International Seminar on Comparative Labour Law "The binding effect of Collective Labour Agreements in Poland"

National report

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Supplementary information:

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Questionnaire

Questionnaire for EWL seminar on collective labour agreements 2024

Objective of the seminar and point of comparison

The purpose of this seminar is to investigate how employers and workers are bound by collective labour agreements: which techniques exist, what is the explanation for the choice of a particular technique, what is the impact of the system on the organization of the labour market?

Note that for this report only the general law towards collective agreements is relevant to discuss, so no that applicable to specific groups of the working force, such as the public sector or particular professions. Broadly we are interested in those schemes which are suitable to compare internationally.

During the seminar, the differences in these areas between the countries will be compared, and the explanations for the differences and the impact of the respective systems on the organization of the labour market will be discussed. For the purpose of this comparison during the seminar we will prepare more specific questions in a later stage. In your report the following issues are relevant.

In answering the questions, you are advised to give the answers the structure of a report, i.e. that you start with an introductory session in which you give an overview of the system, and then order the answers in relevant sections. If a question is irrelevant to your country, you can explain this in the introduction and then skip that question.

Make sure that the report is comprehensible for your fellow students.

Questions

1. The binding effect of collective labour agreements (avoid overlap with question 2)

By means of a short introduction: does your constitution protect and regulate collective bargaining and its products and/or do treaties play a specific legal role on this matter in your country?

Is there any legal regulation on the binding effect of (provisions of) collective labour agreements and/or is the binding effect based on case law? If this is not the case, go to question 3.

If there is such regulation, specify what is the law as regards:

* which agreements qualify as collective labour agreements and what are the criteria for this?
* who is bound by the collective labour agreement?
* what is the relationship between the sectoral agreement and company agreements?
* for how long is this binding regulated (is there after-effect)?
* is there a difference between members and non-members of contracting parties as regards the binding effect or the method of binding?
* does the binding effect depend on the personal or substantive (material) scope of the collective agreements or provisions thereof? If so, in which way?
* are agreements or provisions thereof - in se - void or can they be declared void? If so, on which grounds? (f.i. when they violate binding law, such as non-discrimination law) or when they are not made by independent unions?

2. Extension of collective agreements by public authorities

Does a (public/semi-public) authority have the power to declare a collective labour agreement binding for a larger group than the members of the signatory parties? If the answer is in the negative, please go to question 3.

* if there is such system, how and where is this regulated? What conditions apply? How is defined who is covered?
* What are or can be the limitations to the binding effect on the basis of this extension? Relevant may be:

- is the binding effect limited in time?
- are exemptions from the extended collective agreement possible (e.g. for collective agreements for particular groups of workers or for agreements for a particular company), under what conditions?

- who has the competence to make these exemptions and is it possible to challenge a refusal for exemption in court?

3. The binding effect on the basis of the individual contract or employment relationship

If there is no legislation ensuring the binding effect of (provisions of) collective labour agreements or if that legislation does not apply to particular collective agreements or provisions thereof:

* can or do workers invoke provisions of a collective agreement, for instance, on the basis of general contract law, an incorporation clause, custom, etc.?

* can an employer apply (provisions of) a collective agreement to workers, in particular provisions that restrict workers' rights?

* can workers organisations' enforce the agreement?

* does the collective labour agreement play a role in a sense not discussed yet?

4. What is the relation between competition law and collective labour agreements in your country?

In this section you describe the way in which your country deals with employment conditions laid down in collective agreements for (groups of) self-employed, including bogus self-employed persons. How is follow-up given to the guidelines of the European commission on solo self-employed persons (https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5796)?

Are there examples of such application? Are the rules strictly observed? Or are there particular problems for the self-employed to make use of these possibilities?

5. How does the system of collective agreements work in practice?

This section asks you to describe how the issues addressed in the previous sections work in practice. Statistical information, if available, is very useful, but if this does not exist (on all issues), clarification of how the system works according to the experts in your country (or according to the unions etc etc) is also very useful.

Relevant topics include:

* the extent to which workers are covered?

* are there differences between union members and non-union members?

* what impact does the system have on unionization rates? And if unionization rates are low, do collective labour agreements still have an impact?

* is there competition between unions or between unions and other workers' organizations?

