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THE IMPACT OF THE PANDEMIC ON COLLECTIVE RELATIONS IN POLAND

Abstract

The crisis caused by the outbreak and spread of the COVID-19 pandemic forced the legislature to make numerous legal changes. The undertaken measures comprised labour law understood in the broadest sense. They were intended to protect the economy, including jobs, from the dramatic consequences of the spread of the virus and the associated danger. The extraordinary circumstances called for specific measures, focused on protecting work and workers. The drafting of protective regulations, under such special circumstances, could not take place without dialogue involving the labour. At the multi-company level, this was seeking concrete solutions to protect the employees. In turn, at the company level, the partners exercised the rights guaranteed by the anti-crisis regulations. The article offers an analysis of the legal situation of participants in social dialogue – both the employees and the employers. In retrospect, it is possible to evaluate specific measures which have been adopted.

KEYWORDS

labour law, crisis, COVID-19, protection, anti-crisis regulations, social dialogue, social partners

SŁOWA KLUCZOWE

prawo pracy, kryzys, COVID-19, ochrona, regulacje antykryzysowe, dialog społeczny, partnerzy społeczni

1. THE COVID-19 CRISIS: INITIAL REMARKS

The crisis caused by the COVID-19 pandemic involved unprecedented phenomena related to the restriction of social contacts, suspension of various forms of activity, and development of remote relations. At first, it could be feared that the existing socio-economic order was bound to fail. There were concerns that we would face an economic crisis, a wave of insolvencies, and a fundamental reduction in employment (which was attested by data on the decreasing number of jobs, the dismissals, and the growing unemployment)¹. Employers and workers were unable to protect themselves against the consequences of the crisis. The state, which was the only entity with sufficient (organisational and financial) means to provide necessary support, was forced to intervene. It had to restructure the regulatory framework of the socio-economic relations and provide direct support to entities affected by the crisis. It was vital to take steps to protect human life and health, support businesses (especially those whose operations were suspended or curtailed), and protect jobs.

First, various health and hygiene-related protective measures were adopted to contain the threat caused by the virus. Second, remote work was introduced on a grand scale, which made social distancing possible. In some instances, the regulations imposed a direct obligation to organise remote work (as far as it was possible, of course). In many legal systems, a new legislative framework for remote work was developed (as the existing solutions were often inadequate). Third, it was possible to reduce the employees' working time or even to suspend employment relationships. As a result, businesses could cut labour costs. Fourth, financial support schemes for businesses and employees were developed. They

¹ See, among others, International Labour Organization Monitor, COVID-19 and the world of work, 27 October 2020, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_824092.pdf (accessed 11.04.2023).

included, among others, subsidies compensating for the lower or lost remuneration caused by the shorter working time or the suspension of the employment relationship (short-time work)².

In some legal regimes, social dialogue played a considerable role in protective measures against the consequences of the COVID-19 crisis³. First, the social partners initiated protective actions (e.g. in the area of occupational health and safety), which were applied autonomously or adopted in legislation. Second, the provisions stipulated the possibility to adopt anti-crisis solutions with the participation of social partners. That said, social partners had to deal with restricted social contacts and the development of remote communication. Therefore, there were also questions about how the pandemic would affect traditional forms of social dialogue, including collective bargaining – their intensity, effectiveness, and finally also scope of application (with regard to employers and employees). This issue was growing more complex due to the overhaul of many national collective bargaining systems resulting from the economic crisis and the resultant expectation of greater flexibility and decentralisation⁴.

The last few months, even if there has been an increase in SARS-CoV-2 infections⁵, have no longer caused major disruptions in the functioning of socio-economic relations. We can speak of the end of a certain phase, which leads us to reflect on the post-pandemic socio-economic order and its legal framework. One important area where the pandemic may have caused significant changes are collective labour relations. The first level of analysis is the actual situation of the social partners (including the density of trade unions) and the practice of their social dialogue (the number of collective agreements concluded, the extent of coverage of employees or other workers). The second level is an analysis of the legal framework in which social dialogue is held and an attempt to answer the question of whether the pandemic has caused any lasting changes to the rules governing relations between the social partners. The subject of reflection are collective relations in Poland, which, on the one hand, have significant potential (a large labour market, traditional position of trade unions) and, on the other, have undergone a deep crisis in recent decades. From the Polish perspective, the fundamental question is whether the pandemic and the response to it entail a deepening of the

² Various national solutions have been discussed e.g. in “Italian Labour Law e-Journal” 2020, No. 1S, <https://illej.unibo.it/issue/view/868> (accessed 11.04.2023).

³ Cf. S. Adameczyk, B. Surdykowska, *Gospodarka i świat pracy wkraczają na niezbadany łąd. Kilka wstępnych refleksji wokół rozwoju pandemii COVID-19*, “Monitor Prawa Pracy” 2020, No. 4, pp. 5–6.

⁴ For more on this subject, see e.g. S. Laulom (ed.), *Collective bargaining developments in times of crisis*, “Bulletin of Comparative Labour Relations” 2018, No. 99; A. Liukkunen, *The role of collective bargaining in labour law regimes: A global approach*, (in:) A. Liukkunen (ed.), *Collective bargaining in labour law regimes: A global perspective*, Springer 2019.

