ECJ consequences and policy perspectives.

Report for Poland.

dr Joanna Unterschütz

CONTENT:

Literature review

The recent ECJ judgements in the Viking (C-348/05), Laval (C-341/05) and Rüffert (C-346/06) cases have attracted a lot of attention, especially in the countries directly affected by their content.

It is though surprising that in the Polish legal literature the impact is nearly unperceivable.

Authors of several publications, mention the Laval and Viking case in reference to the ECJ position on fundamental freedoms and fundamental rights[1]. A monographic work on free movement of persons and freedom to provide services[2] covering various aspects of these phenomena, including posting of workers has been written before all the three judgements were passed, therefore S. Majkowska- Szulc mentions the Laval case being filed, explains its background, but does not draw any conclusions for the application of posting directive[3].

A. Frąckowiak – Adamska in her work on the principle of proportionality mentions the Viking and Laval judgements in the context of protection of fundamental rights. The author underlines statements of the ECJ relating to necessity to balance fundamental freedoms and fundamental rights, applicability of proportionality principle but also the social dimension of the EU[4].

A.M. Świątkowski in his commentary to the Act on collective conflicts resolution describes the regional aspect of the act, in reference to the *acquis communautaire*, and the European labour law in particular. The author also shortly presents main conclusions of the Viking and Laval judgements, underlining both the fundamental character of the right to strike and the right to bargain collectively, and the fact that these fundamental rights must be exercised with respect to the fundamental freedoms and principle of proportionality[5].

The same author in an article on freedom of collective actions vs. free movement of goods and services[6] disagrees with an opinion that the ECJ puts the fundamental freedoms over

---

[1] *Ochrona praw podstawowych w Unii Europejskiej* (ed.) A. Florczak, Warszawa 2009; ; A. Cieśliński, *Wspólnotowe prawo gospodarcze. T. 1, Swobody rynku wewnętrznego*, Warszawa, 2009; A. Wyrozumska *Znaczenie prawne zmiany statusu Karty Praw Podstawowych Unii Europejskiej w Traktacie lizbońskim oraz Protokołu polsko-brytyjskiego,* Glosa 2008 nr 4.

[2] *Przepływ osób i świadczenie usług w Unii Europejskiej*, (ed.) S. Biernat, S. Dudzik, Warszawa 2009

[3] S. Makowska – Szulc, *Sytuacja prawna pracownika delegowanego w ramach świadczenia usług [in:] Przepływ osób…*

[4] A. Frąckowiak –Adamska , *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej*, Warszawa 2009

[5] A.M. Świątkowski [in:] *Zbiorowe prawo pracy. Komentarz do ustawy o rozwiązywaniu sporów zbiorowych* (ed.) J. Wratny, K. Walczak, Lex. 2009.

[6] A.M. Świątkowski, *Wolność prowadzenia akcji zbiorowych przez związki zawodowe a swoboda prowadzenia działalności gospodarczej i swoboda przepływu usług w obrębie Unii Europejskiej*, MPP 10/2008

fundamental rights. Quite opposite, in the Laval judgement the ECJ has envisaged the value of trade union freedom to undertake the collective action. The author concludes with a statement that the ECJ in both sentences has found a right balance between the free movement of goods, services, persons and capital and the aims of EU social policy to improve working and living conditions of workers.

An annotation on the Laval case can be found as well with no reference to the Polish legal system. The author, extensively describes the ground of the case and reasoning of the Court and concludes with an approving remark[7]. Another concerns the Viking case[8]. The author, A. Wozniak, underlines the economic dimension of the EU and importance of competition in the internal market. If trade unions could hinder transfer of enterprise to another EU country where performing economic activity is more attractive from the economic perspective, the enterprises in the "Old" MS did not need to develop and achievement of the Lisbon strategy goals wouldn't be possible, concludes the author.

The majority of publications mentioning the ECJ judgements in question concern mainly the EU law and not the national labour law. None of the quoted authors reflects on common ground for the questions discussed in the judgements and the Polish legal system. Neither does anyone refer directly or even indirectly to the possible effects of the judgements on the Polish labour law.

Doctrinal discussion in the area of collective labour law is currently concentrated around the issue of workers' representation and overlapping of individual and collective labour law, especially in reference to the right to information and legal character of various agreements concluded by social partners[9].