* can general remarks be made on the contents of collective agreements (in particular sectors), e.g. do they include just minimum levels of protection or standard levels, only about wages or also other conditions, can they serve to deviate from statutory law).

6. Characterization of the system of collective labour agreements in your country

This section addresses the issues described in the previous sections. You do not need to repeat the legal information given in these sections, but you can jump to the following questions:

How would you describe your system in terms of:

- the freedom of parties to contract,

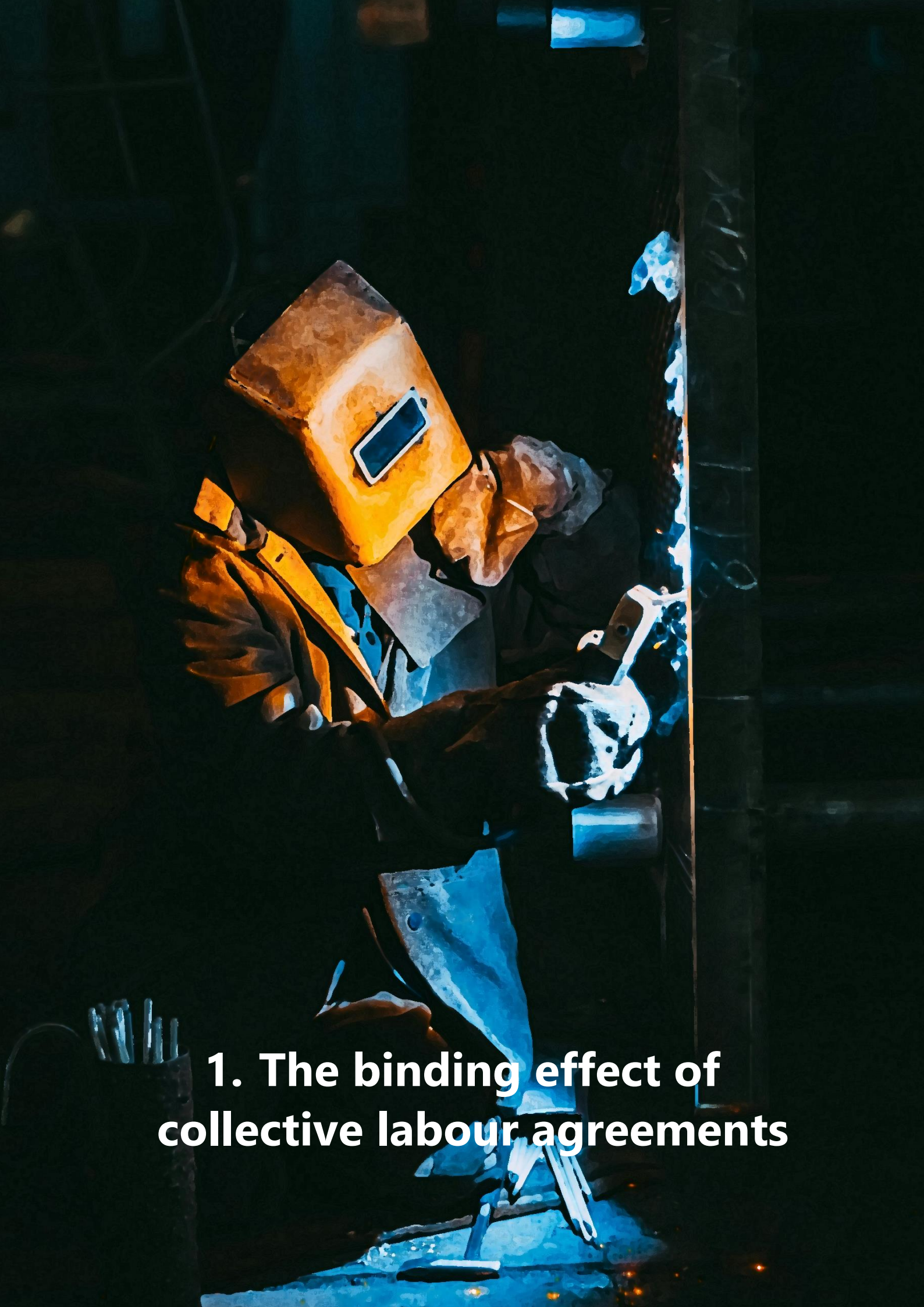
- the place of collective labour agreements in labour law,

- the relation between the agreements and statutory law (can collective agreements be less beneficial than statutory law, or can they deviate from statutory provisions?)