⁵ <https://www.gov.pl/web/koronawirus/wykaz-zarazen-koronawirusem-sars-cov-2> (accessed 11.04.2023).

crisis of collective relations, maintenance of the status quo, or perhaps an impulse to revive social dialogue (increasing the number of agreements, extending the scope of coverage, or perhaps extending agreements to new groups of workers, such as the self-employed). Despite the dramatic impact of the pandemic, it was expected that the exceptional situation in which people seek effective protection could be a factor in the development of workers' representation and the revival of social dialogue⁶.

The subject of the analysis will be the situation and competences of the most important participants in the social dialogue. Those will be, on the employers' side – the employers themselves and their associations, and on the employees' side – trade unions and elected employee representatives, which can be established in the largest number of work organizations – works councils and employees' representatives elected according to the procedure adopted at a given employer. The legal act of fundamental importance for the situation of the social partners and their bargaining during the pandemic is the so-called anti-crisis shield, i.e. the Act of 2 March 2020 on special solutions related to preventing, counteracting, and combating COVID-19 and other infectious diseases and crisis situations caused by them⁷, hereinafter referred to as the Anti-Crisis Shield Act.

2. THE INSTITUTIONAL CRISIS AND ATTEMPTS AT OVERCOMING IT: COLLECTIVE RELATIONS IN POLAND

Collective relations in Poland have been in deep crisis for several decades. It is a systemic crisis caused by the effects of the political transformation, the adopted concept of shaping the socio-economic order, and the weakness of the social partners. The collapse of collective bargaining began in the 1990s, when the system of collective agreements was restructured. On the one hand, this was necessary in view of the undemocratic nature of collective agreements during the communist period. On the other hand, given the weakness of the social partners, the adopted model did not (and probably could not) result in the formation of a comprehensive collective bargaining system. The weakening, or even atrophy of collective agreements has been accompanied by the emergence of other forms of defining employment conditions⁸. Employers issue various types of regulations (among which the

⁶ In this context, see e.g. S. Adamczyk, B. Surdykowska, *Świat pracy na bezdrożach. Refleksje na temat możliwych skutków pandemii COVID-19*, "Praca i Zabezpieczenie Społeczne" 2020, No. 4, pp. 3–10; K. Walczak, *Kilka uwag na temat zatrudnienia w dobie pandemii i po jej zakończeniu*, "Monitor Prawa Pracy" 2020, No. 6, pp. 9–16.

⁷ "Journal of Laws" 2021, item 2095.

⁸ For more on the subject, see Ł. Pisarczyk, J. Rumian, K. Wiczorek, *Zakładowe układy zbiorowe — nadzieja na dialog społeczny?*, "Praca i Zabezpieczenie Społeczne" 2021, No. 6, pp. 3–14.

remuneration regulations play a special role), as well as engage in dialogue with employee representatives outside the framework created by the legislation, which is an element of collective autonomy (innominate collective agreements). The social partners themselves are unable to reverse the unfavourable trends, as they face their own problems (weakness of employers' organisations, declining trade union membership, insufficient trade union activity and pressure) and are unable to adapt to the changing socio-economic environment (sticking to old structures and operating methods). As a result, collective agreements, especially regular collective agreements, which should be the primary means of shaping the terms and conditions of employment, cover a relatively small group of businesses (large entities, the former state-owned enterprises, entities funded by local government) and a relatively small circle of employees (other working people exercising trade union rights).

3. LEGAL FRAMEWORK FOR THE FUNCTIONING OF THE SOCIAL PARTNERS

The situation and the potential (including the negotiating potential) of the social partners are substantially affected by regulations concerning the structure of individual organisations and actors.

When it comes to trade unions, the anti-crisis legislation did not alter the principles of representation. Most of the mechanisms were company-wide. If trade union involvement was envisaged, the entitled subject was supposed to be, as before, the company trade union organisation. In the absence of such a structure at the employer, elected representatives were to be involved in individual procedures. Thus, even a serious pandemic threat did not induce the legislature to abandon the concept of a company-level trade union organisation, which hinders the development of universal trade union representation⁹. The legislature opts for alternative representation by elected representatives, which does not guarantee workers a similar level of protection.

The anti-crisis provisions adopted the existing legal structure also with regard to elected representatives. In certain situations, agreements with employee representatives elected in the manner adopted at the employer were stipulated. The statute does not specify the structure of the representations, the manner of their election or, finally, the rights of the representatives, including protection

⁹ For more on the subject, see especially Z. Hajn, *Ustawowy model organizacji polskiego ruchu związkowego i jego wpływ na zbiorowe stosunki pracy*, (in:) M. Matey-Tyrowicz, L. Nowacki, B. Wagner (eds.), *Prawo pracy a wyzwania XXI wieku. Księga jubileuszowa Profesora Tadeusza Zielińskiego*, Warszawa 2002.

against repression by the employer¹⁰. The general framework for the election of representatives is set by the provisions of ILO Convention No. 135 – Workers’ Representative Convention 1971¹¹, which provides for “elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned” (Art. 3). Given the reference to national rules for the election of representatives, this provision would hardly be considered self-executing. Moreover, it is “national laws or regulations, collective agreements, arbitration awards or court decisions that may determine the type or types of workers’ representatives which shall be entitled to the protection and facilities provided for in this Convention” (Art. 4).