[7] K. Klafkowska – Waśniowska, *Uniemożliwianie przedsiębiorcom zagranicznym korzystania ze swobody świadczenia usług*, Glosa 4/2008.

[8] A. Woźniak, *Akcje strajkowe jako ograniczenie swobody działalności gospodarczej, wyrok ETS w sprawie Viking, C-438/05*, Edukacja Prawnicza online. 30.04.2009

[9] *Indywidualne a zbiorowe prawo pracy* (ed.) L. Florek, Warsaw 2007; *Informowanie i konsultacja pracowników w poskim prawie pracy* (ed.) A. Kobczyk, Kraków 2008

Overview of industrial relations system in Poland

System of the labour law sources

In order to understand the system of industrial relations in Poland, it is important to see it in the context of the system of sources of individual and collective labour law.
Traditionally, the sources of labour law are divided into general and autonomous (specific) ones. There is also a hierarchy of the legal sources, as illustrated in the table below.

General sources of law	Acquis communautaire
	Constitution
	International conventions (including the ILO ones)
	Legal acts (Including the Labour Code) Regulations
Autonomous sources of law	Collective agreements
	Other agreements of social partners
	Regulations (especially remuneration regulation and work regulation) and statutes

The main difference between the general and autonomous sourcesof law is that the first ones are generally binding (*erga omnes*) and the latter are applicable only to the company (or companies) involved.

It is also worth mentioning that most[10] of labour law provisions have "*semi- dispositive*" character, which means, that employees representatives (trade unions or employees' representative in an establishment) can negotiate on employment conditions, bearing in mind that labour law regulations constitute minimal standards. The margin of co-regulatory function of social dialogue is to the certain extent limited, but also allows for some adaptation of labour law within a company. The labour Code also contains a principle which is called "a principle of workers' privilege" and refers to the hierarchy of the labour law norms. According to this principle provisions of collective agreements and collective arrangements or regulations and statutes cannot be less favourable to the employees than the provisions of the Labour Code or other acts of law and secondary legislation. Moreover, the provisions of rules and statutes shall not be less favourable to employees than the provisions of collective

[10] Except of the provisions on minor offences against workers rights and those regulating proceeding before the courts, namely the terms of lodging the claim

agreements or collective arrangements. The provisions of contracts of employment cannot be less favourable to the employee than the provisions of the labour law. Provisions of the contract or other acts that are less favourable to the worker than the acts higher in the hierarchy are invalid and relevant provisions of the labour law apply instead.

Finally the provisions of collective agreements and other collective arrangements based on the acts of law as well as rules and statutes specifying the rights and duties of the parties to the employment relationship that violate the principle of equal treatment in employment shall be invalid.

This rule, together with the *semi-despositive* character of the statutory labour law limits the freedom of social partners to establish working conditions at the enterprise (or higher) level. They can only be more favourable to workers, unless otherwise specified in the labour Code itself.

Statutory law

The labour law is regulated in several acts and many regulations, concerning mainly more specific and technical questions. There are also some provisions in the Constitution referring to the labour law, such as the right to equal treatment, prohibition of forced labour, right to rest, healthy and safe conditions of work and minimum remuneration established by the state concern the individual labour relation. The collective rights include coalition right, the rule of social dialogue and co-operation of social partners as well as the right of social partners to conclude agreements.

Still, the basic source of labour law is the Labour Code, which include quite detailed provisions on most of the areas included in the article 3 of the Posting Directive: conditions of employment, maximum work periods and minimum rest periods, minimum paid annual holidays, method of calculation of overtime rates, health , safety and hygiene at work[11], equal treatment of men and women and other non- discrimination provisions, as well as basic protective measures for pregnant women and women who have recently given birth, employment of minor workers. The last two issues are also regulated in detail in another acts and regulations[12]

[11] This area is covered In a more detailed manner by regulations issued on the grounds of delegation contained In the Labour Code

[12] Act on benefits In case of illness or maternity; regulation on parental leave, regulation on Works prohibited for women, regulation on professional training of young workers, on- work training for young workers, works prohibited for young workers and specific case when employment of children under 16 year of age is admissible.

Minimum rates of pay should be negotiated by the Tripartite Commission for Economic and Social affairs[13] every year. If the negotiations fail, The minimum rate of pay is announced by the Government in the form of regulation. The minimum wage is applicable to al workers in all sectors throughout the country. No person employed on the basis of employment contract can earn less than the minimum wage. Of course if the job is performed part- time, an adequate part of the wage is to be paid.
Conditions of employment of agency workers are regulated by a specific act[14], which also refers to the labour code as far as e.g. working time is concerned. Prohibition of discrimination of agency workers exists, but it may be difficult to apply if there is no comparable working post in the company.