- the autonomy of the social partners

- the place of the workers: does the system influence the attractiveness to be a union member or are free riders accepted; the influence of workers on being bound by collective labour agreement or not etc

- if there is no legislation giving legal effect to collective labour agreements, to what extent do they actually have legal effect?



1. The binding effect of collective labour agreements

1.1. Collective bargaining and collective labour agreements in the Polish Constitution

In the case of the Polish legal system, the right to collective bargaining and to conclude collective and other agreements has a strong constitutional basis. The Constitution not only guarantees these rights, but also clarifies their political nature and their direct link with freedom of association.

In the case of the constitutional right to collective bargaining, it should be noted that the Constitution guarantees this right to specific subjects, i.e. only to trade unions and employers and their organisations. Thus, the scope of the right in question is subjectively limited. Collective bargaining must concern matters of common interest, i.e. those arising in the context of labour relations. As the right to collective bargaining is directly enshrined in the Constitution, there is no need to derive this right from the more general concept of freedom of association. It should also be noted that, from a constitutional point of view, the right to collective bargaining is also an essential element of the Polish economic system, which, according to Article 20 of the Constitution, is based on a social market economy, which is to be based on "solidarity, dialogue and cooperation between the social partners". From this point of view, there is no doubt that the right to collective bargaining is an important guarantee and dimension of the dialogue and cooperation between the social partners referred to in the said provision.

The Constitution also regulates the right to conclude collective agreements and other labour accords. The Constitution does not prescribe the specific content of collective labour agreements (hereinafter as: CLA) or other accords. According to the doctrine, they have a political function to ensure social peace, an economic function to prevent excessive wage disparities and unjustified wage reductions, and a social function to allow for wage growth in relation to increasing national income and positive economic conditions. Similarly, the right to conclude CLAs or other labour accords is constitutionally guaranteed only to trade unions and employers and their organisations.

In view of the constitutional monopoly of trade unions and employers and their organisations to conduct collective bargaining and conclude collective agreements, it remains equally important to guarantee the free functioning of the social partners themselves. In this context, too, the Polish Constitution contains a number of guarantees:

- According to Article 12 of the Polish Constitution, one of the fundamental duties of the Republic of Poland is to ensure the freedom to form and operate trade unions and other associations;
- According to Article 20 of the Polish Constitution, solidarity, dialogue and cooperation between social partners are the pillars of the Polish economic system;
- according to Article 59 of the Polish Constitution, freedom of association in trade unions and employers' organisations is one of the fundamental political freedoms.

1.2. The importance of international law for the collective bargaining system in Poland

There are numerous international acts being a part of the polish legal system that are relevant to the phenomenon of collective bargaining. These acts include (e.g.):

- the ILO's Freedom of Association and Protection of the Right to Organise Convention No. 87;
- the ILO's Right to Organise and Collective Bargaining Convention No. 98
- the ILO's Workers' Representatives Convention No 135;
- the ILO's Labour Relations (Public Service) Convention No 151;
- the European Social Charter (especially Article 6) or
- the Convention for the Protection of Human Rights and Fundamental Freedoms (especially Article 11).

International law in the context of the collective bargaining system in Poland is primarily of an interpretative and practical nature. This is because the norms and standards contained in the above-mentioned documents are used by, among others, the Polish Constitutional Tribunal or the Supreme Court as a control standard for the assessment of statutory regulations affecting the social partners' right to collective bargaining. For example, the Constitutional Tribunal:

1) in its judgment of 2.10.2018, (ref. K 26/15), found the provision of the Labour Code, which makes the possibility of introducing wage regulations subject to the consent of the company's trade union organisation, to be consistent with, inter alia, Article 4 of Convention No. 98 and Article 6(2) of the European Social Charter.
2) in the judgment of 17.11.2015. (ref. K 5/15), found the provision of the Labour Code excluding the possibility of concluding collective agreements for members of the civil service corps to be compatible, inter alia, with Article 6(2) of the European Social Charter, Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Articles 1 and 7 of Convention No. 151;
3) in a judgment of 18.11.2002 (ref. K 37/01), found a provision of the Labour Code, which enforces the application of the provisions of a terminated collective agreement until the entry into force of a new agreement, to be incompatible, inter alia, with Article 4 of Convention No. 98 and Article 6(2) of the European Social Charter.