The fundamental problem with the adopted structure stems from the fact that the employer is the entity with the greatest influence on the design of the election procedure. The law does not in any way require the participation of the employees (the staff), who will then choose their representatives. Any form of their involvement (e.g. consultation) is at the discretion of the employer. Ultimately, therefore, employers can create mechanisms that primarily take into account their own interests. Only *ex post* can the adopted solutions be possibly challenged as violating the principles of representation (e.g. if the employer appoints employee representatives or limits the circle of those entitled to vote¹²). The only requirement that can be derived from the law is that – in view of the use of the plural – there should be at least two employee representatives. This would make the position of the representatives stronger. It may be feared, however, that the numerical criterion does not offset other weaknesses in representation. Representatives are protected against discrimination under the general principles of labour law. However, such protection will not be available to representatives who are not employees. Similarly, representatives are not explicitly guaranteed facilities to exercise their functions. All this renders their position quite weak, and they are under strong pressure from employers.

It is regrettable that, in a situation where the representatives had a major role to play and could have been expected to be created, the legislature refrained from restructuring the legal framework in order to eliminate the concerns noted and

¹⁰ More on the subject see e.g. M. Latos-Miłkowska, *Przedstawiciele pracowników wylaniania w trybie przyjętym u danego pracodawcy*, ”Praca i Zabezpieczenie Społeczne” 2010, No. 10; A. Sobczyk, *Przedstawicielstwo pozazwiązkowe w systemie zbiorowej reprezentacji pracowników – stan obecny i kierunki zmian*, (in:) A. Wypych-Żywicka, M. Tomaszewska, J. Stelina (eds.), *Zbiorowe prawo pracy w XXI wieku*, Gdańsk 2010.

¹¹ C135 – Workers’ Representatives Convention, 1971 (No. 135), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312280.pdf (accessed 11.04.2023).

¹² See <https://www.prawo.pl/kadry/porozumienie-pracodawcy-z-przedstawicielem-pracownikow-warunkuje,499370.html> (accessed 11.04.2023) (statement by M. Głądoch).

signalled so far. An excellent opportunity was lost to build a stronger and viable second channel for the representation of workers' interests, which could provide an alternative to the weakening trade unions, but also stimulate them to become more active. Nor was it guaranteed that a dialogue involving elected representatives could become, if not a dialogue between two equal actors, then at least a form of genuine expression of the interests of working people and a means of exerting pressure on the employing entity. A particular solution was to create a mechanism to facilitate the establishment of representation under pandemic conditions. If, due to the given situation, it was not possible to elect representatives, the law allowed an agreement to be made with representatives previously elected for other purposes (for the purpose of negotiating other agreements).

4. THE ACTUAL SITUATION OF THE SOCIAL PARTNERS

Another question is how the actual situation of the social partners has evolved during the pandemic, including the number of different structures and the range of people and actors they represent. A separate analysis should be made of voluntary associations (trade unions and employers' organisations)¹³ and elected representations, which are established on the basis of the law, although also in their case, the establishment requires an initiative (workers' councils) or some activity on the part of the employees (employees' representatives elected according to the procedure adopted by the employer). It should be emphasised that the very manner of representation and the objectives of trade union activity have not changed. The challenge, however, consisted in the completely new circumstances in which unions had to pursue their objectives. This applies to both internal union activities and relations with the employer.

The period of the pandemic is too short to establish clear trends in unionisation levels, on both the labour and the employer side. Still, there are insufficient grounds to consider the pandemic as a turning point for the condition of trade unions and employers' associations. The level of unionisation remains low (trade unions), and even very low (employers' associations). Despite some expectations, there is likewise no breakthrough when it comes to the collective representation

¹³ Data published by the Central Statistical Office (GUS) shows that 0.4 thousand of active employers' organisations had 19.1 thousand members in 2018 (2.4 per cent more than in 2014). A total of 1.5 million people belonged to 12.5 thousand trade unions (1.1 per cent less than in 2014). The largest proportion of trade union members (23.2 per cent) worked in education, while employers belonging to employers' associations were involved in health care and social assistance (18.5 per cent), <https://stat.gov.pl/obszary-tematyczne/gospodarka-spoeczna-wolontariat/gospodarka-spoeczna-trzeci-sektor/partnerzy-dialogu-spoecznego-zwiazki-zawodowe-i-organizacje-pracodawcow-wyniki-wstepne,16,1.html> (accessed 11.04.2023).

of working people who have no employee status. Even the state of emergency associated with the pandemic and the crisis it caused has not resulted in a visible increase in the number of union members. Theoretically, it could be presumed that employment concerns could provide an impulse to join trade unions. However, the restriction of social contacts significantly hampered any form of collective cooperation.

At the same time, some symptoms of a revival of union activity and a change in the public perception of unions are noticeable¹⁴. Yet the reasons for this revival are complex. It is the result of several spectacular collective actions that reminded people of trade unions' potential and possibilities (e.g. collective labour disputes in education, in the Polish Air Navigation Services Agency¹⁵ or, finally, in the Social Insurance Institution¹⁶). These actions were in response to the deteriorating situation of various employee groups, caused, among other things, by inflation, the rising cost of living, and the fall in the real level of wages (partly even before the pandemic broke out). There is no doubt that, at least in some cases, the worsening situation of workers was directly (e.g. air traffic controllers) or indirectly linked to the COVID-19 crisis. Similarly, the positive signals should not be overstated in anticipation of future developments.