The traditional distinction between individual and collective labour law is not clearly mirrored by the content of legal acts covering it. There are two basic acts in the are of collective labour law: act on trade unions and the act on collective disputes resolution. There is also an act on information and consultation of employees, providing for the rules of election and rights of works councils. But the provisions on collective agreements and workplace regulations are included in the Labour Code.

Autonomous sources of the labour law

Workplace regulations (work regulation and remuneration regulation) are created in the establishments where with at least 20 employees. They cover employees of one employer (normally in one establishment) and specify the organisation and order of the work process, and the associated rights and duties of employers and employees[15]. The employer should agree with the establishment's trade union body on the content of the regulation and also if there is no establishment's trade union body at a given employing establishment, the workplace regulations and orders shall be specified by the employer. The remuneration

[13] A tripartite body, gathering employers' and employees' representatives and the Government.
[14] Act of 9.07. 2003 r. on employment of temporary workers (Journal of laws 2003.166.1608)
[15] e.g. Organisation of work, terms of being present at an employing establishment during and after work, provision of equipment tools and materials to employees, as well as provision of work clothing and footwear and personal protective and hygienic equipment; systems and schedules of working time, and the adopted reference periods; the date, place, time and frequency of remuneration payments; duties relating to occupational safety and health and fire protection, including the manner of informing employees of occupational risks involved in the work performed; Method of confirmation by the employees of their arrival and presence at work and of justification of their absence from work, adopted by a given employer;

regulation is also issued inn establishments with at least 20 employees, and it should also be agreed upon with trade union organisation. The remuneration regulation is not issued if an employer is covered by a collective agreement.

Collective agreements

Collective agreements are concluded on the company level or cover more than one company. There are over hundred such collective agreements, covering about 500 000 workers , but it should be borne in mind that this category covers both branch collective agreements and ones that cover one enterprise comprising more than one employers (e.g. with branches as separate employers) . Collective agreements can be concluded only by representative[16] trade union and an employer (or employers' organisation, minister, or local authority representative for multi- company agreements) . In a company not covered by trade union a collective agreement cannot be concluded, which is an important fact, given that trade union participation is below 20%. A trade union in one company cannot conclude an agreement with another employer, even if the employer's workers are present at the company. It is not possible to conclude a collective agreement covering agency workers at the user company[17].

A collective agreement is covers all employees of the employer –party to the agreement, unless parties agree otherwise (which normally is not the case) it may also be applied to persons employed on another legal basis than the contract of employment. If one party (trade union or employer) authorised to conclude a collective agreement requests to initiate negotiations, the request can not be refused. The parties authorised to enter into a collective agreement may make arrangements as to the applicability of the whole or a part of collective

[16] According to the LC Article 241(17). § 1. A multi-establishment trade union organisation shall be representative if it covers: at least five hundred thousand employees; or at least 10% of all employees to which the statute relate, however not less than ten thousand of employees; or maximum number of employees for whom a multi-establishment agreement is to be made. Article 241(25a) refers to a representative establishment's trade union body i.e. a trade union organisation which: is an organisational unit or member organisation of a multi-establishment trade union organisation recognised as representative under Article 24117 § 1 (1), provided that its members represent at least 7% of employees employed by the employers; or its members represent at least 10% of employees employed by the employers. If none of the establishment's trade union bodies satisfies the requirements referred to in § 1, a representative establishment's trade union body shall be the organisation having the largest number of employees as its members.

[17] Even though In practice various agreements include provisions for equal treatment of such employees,. Sometimes even specific agreements concerning agency workers are concluded, but they cannot be regarded as sources of the labour law, so they may not be sources of obligations of an employer towards employees.

agreement to which they are not parties. Such action, however, requires of course a consent of both parties.