1.3. The legal nature of CLAs in Poland

1.3.1. Introductory Remarks

Collective labour agreements in Poland do not have a defined scope of matters that can be regulated. According to the doctrine[1], they have:

- a political function to ensure social peace;

[1] Ł. Pisarczyk, 3. Prawo a inne systemy normatywne [w:] Autonomiczne źródła prawa pracy, Warszawa 2022

- an economic function to prevent excessive wage differentials and unjustified wage reductions and
- a social function to enable wage growth in relation to rising national income and positive economic conditions.

A CLA is the most formalised form of industrial agreement concluded through negotiations between the social partners. It can be concluded at both company and industry level. The negotiations are based on the principle of equality of the parties, which can be slightly modified, although the Constitutional Tribunal (ref. K 37/01) has criticised excessive favouritism towards trade unions.

In the case of the Polish labour law system, collective agreements are undoubtedly a source of law. The rights deriving from them can be enforced through the courts. An CLA may cover matters that are not regulated by any law as well as those that are, provided that the provisions of the CLA are more favourable than the statutory minimum. The issue of recognising CLAs as a source of universally binding law is problematic for Polish doctrine. These sources are listed in Article 87 of the Polish Constitution, and CLAs are not among them. However, the Supreme Court (ref. III ZP 17/00) concluded that, due to CLAs' content and the way in which CLAs are drawn up, they are closer to the sources of law listed in Article 87 of the Constitution than to a civil law contract. The above dilemmas are ultimately resolved by the Labour Code itself. Indeed, according to the wording of Article 9 § 1 LC, whenever labour law is mentioned in the Labor Code (hereinafter: LC), it is understood to mean the provisions of the Labor Code and the provisions of other laws and executive acts that define the rights and obligations of employees and employers, as well as the provisions of collective labour agreements and other collective agreements based on the law, regulations and statutes that define the rights and obligations of the parties to the employment relationship. It is also important to note that the provisions of CLAs cannot be less favourable to employees than those resulting from statutory acts (Article 9 § 2 LC).

1.3.2. Distinctive features of CLAs and the problem of other collective accords based on law

Article 9 of the LC, which lists the sources of labour law in Poland, explicitly mentions, inter alia, collective agreements and other collective accords based on the statue, which are not the same as CLAs. There are some specific features that allows us to distinguish between CLAs and other normative labour agreements. These are:

- Parties to the agreement: An CLA can only be concluded between employers (or their organisations) and trade unions representing employees. In the case of other collective agreements, employees may be represented by other, non-union representatives.
- Scope of regulation: An CLA cover general working conditions and pay, such as working hours, pay, holidays, job security and other issues related to employment conditions. Other collective labour accords are narrower in scope, regulating only specific aspects of working environment.
- Legal basis: CLAs are regulated in detail in the LC. Other collective accords may be based on other legislation, depending on the area they cover.

- ❖ The bargaining process: The process of reaching a CLA is strictly regulated by law, including requirements for union representativeness, bargaining procedures and rules for drafting divergence protocols. Other collective accords may be established in a less formalized way. Examples of statutory agreements other than CLAs are those concluded on the basis of the Act on the Settlement of Collective Disputes (Articles 9 and 14). Other examples are agreements between the employer and workplace trade union organisations on collective redundancies and agreements on rules for remote work.

1.3.3. Entities bound by a CLA

In accordance with Article 239 § 1 LC, a CLA specifies

1) the conditions to which the content of the labour relations of the employees covered by the CLA must conform; and
2) the mutual obligations of the parties to the agreement, including the application of the agreement and compliance with its provisions.

On the basis of the provision in question, it can be concluded that a CLA binds:

1) the contracting parties themselves; and
2) the employees, for whom the CLA may create new rights and obligations.

In addition, the CLA may extend its scope to

1) pensioners and retired workers (Article 239 § 2 LC) and
2) persons performing paid work on a basis other than the employment contract as well as their organisations (Article 21[3] Trade Unions Act).