There is, unfortunately, no aggregate data to illustrate how the practice of establishing representations, elected according to the procedure adopted by the employer, has developed. However, it is possible to make some hypotheses. A significant proportion of employers (several tens of thousands of entities), including relatively large companies, wanted to benefit from some form of support that required an agreement with employee representatives¹⁷. Given that few employers have company-level trade union organisations, it was necessary to negotiate agreements with elected representatives. This meant that a representation had to be elected or an existing representation had to be empowered. It is, therefore, to be expected that the number of employers with elected employee representatives has increased significantly. However, it is not clear whether the representatives were elected only for the purposes of the Anti-Crisis Shield (which would imply a temporary increase in activity) or whether they have been empowered for other procedures, as well. The development of more permanent representative structures may provide the impetus for a revival of companylevel dialogue, although

¹⁴ See communication of CBOS based on November 2021 studies, https://www.cbos.pl/SPIS-KOM.POL/2021/K_140_21.PDF (accessed 11.04.2023).

¹⁵ <https://www.rynek-lotniczy.pl/wiadomosci/konflikt-w-pazp-bez-porozumienia-po-niedzielnym-rozmowach-14297.html> (accessed 11.04.2023).

¹⁶ <https://businessinsider.com.pl/wiadomosci/brutalna-gra-w-zus-spor-o-strajk-to-tylko-wi-erzcholek-gory-lodowej/nv7scww> (accessed 11.04.2023).

¹⁷ Almost 28 thousand agreements were concluded by February 2021, <https://gospodarka.dziennik.pl/news/artykuly/8105179,pip-kontrola-firmy-tarcza-antykryzysowa-koronawirus-covid-19-pieniadze.html> (accessed 11.04.2023).

of course to a very limited extent (as determined by the scope of the elected representatives' powers).

In the case of workers' councils, reference can be made to statistical data concerning their number and the term for which they have been set up at individual employers. The general trend is a declining rate of establishing workers' councils: for the first term, for subsequent terms of office, and as a total number of all councils¹⁸. The numbers of workers' councils established during the pandemic are, respectively: 47 (2020), 55 (2021), and 43 (2022 – here the data are not yet complete; that said, this is the year in which the councils are appointed for a fifth term – one such council has been reported to have been set up so far). Compared to previous years (105 in 2016, 78 in 2017, 179 in 2018, and 112 in 2019), a slowdown in establishing councils is evident. On the one hand, even if we take into account the rhythm of a term of office, in particular set by the first elections in 2006, we can notice a clear weakening of elected representation. On the other hand, declining trends with regard to councils have been evident since the outset (1,903 structures were created in 2016), and the pandemic caused not so much a collapse, but perhaps rather an acceleration of certain processes.

5. TRADITIONAL COLLECTIVE BARGAINING

Due to the course of the pandemic, especially in its first phase, it could have been feared that the epidemiological situation would contribute to a further weakening of the collective agreement system, especially collective bargaining. Social distancing and contact restrictions are undoubtedly not conducive to bargaining, especially in its traditional form. A basic indicator of the intensity of collective relations during the pandemic may be the number of collective bargaining agreements concluded (based on register data). The legislature itself did not make major changes to the rules of bargaining involving collective bargaining agreements and other collective agreements (with the exception of agreements provided for in the anticrisis provisions and treated as special institutions).

No multi-employer collective agreement was registered during the pandemic (this also applies to agreements concluded as part of the activities of the Social Dialogue Council). The last multi-employer collective agreement was registered in 2014. Additional protocols (formal amendments to agreements) have been registered since then. In this area, the activity of the social partners was even greater than in some previous years. There were also some attempts to conclude agreements which did not result in registration. Therefore, the atrophy of multi-em-

¹⁸ Based on data published by the Ministry of Family and Social Policy, <https://www.gov.pl/web/dialog/rady-pracownikow2> (accessed 11.04.2023).

ployer agreements should not be associated with the pandemic but rather with the general situation of collective relations at the multi-employer level. Undoubtedly, however, the pandemic did not result in an increased interest in multi-employer bargaining, which was partly justified by the types of threats and the nature of the actions taken – mainly at the level of the work establishment or larger economic entity.

The data concerning activity in terms of company-level collective agreements in 2020 and 2021 are the following:

in 2020 – 49 collective agreements (13,650 employees) and 778 additional protocols, in 2021 – 48 collective agreements (20,407 employees) and 788 additional protocols.

For comparison, the data for preceding years are as follows:

in 2014 – 88 collective agreements (43,576 employees) and 1,030 additional protocols, in 2015 – 69 collective agreements (106,552 employees) and 909 additional protocols, in 2016 – 79 collective agreements (38,227 employees) and 896 additional protocols, in 2017 – 50 collective agreements (28,230 employees) and 845 additional protocols, in 2018 – 54 collective agreements (21,067 employees) and 945 additional protocols, in 2019 – 68 collective agreements (33,437 employees) and 988 additional protocols¹⁹.

On the one hand, the period of the pandemic entailed lower numbers of collective agreements and additional protocols as well as employees who were covered by the agreements. On the other hand, the declines are not sharp. They are rather a part of a constant downward trend that has been noted for many years. In conclusion, one could hardly expect a reversal of the previous unfavourable trends at the time of the pandemic. Additionally, the pandemic itself appears not to have been a major factor in increasing the intensity of bargaining. Certainly, the social partners did not opt for collective bargaining as a form of counteracting the effects of the crisis, which was the result of their own strategies, but also of statutory solutions. Rather, they used the construction of specific agreements, which were better adapted to the current situation and easier to negotiate.