The labour Code provides for a possibility to extend a scope of a collective agreement and make it generally binding for a certain group of employers of the same branch. According to the article Article 241[18] § 1 upon a joint request of the employers' organisation and the multi-establishment trade union organisations that entered into a multi-establishment agreement, the Minister responsible for labour affairs may, if an important social interest so requires, extend by way of regulation the applicability of the whole or a part of that agreement to the employees employed by the employer who is not covered by any multi-establishment agreement and who carries out business activities identical or similar to those carried out by employers covered by that agreement, specified on the basis of separate regulations on the classification of activities, after consultation with that employer or an employers' organisation nominated by him or her and the establishment's trade union body, if such a body is active at a given employing establishment, and also having sought the opinion of the Commission for Collective Agreements appointed on the basis of separate regulations. But no such regulation has been issued so far.

Collective agreements are concluded mostly on company level. Rarely do they enshrine provisions more favourable to workers than basic provisions of the Labour Code([18]). Most of them deal with remuneration systems and other employee benefits and working time arrangements as a form of labour flexibility. It can be stated that social partners do not benefit sufficiently from the possibilities offered by the law concerning collective agreements as a useful tool of adapting working conditions to the needs of particular establishment. Main cause of this is weakness of social partners: trade unions are rarely present in private- owned companies, while employers organisations do not gather many employers, which is especially true in case of agencies ([19]). The coverage by collective agreements is rather low in small companies (estimated at 5%), but it is higher (more than 40%) in medium and large companies with unions. Overall coverage is estimated at about 35%[20].

[18] J. Wratny, *Teoria i praktyka układów zbiorowych*, Dialog, 3/2006 . p. 37.
[19] J. Wratny, *op.cit.* p. 36.
[20] http://www.eurofound.europa.eu/eiro/country/poland_4.htm

Workers representation: trade unions

Organisations called to **represent rights of employees** in the framework of collective and collective dispute bargaining procedure are trade unions. It is their prerogative to negotiate collective agreements and enterprise- level regulations (work regulation and remuneration regulation). Another form of workers' representation are works councils existing in Poland since May 2006, however they have only information and consultation prerogatives and are to be created in companies employing more than 50 employees.

Some prerogatives traditionally reserved to trade union organisations were given also to employees' representative within a company where no trade unions operate. This could be seen as a provisional form of personnel representation, although questions were raised about independence of such person from employer, given that such representative does not apply any protection against discrimination or unfair dismissal.

Trade union membership is acquired by joining trade union organisation operation at employer's establishment. Nevertheless workers not always can benefit from their collective rights. Trade unions may exercise their rights on a company level only if they represent at least 10 employees. Unfortunately trade union representation is not very high. Trade unions are present in about 20% of companies (mostly the large companies, foreign capital and state – owned companies) and trade union membership rate is about 12% ([21]).

According to trade union act, only employees and home- workers can be unionised, however according to the statute of "Solidarność" trade union also workers employed on other legal basis may join it ([22]). Given that such statute has been registered and is legally binding, it is possible that other trade unions may include similar provisions. This is particularly relevant since the trade union act was created in 1990, when atypical forms of work were not at all popular in Poland.

Collective disputes

In Poland, the 1982 Act on Trade Unions made it mandatory to use a lengthy dispute-resolution procedure, involving negotiation, conciliation and (voluntary) arbitration with a view to avoiding potential strikes. After transition to democracy, the 1991 Act on Settlement

[21] *Pracujący Polacy* 2006. http://i.wp.pl/a/f/rtf/9806/pracujacy_polacy.rtf

[22] Statute of NSZZ Solidarność, which stipulates in the article 5 that also person employed on the basis of other type of contracts may join the trade union.

of Collective Labour Disputes substantially simplified the collective dispute-resolution procedure. However in practice it is not easy to judge whwther a strike which results from collecyive dispute is legal pr not. According to the Act, a collective dispute is a conflict between employees and their employer over employment conditions, remuneration and/or social benefits (disputes concerning interests), or over union freedoms and union organisational rights (dispute concerning rights). The Act grants authority only to trade unions to represent the collective interests of employees in disputes. The procedure for resolving collective labour disputes comprises the following stages. First in order to initiate the dispute, trade union organisation lodges a claim which may be subject to collective dispute procedure. If the employer does not fulfill trade union's demands, the parties take up negotiations which may result either in agreement or the drafting and signing of a 'protocol of differences'. If the latter is the case, the dispute proceeds to a second stage – mediation. The parties may either appoint a mediator of their own accord or apply for one to be nominated from an official list. This stage may again lead to an agreement, but if it fails, trade union may call a strike, or the parties may agree to refer the matter to a jointly chosen arbitrator; and where a dispute is referred to arbitration, the arbitrator's decision will be binding upon the parties as long as neither party disagreed with this outcome prior to referring the dispute.