The parties to a collective agreement are:

1) in the case of multi-company CLAs: the supra-company trade union organisation and the employers' organisation (Article 241^{14} § 1 LC);
2) for company-level CLAs: the employer and the company trade union organisation (Article 241^{23} LC).

1.3.4. The relationship between company-level and multi-company CLAs

According to Article 241[26] § 1 of the LC, the provisions of a company CLA cannot be less favourable to employees than those of a multi-company CLA covering them. This provision creates a hierarchy of CLAs, meaning that the multi-company CLA is superior to the company CLA. According to the quoted section, a company level CLA must be at least equal to the terms and conditions of employment laid down in the multi-company CLA. This superiority applies only to the normative part of the two types of collective agreement under discussion.

Given that a collective agreement is a source of law under Article 9 LC, it might seem that the conclusion of a company CLA with worse working conditions than those resulting from the multi-

company CLA would trigger the principle of legal automaticity, replacing less favourable conditions with more favourable ones. However, the Supreme Court (ref. I PK 365/03) approached this issue differently, recognising that it is the duty of the parties of given CLA to adapt the content of the company CLA to the requirements of the multi-company CLA.

1.3.5. Is there a difference between members and non-members of contracting parties as regards the binding effect or the method of binding?

A collective agreement is concluded for all employees of employers covered by its provisions, unless the parties to the agreement decide otherwise (Article 239 of the Labour Code), and it also covers all newly recruited employees. The principle of concluding a collective agreement for all employees is in line with the principle in Article 7(1) of the Trade Unions Act, which states that trade unions represent all employees in the area of collective rights and interests, regardless of their membership. This principle may be restricted due to the need for special protection of a group of employees or persons employed in certain positions (which may result from the nature of their work and the particular harshness of the work performed). A collective agreement may also cover persons employed on a basis other than an employment relationship. These may include contractors, self-employed persons, agents, commissioners and contractors employed under civil law contracts. A collective agreement may also cover retired persons and pensioners.

As a general rule, therefore, CLAs should not discriminate between unionised and non-unionised workers in terms of working conditions, pay or rights and obligations arising from the employment relationship. Given the union's monopoly on representing workers in collective bargaining and in concluding CLAs, the union side has a legal obligation to represent all workers, regardless of their union status or attitude.

1.3.6. The Content of the Collective Labour Agreement and the Scope of Its Binding Force

The parties to a collective agreement have considerable freedom to regulate issues that are important to them.

A collective agreement can be divided into 2 basic and fundamental parts:

- The first part - normative - regulates the conditions that the employment relationship should meet. The provisions of this part are directly incorporated into the employment relationship (Article 241[13] LC). This part may regulate the principles of remuneration of employees, working hours, holidays, etc. This part of the CLA has a normative character. It is interpreted in the same way as a normative act (Art. 240 LC)[2]. It is also binding in the same way as statutory law. Until it is registered, a collective agreement is a contract, after which only part of its provisions acquire a normative character. This part of the CLA binds the employer and employees.

[2] Sobczyk 2023 ed. 6 / Gładoch

- The second part - obligatory - defines the mutual obligations of the parties to the agreement. This part may concern issues related to the dissemination of the content and interpretation of the collective agreement (Article 241(1) LC). This part has no normative character and is not a source of law. This part is contractual in nature. This part is binding on the parties to a CLA - employers and trade union organisations that are signatories to a CLA.
- In addition, a collective agreement may contain provisions on issues other than working conditions and pay. Usually this part is called the social part and defines issues related to social benefits, such as: the totality of social and welfare entitlements of employees and their families, including, for example, the amount of the deduction for the company's social fund, the rules for admitting employees to work, preferences in terms of priority of employment, death benefits, the powers of the crew's representative bodies[3].

At the same time, it should be remembered that the binding effect of the CLA, in terms of its impact on the content of employment relationships, also depends on the favourability of the solutions introduced in the content of the CLA. In fact, the date of application of the legally active CLA depends on the positive or negative impact of the implemented provisions on the situation of the employees. According to Article 241[13] LC:

- the more favourable provisions of the CLA replace by virtue of law, from the date of its entry into force, the terms and conditions of the employment contract or of any other act constituting the basis of the employment relationship (§ 1);
- the provisions of the CLA that are less favourable to the employees shall be implemented by terminating the existing terms and conditions of the employment contracts or other acts constituting the basis for the establishment of the employment relationship with the employees (§ 2). This must be done on an individual basis for each employee covered by the CLA.