Due to the lack of the requirement to register such an agreement, it is much more difficult to assess the situation of collective agreements (normative agreements) other than collective bargaining agreements. Information about the market situation suggested that the parties more often resorted to the institution of crisis agreements provided for in the Labour Code²⁰ (Articles 9¹, 23^{1a}, and 241²⁷). Collective dismissals were likewise more frequent, which required the procedure provided for in the Collective Dismissals Act and, if the employer was covered by a company-level trade union organisation – negotiations with that organisation(s). The activity of trade unions in the context of dismissals for reasons not related to employees deserves to be highlighted. According to the trade union report,

¹⁹ <https://www.pip.gov.pl/pl/o-urzedzie/sprawozdania-z-dzialalnosci> (accessed 11.04.2023).

²⁰ Act of 26/06/1974 – Labour Code, “Journal of Laws” of 2022, item 1510, as amended.

collective dismissals during the pandemic affected some 15,000 employees. The examples cited in the report may justify the thesis that without trade union protection, the scope of redundancies could have been greater²¹. At the same time, it should be emphasised that the Act, by lowering severance payments, facilitated redundancies and weakened the trade unions' bargaining position (Art. 15gd of the Anti-Crisis Shield Act), which has been criticised²². Despite the effectiveness of trade union action, it should be borne in mind that agreements to worsen employment conditions or concerning collective dismissals count as extraordinary. An improvement in the economic situation and the absence of other difficulties result in a declined interest in these institutions and a return to the *status quo*. Therefore, it does not seem that the pandemic will bring about fundamental changes in the area of collective agreements other than agreements under general labour law, although, of course, any form of involvement can spark social partner activity.

Finally, seeing the weakness of the typical forms of dialogue, some social partners undertook independent measures to mitigate the impact of the pandemic. Trade union activities included publishing a handbook prepared by the OPZZ trade union as part of a project titled "Knowledge and Education – a Key to Efficient Social Dialogue at Company Level during the COVID-19 Pandemic"²³. The project is a direct response by trade union central authorities to the need to support company-level trade union organisations. The development, and later the implementation of the new legislation required support. The project was therefore a strong response to a recognised need.

6. THE INVOLVEMENT OF SOCIAL PARTNERS IN THE DEVELOPMENT OF UNIVERSALLY APPLICABLE LAW

When analysing the situation of collective bargaining, it is difficult to ignore the involvement of social partners in the drafting of universally binding law. First, the law establishes the formal framework for social dialogue and determines the scope of the social partners' freedom. Second, the involvement in the drafting of universally applicable law is not without influence on activity in autonomous

²¹ K. Duda, Sytuacja na rynku pracy w dobie pandemii koronawirusa. Raport. Wydział Polityki Społecznej, Rynku Pracy, Ubezpieczeń i Zdrowia OPZZ, <https://www.opzz.org.pl/aktualnosci/kraj/rynek-pracy-w-dobie-pandemii-raport-opzz> (accessed 11.04.2023)

²² B. Mądrzycki, *O związkach zawodowych z pandemią Covid-19 w tle*, "Zeszyty Naukowe Wydziału Zarządzania GWSH" 2022, No. 17, pp. 77–86.

²³ <https://www.opzz.org.pl/szkolenia-i-projekty-ue/kursy-i-szkolenia-dla-zwiazkowcow/kursy-i-szkolenia-dla-zwiazkowcow-zakonczone/wiedza-i-edukacja-kluczem-do-sprawnego-dialogu-spolecznego-na-poziomie-zakladu-pracy-w-dobie-pandemii-covid-19> (accessed 11.04.2023).

areas (the possibility to influence the content of laws limits this activity in a certain way).

The draft anti-crisis solutions proposed by the legislature aroused reservations of both the labour and the management. Social consultations of draft regulations were carried out at a very rapid pace, with social partners often having only a few days to take a position. The scope of the regulations was extensive and the proposed solutions raised doubts. It should be stressed that the social partners were very active in the legislative process²⁴. They were also fairly effective in blocking some of the solutions that could be considered controversial²⁵. Examples include proposals to facilitate the termination of employment contracts, e.g. by e-mail, or to expand the employer's unilateral powers to shape the employment relationship, which were criticised as being in conflict with the protective function of labour law²⁶. On the one hand, the activity of trade unions and employers' organisations in the law-making process is an example of the promotion of the social partners and the effective use of their potential (which, as it turns out, is still significant). On the other hand, these mechanisms may consolidate the practice of social partners, including trade unions, concentrating in the political sphere – at the expense of typical collective bargaining.

7. ANTI-CRISIS MECHANISMS

The anti-crisis legislation provided for a number of solutions with a direct or indirect impact on the employment sphere. The introduction of some of them required the participation of employee representatives. The involvement of a collective entity may contribute to the application of solutions that take into account the interests of both parties to the employment relationship. It thus guarantees, despite extraordinary circumstances, a certain level of protection for employees and other workers (provided, of course, that the representatives are in a position to genuinely bargain with the employer). As a result, it is worth considering which constructions were introduced by collective agreements (and which could have been introduced under employment contracts or unilaterally by employers),

²⁴ <https://www.opzz.org.pl/aktualnosci/kraj/czas-na-podjecie-dzialan-antykryzysowych> (accessed 11.04.2023).