Strikes

In order to defend the rights and interests of workers who do not have the right to
strike, the trade union of another establishment may declare a solidarity strike not exceeding one half of a working day. Still, all the rules concerning a strike must be observed. Any work stoppage because of the strike that affects positions, equipment and installations where the interruption of work constitutes a hazard to human lives or health or to security of the State, is prohibited.

There are also certain groups of workers who cannot go on strike: Persons employed in State authorities, government and self-government administration, courts and public prosecutor's offices and also employees of the Agency of Internal Security, the Intelligence Agency, in units of the Police, Armed Forces of the Republic of Poland, Prison Service, Frontier Guard, Custom Service as well as units of the fire brigades.

During the strike, the manager of the establishment may not be hampered in the performance of duties and exercising of rights in relation to employees who do not take part in the strike as well as, to the extent that is necessary, to ensure the protection of the property of the

establishment and the continued operation of the structures, equipment and installations, the interruption of which could constitute a threat to human life or health or to the resumption of the normal activity of the establishment. The leaders of the strike shall cooperate with the manager of the establishment to the extent necessary to ensure the protection of the property of the establishment and the continued operation of the structures, equipment and installations. Failure to observe to the rules is a criminal offence

Stakeholders reaction to the ECJ judgments

Legislator

The recent ECJ judgments did not provoke legislative initiatives neither from the part of social partners, the government nor the Parliament itself. Moreover, no changes in the law are expected as a result of the sentences.

As shown above the Polish labour law is mostly a statutory law. Workplace regulations and collective agreements do not play significant role in the system, especially because they rarely modify the statutory provisions in a significant manner. The Labour Code in the following provisions regulates the terms and conditions of employment of workers posted[23] to the territory of Poland both from the EU member states and the third countries. The Article 67^2 LC stipulates that the terms and conditions of employment include: working time standards and schedules, daily and weekly rest periods; duration of vacation leave; minimum remuneration specified under separate regulations; overtime remuneration; occupational safety and health rules and regulations; parenthood-related rights of employees; employment of adolescent people; non-discrimination in employment; performance of work in compliance with regulations on temporary work.

The scope of minimum requirements does not vary from the scope provided in the article 3(1) of the Posting Directive and all of them are regulated in the LC. The main area where minium requirements stipulated in the Labour Code and standards reached by means of collective agreement (or even a work regulation) vary, is the wage level. The minimum wage is currently around 300 EUR, while the average wage is around 800 EUR. Even though the gap between the two is slowly diminishing, it is still not possible to for a worker to support himself with 300 EUR without any forms of state aid.

Collective agreements are usually concluded on a plant level and the mechanism of declaring a collective agreement universally applicable seems to be just an empty provision. They cannot be used as a tool to improve working standards for posted workers. It is not possible either to impose into a third party any obligations by the virtue of a collective agreement. The

[23] Posting according to the definition from the article Article 67^1. work performed in the territory of Poland by an employee seconded to this work for a fixed term by the employer established in a European Union Member State in connection with the implementation of a contract concluded by the employer with a foreign entity; in a foreign branch (affiliate) of that employer; as a temporary work agency

agreement cannot therefore provide for obligations of a contractor – a party to the agreement, even if they concern working conditions.

Undertaking a collective action, especially a strike is only possible after exhausting amicable stages of collective conflict resolutions. The issues that can be a subject of a collective dispute are also limited. There are also various obligations imposed on trade unions during the strike. All these provisions allow to question many strikes' legality, especially that the law on collective conflict resolutions contains many general clauses, that can result ambiguous.

Therefore problems such as those referred in the Laval and the Viking case could not appear in the Polish industrial relations system.

The Rüffert case concerned not only working conditions for posted workers but also social clauses in public procurement. Poland is one of the EU countries who did not ratify the ILO Convention No 94. So the mutual relations between the Convention and EU law are not to be discussed. The law on public procurement[24] specifies in detail the elements which need to be included in the specification; still this is not a closed list. At the same time, the subject of the order cannot be described in a way that impedes fair competition.

