied to state enterprises only, its scope is bound to become reduced with the progress of privatization in Poland. It is doubtful, though, whether employee participation can be preserved in its original shape (with most extended competence of the bodies of workers' self-management) also in companies that maintain the status of state enterprises. The idea of participation has most ardent followers but also opponents in Poland, especially among managers. From the beginning of the 1990s, there has been in Poland a marked trend towards replacing the conception of workers' self-management with that of employee stockholding which acquired the legal shape in the act of 1990 on privatization of state enterprises[38] (the staff of a privatized state enterprise are entitled to buy at preferential prices 20 % of the total stock; they also appoint one-third of the composition of the Board). In 1994, employee stockholding is criticised more and more often: the injustice of the staffs privileged position in buying stock is stressed as not only that group but also the entire society contributed in the past to the emergence and development of state industry and should therefore profit by ownership transformations which should

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[33] Act of 23 May, 1991 on trade unions *(Journal of Laws,* Nº 55, item 234).

[34] Act of 23 May, 1991 on settlement of collective labour disputes *(Journal of Laws,* Nº 55, item 236).

[35] Act of 23 May, 1991 on organizations of employers *(Journal of Laws,* Nº 55, item 235).

[36] Act of 29 September 1994 — the amendment to the Labour Code (Chapter on collective agreements), *(Journal of Laws,* Nº 113, item 547).

[37] Act of 25 September, 1981 on workers' self-management of state enterprises *(Journal of Laws,* Nº 24, item 123, with subsequent changes).

[38] Act of 13 July, 1990 on privatization of state enterprises *(Journal of Laws,* Nº 51, item 298).

assume the form of so-called general privatization on equal terms. Not going into appraisal of the justness and correctness of the principles of privatization processes, it can just be supposed that development of market mechanisms in Poland may result in the future in a complete resignation of the idea of employee participation. The European standard — requirement of information and consultation of workers — may prove to be the factor to force preservation of employees' rights, even as reduced as the above.

IV. The state of research into approximation of Polish labour law to European standards

The researchers' interest in approximation of Polish labour law to European standards could be noticed as early as the beginning of 1990s, even before the conclusion by Poland of the 1991 Association Treaty with European Communities. At the initial stage, that interest was directed at a study of the system of related European standards which had been not too well-known in Central and Eastern Europe.[39] Next, analyses started of Polish labour law legislation from the viewpoint of its consistence with European norms. The studies had a practical aspect as well: current works of the National Commission for Labour Law Reform (at the Minister of Labour and Social Policy), and analyses conducted by the Office of Plenipotentiary of the Government for European Integration and Foreign Aid which led to the drawing up of the so-called ''White Paper" of approximation of Polish legislation to Community norms. Successful coordination of those works — and also of similar undertakings in other branches of the law — should contribute to a success of Poland's striving towards full membership of the European Union, formally started on 9 April, 1994.

[39] See the earliest publication by M. Matey: „O koncepcji i praktyce harmonizacji prawa pracy w krajach EWG" [The Conception and Practice of Harmonization of Labour Law in Countries of the EEC], *Państwo i Prawo,* №8-9, 1972. In the 1990s, see E. Sobotka: „Europa 1992 — z problematyki integracji społecznej w ramach Wspólnoty Europejskiej" [Europe 1992 —the Problems of Social Integration within European Community *],* *Praca i Zabezpieczenie Społeczne,* № 7,1991 ; M. Matey, H. Szurgacz: „Normy Wspólnoty Europejskiej w dziedzinie prawa pracy" [The Norms of European Community in the Sphere of Labour Law],Praca *i Zabezpieczenie Społeczne,* № 8, 1992; L. F1orek: *Prawo Wspólnot Europejskich w zakresie zatrudnienia i stosunków pracy* [The Law of European Communities on Employment and Employment Relations], Friedrich Ebert Stiftung, Warszawa 1993, and the most extensive work by R. B1anpain, M. Matey: *Europejskie prawo pracy w polskiej perspektywie* [European Labour Law in Polish Perspective], Institute of Law Studies, Polish Academy of Sciences, Warszawa 1993.