²⁵ <https://www.opzz.org.pl/aktualnosci/kraj/natychmiastowa-reakcja-opzz-przynosi-skutek-rzad-powoli-wycofuje-sie-z-najbardziej-antypracowniczych-rozwiazan-tarczy-3-0> (accessed 11.04.2023); see also <https://www.solidarnosc.org.pl/aktualnosci/wiadomosci/kraj/item/19356-rzad-uwzglednil-czesc-postulatu-solidarnosci-bez-porozumienia-nie-bedzie-wsparcia-w-ramach-tarczy> (accessed 11.04.2023).

²⁶ B. Mądrzycki, *op. cit.*

which entities represented the employees' interests, and what were the procedure of conclusion and the content of the agreements.

One of the most important decisions of the legislature was to determine the mode in which remote work would be introduced. Due to the risks to human life and health, it was necessary to create a mechanism that was as flexible and effective as possible. As a result, remote work was introduced on the basis of the employer's decision (the law in a way extended the employer's managerial prerogatives). Only after several months were provisions adopted to safeguard the interests of employees, although they too were characterised by a rather high level of generality. The managerial prerogatives were extended also with regard to employers in charge of so-called critical infrastructure (e.g. they gained the right to make changes to working time schedules). In this way, the legislature wanted to ensure the smooth operation of work establishments of key importance to society and the economy. Partly justifiable given the special circumstances, the form of remote work provided for in the anti-crisis legislation would have been difficult to accept as a permanent element of the employment relationship (due to the excessive expansion of the employer's managerial prerogatives). At the same time, the pandemic revealed the significant weaknesses of remote work as regulated by the Labour Code. Therefore, the legislature is looking for a new, comprehensive solution that will combine the existing telework with remote work. Among other things, the drafters are looking for a balance between collective elements (participation of employee representatives in the introduction of remote work) and individual elements (role of the employment contract, right of the employer to introduce remote work unilaterally)²⁷.

Collective agreements provided the legal basis for the application of the most important mechanisms to reduce labour costs and thus support employers and avoid or limit redundancies. This was possible with employers who met certain conditions, in particular those facing a decline in turnover. In some cases, the conclusion of an agreement was also a condition for applying for state aid. On the basis of an agreement with employee representatives, it was possible, among other things, to: 1. introduce a furlough, 2. reduce the working time of employees (Article 15g), 3. adopt less favourable terms of employment than those resulting from employment contracts (the agreement should specify the extent of such deterioration), 4. introduce certain forms of work organisation, including the extension of the daily working time to 12 hours in a reference period not exceeding 12 months, and the reduction of uninterrupted rest periods (Article 15zf). Since they were explicitly based on legislation, the agreements could be considered as sources of labour law (Art. 9(1) of the Labour Code). Importantly, they could affect the situation of not only employees, but also

²⁷ See a bill to amend the Labour Code, where the existing model of distance working is supposed to be replaced with a new, comprehensive concept of remote work, which could be used in a number of variants, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2335> (accessed 11.04.2023).

persons performing work under civil law contracts. The latter solution was an important step towards shaping uniform protection for all persons who perform work. However, it was introduced under specific circumstances. It is, therefore, difficult to say whether this will already be a permanent statutory trend or rather an incidental solution.

As far as the entities representing the interests of the employed persons were concerned, the legislature applied the concept of trade union priority that had already been used before. If a company-level trade union organisation was active at the employer, the agreement had to be concluded with this trade union entity. The existence of a company-level trade union structure at the employer precluded the conclusion of agreements with elected representatives. Thus, if it was not possible to conclude an agreement with the trade union, the employer could not obtain aid. At the same time, a conflict mechanism was adopted in the regulations in an effort to ensure that the procedure was efficient. Where more than one trade union structure was active at an employer, the agreement could be concluded with representative organisations (Art. 15g(11) and 15zf(4) of the Anti-Crisis Shield Act). Due to the link with employment relationships, a two-stage criterion of representativeness was applied: taking into account all persons performing paid work (at least 8 per cent of persons performing paid work for unions representative in accordance with the provisions on the Social Dialogue Council, 15 per cent for the others, and finally – in the absence of meeting these requirements – the criterion of the largest organisation) and, in addition, the employees themselves (at least 5 per cent of the employees). Recognising the importance of crisis agreements for employers (businesses), the provisions enabled them to be concluded also when employees are not represented by trade unions (15g(11)(4) of the Anti-Crisis Shield Act). Then, the parties to the agreement could be elected representatives²⁸. The agreements were verified in that they were required to be forwarded to the competent district labour inspectors, who, however, were not granted any special powers.

The negotiation of anti-crisis agreements has become an important element in maintaining social dialogue. The implementation of the anti-crisis legislation revealed the potential of social dialogue. Employers with an interest in concluding agreements (seeking to reduce labour costs and obtain state aid) started negotiations with the workers. In the absence of trade unions, they also initiated (usually successfully) the election of representatives able to conclude an agreement. Workers' representatives tended to take into account the particular situation of employers affected by the crisis (especially if they had to suspend or reduce operation)²⁹. As a result, there were no major tensions and disputes in the background of crisis

²⁸ See M. Latos-Milkowska, *Porozumienia zbiorowe w tarczy antykryzysowej*, "Praca i Zabezpieczenie Społeczne" 2020, No. 10, pp. 31–33.