Since May 2009 the specification of essential terms of the contract can include requirements concerning employment of unemployed or disabled persons or other groups covered by social employment regulations. If such requirements are presented the contractor must also specify the number and period of employment of such persons as well as documentation confirming employment of these workers. These are the only provisions touching upon employment in public procurement law, what is more, the level of remuneration of these workers is not regulated. One of the provision which local authorities concerned with employment conditions of workers in a contracted enterprise use is article 36. 4 according to which an entrepreneur may entrust subcontractors with executing the contract, except for the case when the awarding entity defined in the specification of the essential terms of contract that the contract or its part may not be subcontracted on account of the nature of the object of contract. This will not guarantee high wages for workers, but at least can limit precarious work.

[24] Act of 29.01.2004 on public procurement (Journal of law of 2007.223.1655)

Social partners

Social partners reaction was not as strong as in the countries directly affected by the judgements. Again , the main reason for that is the nature of labour law and industrial relation system in Poland. The social partners in Poland in their day-to day work face specific national problems, which should not be put in oppositions to the events on the EU level, but may be rather detached from it. Trade unions and employers organizations have been concerned by the reform of pensions system, emerging and evolving new forms of labour, and of course, recently the global crisis.

Only one employers' organization KPP[25] has issued a statement in relation to the Viking case. In the statement the KPP expresses its concern about the content of the judgement and perceives it as a threat to the freedom of economic activity within the EU[26]. According to the KPP the facts that the ECJ has acknowledged the right of trade unions to prevent a transfer of undertaking if the action is in favour of workers rights will hinder freedom of movement of goods and threat competiveness of enterprises.

Trade union organisations, members of the ETUC, share the concern of the European Confederation about the judgement. Their representatives take part in the ETUC works concerning the posting directive. But still no analyses by the trade unions are published by these organisations. However, it is admitted that some consequences can be felt by the Polish workers performing work abroad, especially as posted workers. Less favourable working conditions for workers posted by the Polish company to another MS does not comply with the principle of equal treatment and equal pay for equal work[27]. These concerns however are not expressed in official statements of trade unions.

[25] KPP – Konfederacja Pracodawców Polskich Polish Employers' Confederation

[26] Wyrok ETS wstrząśnie rynkiem europejskim 04.01.200 http://www.kpp.org.pl/index.html?action=sai&ida=6085

[27] Interview with International Sectetary of NSZZ Solidarnosc A. Adamczyk

Jurisprudence

The recent ECJ judgements have not influenced the jurisdiction of he Polish courts either. One of the main and most probable reasons, apart from, again, the specificity of the industrial relations system, is the relatively short time elapsed since the judgements were passed.

The practical experience of the author demonstrates, that the courts of first instance extremely rarely refer not only to the jurisdiction of the ECJ, but to the *acquis communautaire* in general. The same can be in a great extent said about the courts of the second instance. Usually when references to the ECJ jurisprudence appear, it is in the judgements of the Supreme Court. But only a small fraction of all the cases reach the Supreme Court because of the formal restrictions. This court does not constitute another instance in the system of civil proceeding, but is rather an extraordinary resort available if a resolution of important legal issue is needed. Besides, the right to strike or collective bargaining is not often a subject of Supreme Court sentences.

Perspectives

The current discussions and developments in the labour law (including the proposed New Labour Code and Collective Labour Code) do not seem to lead to any substantial changes in regulations concerning posting of workers. The model of industrial relations is gradually evolving from a model dominated by trade unions, towards a dual model represented by trade union and works councils. This, together with relatively week trade union representation, brings about questions concerning the current system of industrial conflict resolution, where trade union representation is obligatory.

Social partners are not very strong in Poland, and the statement is true both for trade unions and employers representatives. It is therefore not very likely that current tendency to conclude collective agreements mostly on a company level will be reversed in a way which would make branch collective agreements a strong alternative to statutory law in regulating employment relations. If then the ECJ sentences in the Laval and Rüffert case were to bring any impact, it would be rather to petrify the current state of act in the area of legal sources, than to provoke any changes in this area. Despite frequent amendments, the system has some advantages: it is transparent and majority of essential provisions are enshrined in a single act. Of course sometimes ambiguous or unclear provisions require interpretation, such is the case of labour code regulations concerning working time, and especially overtime rates.

The changes in public procurement act introducing the possibility to insert requirement of employment of certain underprivileged groups of persons in the specification of essential terms of a contract are too recent to asses how they function in practice: they have entered into force only on the 16th of July. The provisions certainly constitute a new element in the public procurement system, which was predominated by economic factors. However it has to be underlined that this amendment is not likely to affect employment of foreigners posted to perform work in Poland. Its aim was rather to counteract unemployment and support social employment, especially as far as the contracts concluded by the state or local authorities are concerned. At the same time it does not resolve the question of remuneration of employees and does not help to combat unfair practices such as long chain of subcontractors or employment of workers on the basis of civil law contract. The latter, together with bogus self-employment are two practices which influence negatively their working conditions, because the labour code provisions do not have to be observed.