²⁹ <https://gospodarka.dziennik.pl/news/artykuly/8105179,pip-kontrola-firmy-tarcza-antykryzysowa-koronawirus-covid-19-pieniadze.html> (accessed 11.04.2023).

agreements negotiations, and a large part of the bargaining ended with an agreement, although there were cases when company-level trade union organisations did not accept the terms of the agreement, which prevented the employer from obtaining aid (such situations generally did not occur in bargaining with elected representatives).

Based on data from February 2021, i.e. those covering the period of the most severe restrictions on business activity and the most intensive implementation of anti-crisis mechanisms, nearly 28,000 agreements concerning employment conditions were concluded, with approximately 24,500 entrepreneurs (employers) as parties³⁰. Agreements on the application of furlough and reduction of working time were concluded most frequently. Agreements on the organisation of working time were concluded much less often³¹.

Unfortunately, the intensification of the social dialogue was conditioned by the specific circumstances of the pandemic, and thus exceptional. The end of the state of emergency and the need for specific solutions resulted in a return to the *status quo*. The increase in activity, like its causes, was atypical. It may be feared that it will not result in a lasting change in relations between the social partners. Given the data on traditional forms of bargaining, social partners did not (in most cases) continue social dialogue after the conclusion of crisis agreements, which could have resulted in especially collective bargaining or other agreements.

8. PUBLIC ADMINISTRATION

A separate problem was the situation of employees in the public sector, including public administration³². The legislature reckoned with the need to cut costs and reduce employment. This assumption alone raised doubts, given that employment in the private sector was supported with significant resources³³. The anti-crisis

³⁰ <https://gospodarka.dziennik.pl/news/artykuly/8105179,pip-kontrola-firmy-tarcza-antykryzysowa-koronawirus-covid-19-pieniadze.html> (accessed 11.04.2023). A report prepared by the Polish Economic Institute shows that 86 per cent of the surveyed businesses benefited from the solutions available under the AntiCrisis Shield Act. Most of them, 92 per cent, used more than one support instrument. See *Tarcza Antykryzysowa. Koło ratunkowe dla firm i gospodarki?* Warszawa 2021, https://pie.net.pl/wp-content/uploads/2021/09/PIE-Raport_Tarcze-antykryzysowe.pdf (accessed 11.04.2023).

³¹ <https://www.prawo.pl/kadry/pip-udostepnila-pierwsze-dane-dotyczace-porozumien-w-sprawie,499793.html> (accessed 11.04.2023).

³² See considerations by J. Szmít, *Państwo wobec pracowników administracji rządowej (uwagi na tle ustawy antykryzysowej)*, "Państwo i Prawo" 2020, No. 12, pp. 92–106.

³³ Even though the planned measures were justified with constitutional solidarity (explanatory memorandum to the government bill on extraordinary support instruments in connection with the spread of the SARS-CoV-2 virus, paper 330, p. 73).

legislation authorised the Council of Ministers (this option was never used) to issue a regulation providing for an obligation to downsize the sector or to apply less favourable employment conditions. The rationale for issuing the regulation was meant to be a state of threat to public finances (Article 15zzzzzo of the Anti-Crisis Shield Act). Importantly, in the event of a reduction of employment, the Act excluded the application of the provisions of the Collective Dismissals Act. This gap of sorts was supposed to be filled by a procedure under the Anti-Crisis Shield Act. Employees' interests were supposed to be represented by trade unions (company-level trade union organisations) only, which meant that employees at agencies where such structures had not been established would be deprived of protection. Moreover, trade unions were not guaranteed the right to negotiate an agreement on dismissals. They were only granted the right to express their opinion on the planned measures. As the consultation did not give rise to specific obligations on the part of the employer, this solution inevitably had to be assessed critically as weakening the protection of vulnerable employees (and that of those employed in the public sector)³⁴. Fortunately, this scenario of dismissals never became reality, although the Act remains an example of a regulation that undermines the potential of social dialogue, and is a result of the state's own actions.

9. THE TECHNICAL SIDE OF SOCIAL PARTNER ACTIVITIES AND COLLECTIVE BARGAINING

One of the greatest challenges during the pandemic was the need to limit social contacts. The need to maintain distance hinders various forms of interaction, including collective bargaining (negotiation), whose essence consists in various forms of interpersonal contacts and meetings. Bargaining, therefore, required special technical and organisational solutions. This was the result partly of explicit statutory solutions, and partly (where possible) of autonomous initiatives. At the same time, the question arises as to whether specific activities from the period of the pandemic can have a more lasting impact on the shape of collective relations.

Trade union activities and collective relations were constrained by laws governing meetings and events. Initially, no provisions allowing remote activities were in place. With time, such a possibility was adopted under Art. 15zzzzr of the Anti-Crisis Shield Act, stipulating, among other things, that meetings of the organs of legal entities could be held using electronic communications without the simultaneous presence of the members of those organs (but subject to other formal requirements). In view of the uncertain future, some trade unions have intro-

³⁴ K. Walczak, "Optymalizacja" kosztów zatrudnienia w administracji rządowej, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2020, Vol. 27, No. 4, pp. 293–303.

duced³⁵ or are considering introducing amendments to their statutes so as to allow remote actions³⁶. In view of the epidemiological threat, the Anti-Crisis Shield Act has also adopted special arrangements for the election of bodies. According to Art. 14i(2) of the Anti-Crisis Shield Act, if the term of office of a statutory body of a trade union, a union or organisation of entrepreneurs, an employers' associations, their federations and confederations, or a social labour inspector expires during the period of a state of epidemic emergency or a state of epidemics declared due to COVID-19 or up to 30 days after the cancellation of the state in question, and as a result there is no possibility to hold elections, the term of office of these bodies shall be extended until the election of the statutory body of the trade union, union or organisation of entrepreneurs, an employers' association, their federations and confederations, or a social labour inspector for a new term of office, but no longer than 90 days from the date on which the state of epidemic emergency or state of epidemic emergency is revoked. This solution was accepted by all trade union central authorities³⁷. During the epidemiological emergency, remote communication means were also widely used in relations between the social partners. It seems that a kind of digitalisation of the social partners' activities may become a more permanent phenomenon. The benefits of remote activities (greater flexibility, cost reduction) have been recognised, although of course social dialogue requires face-to-face interaction, as well. Moreover, digitalisation is an opportunity (mainly for trade unions) to reach out to new groups, including especially young people or the self-employed (while, for example, traditional forms of activities even with regard to gig economy workers are proving ineffective)³⁸. Much will depend on the vision and openness of the unions themselves.

³⁵ The possibility to hold remote meetings is stipulated e.g. in the Statutes of the Polish Teachers' Union (ZNP). Pursuant to Art. 25a, 1. Meetings of the authorities and collegiate statutory bodies of the ZNP shall be minuted. 2. In exceptional situations, in particular when faced with urgent matters, the authorities and statutory bodies may hold meetings and adopt resolutions by means of electronic communication. 3. The rules for convening and holding meetings and voting by means of electronic communication shall be defined by the General Board in its Rules of Procedure.

³⁶ Poradnik OPZZ, <https://www.opzz.org.pl/szkolenia-i-projekty-ue/kursy-i-szkolenia-dla-zwiazkowcow/kursy-i-szkolenia-dla-zwiazkowcow-zakonczone/wiedza-i-edukacja-kluczem-do-sprawnego-dialogu-spoiecznego-na-poziomie-zakladu-pracy-w-dobie-pandemii-covid-19> (accessed 11.04.2023)

³⁷ Opinions on the Deputies' bill to amend the Act on special solutions related to preventing, counteracting, and combating COVID-19 and other infectious diseases and crisis situations caused by them. Sejm paper No. 1018. <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=1018> (accessed 11.04.2023).

³⁸ More on this subject e.g. F. Rosioru, *The "smart" trade union: New strategies for a digitalised labour market*, (in:) J.M. Miranda Boto, E. Brameshuber (eds.), *Collective bargaining and the gig economy: A traditional tool for new business models*, Hart Publishing 2022, pp. 135 *et seq.*

10. CONCLUSION

Despite the extraordinary nature of the COVID-19 crisis, there has been no fundamental overhaul of the legal framework in which collective bargaining is carried out. The legislature has essentially limited itself to creating extraordinary anti-crisis mechanisms that were used during the pandemic, as well as certain procedural simplifications justified by the restriction of social contacts. The concepts of a company-level trade union organisation and representatives elected according to the procedure adopted by the employer – with all their shortcomings – have been retained. At the same time, the competences of these entities have been extended only to include participation in anti-crisis procedures. These are not changes that could significantly affect the practice of social dialogue in the long term. It is regrettable that the parliament failed to take advantage of the situation in which both sides of social dialogue were interested in collective bargaining in order to make changes that could contribute to improving the current situation.

Social partners participated (fairly actively) in containing the adverse effects of the pandemic. This, however, did not fundamentally increase their activity – in terms of either the scope of representation (number of actors represented) or the initiatives taken (e.g. initiating collective bargaining). Thus, even the state of threat and uncertainty, which prompts people to seek protection, has not increased the attractiveness of collective actors. This can be worrying especially in the case of trade unions, as it exposes the depth of the crisis in which they find themselves. Meanwhile, some signs of recovery can be noted; they are reflected, among other things, by significant collective actions. It cannot be ruled out that, at least to some extent, this is a consequence of actions taken during the pandemic. However, it is too early to speak of a clear trend, and even more so – to diagnose its causes.

At the same time, the pandemic has rather not extraordinarily weakened collective bargaining. Admittedly, collective bargaining has continued to decline (as can be seen, among other things, in the number of regular (typical) collective agreements negotiated and in force), but the trends from 2020 to 2022 were not fundamentally different from those of the previous years. If the social partners were interested in pursuing collective bargaining, they usually succeeded in finding a way to do so (even despite the emerging constraints). The crisis, requiring firm and effective action, has reinforced the tendency for the social partners to act in the political sphere and to influence the law-making process (which may not be without impact on the involvement in the area of typical collective bargaining). A change for the better, which, at least from the technical point of view, may facilitate dialogue, is the wider use of new techniques and technologies, including various forms of remote contact. These solutions are a useful instrument, provided of course that the social partners are interested in engaging in dialogue. In addition,

they provide opportunities to reach out to groups that have hitherto been only on the margins of trade union activity.

In conclusion, the pandemic has not had any major impact on the collective bargaining system in Poland – either in terms of legislation (the solutions introduced were mostly incidental) or in the area of facts (bargaining intensified mainly in the face of a serious threat and in the hope of obtaining external support). The key trends observed in the earlier period persisted. The pandemic neither caused the ultimate collapse of collective bargaining nor became, despite initial expectations, an impetus to strengthen trade unions and intensify relations between social partners. At the same time, however, some processes are underway which, with the right attitude on the part of the social partners themselves, could contribute to the revival of collective relations.

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