For some years now a codification commission has been working on a text of a new labour code and another act called collective labour code which aim is to integrate provisions of various acts regulating this area. However, neither the Parliament, nor the Ministry of Labour and Social policy is not actively working on the project. And as time goes by, social and legal reality changes, so the texts of the two codes presented last year by the Ministry also need amendments. Even though some of the planned changes could in principle strengthen trade unions (e.g. right of coalition not only for workers employed on the basis of labour contract but also other persons performing paid work) , other create ground for workers not represented by trade unions to bargain collectively (but still only trade unions are authorised to conclude a collective agreement). Entering into collective dispute is also to remain a trade union's prerogative. The recent changes in the Act on information and consultation of employees does confirm the trend to build a dual model of representation[28].

In Poland it is quite a common practice in implementing a given directive is not even pasting its provisions to already existing legal act[29], but creating a separate one which encompasses almost all the text of the directive only with necessary alternations[30]. Even though it seems that the ECJ jurisprudence did not influence these changes, such sentences as the one in Rüffert and also the Luxemburg case, may further discourage the national legislator from enacting laws which would set up standards higher than those stipulated in directives.

[28] After a sentence of Constitutional Tribunal from 2008 only one mechanism of election of the works council members remained: election from among the candidates appointed by workers by workers in the company organized by employer on employees' request. Before the amendments there were three possible forms of elections of works council members: one by appointment by trade union organization, another – election by employees from among the candidates appointed by trade unions and the one, which remained in force. The remaining one is the most democratic one, but deprives trade unions of the strong influence they've had on the works council constitution.

[29] Which was the case with some of the regulations concerning equal treatment inserted into the Labour Code, e.g – Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services; Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive

[30] E.g. Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees; Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees;

References:

Cieśliński, A., *Wspólnotowe prawo gospodarcze. T. 1, Swobody rynku wewnętrznego*, Warszawa, 2009

Frąckowiak –Adamska, A., *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej*, Warszawa 2009

Indywidualne a zbiorowe prawo pracy (ed.) L. Florek, Warsaw 2007; Informowanie i konsultacja pracowników w poskim prawie pracy (ed.) A. Kobczyk, Kraków 2008

Klafkowska – Waśniowska, K., *Uniemożliwianie przedsiębiorcom zagranicznym korzystania ze swobody świadczenia usług*, Glosa 4/2008.

Makowska – Szulc, S., *Sytuacja prawna pracownika delegowanego w ramach świadczenia usług [In:] Przepływ osób…*

Ochrona praw podstawowych w Unii Europejskiej (ed.) A. Florczak, Warszawa 2009

Przepływ osób i świadczenie usług w Unii Europejskiej, (ed.) S. Biernat, S. Dudzik, Warszawa 2009

Pracujący Polacy 2006. http://i.wp.pl/a/f/rtf/9806/pracujacy_polacy.rtf

Świątkowski, A. M. , [in:] Zbiorowe prawo pracy. Komentarz do ustawy o rozwiązywaniu sporów zbiorowych (ed.) J. Wratny, K. Walczak, Lex. 2009.

Świątkowski, A.M., , Wolność prowadzenia akcji zbiorowych przez związki zawodowe a swoboda prowadzenia działalności gospodarczej i swoboda przepływu usług w obrębie Unii Europejskiej, MPP 10/2008

Wodniak , A., *Akcje strajkowe jako ograniczenie swobody działalności gospodarczej, wyrok ETS w sprawie Viking, C-438/05*, Edukacja Prawnicza online. 30.04.2009

Wratny, J. , *Teoria i praktyka układów zbiorowych*, Dialog, 3/2006 . p. 37

Wyrozumska, A. , *Znaczenie prawne zmiany statusu Karty Praw Podstawowych Unii Europejskiej w Traktacie lizbońskim oraz Protokołu polsko-brytyjskiego*, Glosa 2008 nr 4.

http://www.eurofound.europa.eu/eiro/country/poland_4.htm

http://www.kpp.org.pl/index.html?action=sai&ida=6085