1.3.7. Is there a after-effect of CLA?

According to Article 241[7] § 1 LC, the CLA is terminated by agreement of the parties, at the end of the period for which it was concluded or by its notice of termination by one of the parties. The terminated CLA must then be removed from the Register of CLAs.

Pursuant to Article 241[11] § 5[5] LC, the terms and conditions of employment contracts or other acts which constitute the basis for the establishment of the employment relationship resulting from an CLA deleted from the Register of CLAs remain in force until the expiry of the notice period of these terms and conditions.

As explained by the Supreme Court in its ruling of 21 May 2018 (ref. I PK 50/17), the terms and conditions of employment resulting from a CLA that has been deleted from the Register remain in force until the expiry of the notice period for such terms and conditions. It is important to note that

[3] I. Sierocka [in:] Komentarz do niektórych przepisów ustawy - Kodeks pracy [in:] Zbiorowe prawo zatrudnienia. Komentarz, Warsaw 2019, art. 240.

the loss of validity of a CLA does not automatically affect the content of individual terms and conditions of employment, since a change in the content of an employment contract requires the conclusion of an agreement between the parties or the employer's notice of change[4]. Thus, according to the Supreme Court, there may be a situation in which - despite the removal of the agreement from the Register - the provisions of a CLA continue to determine the content of the employment relationship. In this sense, a CLA agreement will continue to apply to employees who were covered by its provisions despite its cancellation, while new employees will no longer be covered by the cancelled agreement.

Moreover, in the event of the transfer of an undertaking to a new employer, a CLA to which the transferred employees were previously subject must be applied by the new employer. Indeed, according to Article 241[8] of the LC, for a period of one year from the date of the transfer of the undertaking or part thereof to the new employer, the provisions of the CLA by which the employees were covered prior to the transfer shall apply to such employees. In the meantime, after the expiry of that year, the terms and conditions of the contract of employment or other legal act which constitutes the basis for the establishment of the employment relationship, resulting from the agreement, shall continue to apply to individual employees until the expiry of the period of notice for the termination of those terms and conditions.

1.3.8. Invalidity of a CLA

Firstly, the provisions contained in collective agreements, other accords based on the statue, regulations and statutes cannot be less favourable to the employee than the provisions of the Labour Code or other relevant statutes and ordinances, otherwise they are null and void by virtue of law, and the relevant provisions of statutes or ordinances take their place (Article 9 § 2 and 3 LC).[5].

Secondly, according to Article 9(4) of the Labour Code, the provisions of CLAs and other accords based on the statue, regulations and statutes which define the rights and obligations of the parties to the employment relationship and which violate the principle of equal treatment in employment are automatically ineffective.

Thirdly, it should be noted that the Supreme Court, in its decision of 23 May 2001 (ref. III ZP 17/00), ruled that the judicial route for determining the invalidity of a company collective agreement after its registration is not permissible.

Fourthly, it is important to note that a CLA may become effective no earlier than the moment of its registration and the registration of a CLA can be challenged by a third party. Pursuant to Article 241[11] § 5[1] LC, a person with a legal interest may, within 90 days of the date of registration of a cLA, lodge an appeal with the body that registered the agreement, claiming that given CLA was concluded in breach of the rules on the conclusion of CLAs. Then, within 14 days of receiving the appeal, the registering body summons the parties to the CLA to submit the documents and explanations necessary to consider the appeal.

[4] J. Piątkowski [in:] Kodeks pracy. Komentarz. Volume II. Art. 94-304(5), ed. K. W. Baran, Warszawa 2022, art. 241(11).

[5] K. Rączka [in:] M. Gersdorf, M. Raczkowski, K. Rączka, Kodeks pracy. Komentarz, ed. III, Warsaw 2014, art. 9.

A CLA may be removed from the register in three situations

- if the parties to the agreement do not submit the documents and explanations within the specified time limit (not less than 30 days),
- if the parties to the agreement do not correct the irregularities related to the violation of the regulations on the conclusion of collective agreements within the set time limit (not shorter than 30 days),
- if the correction of such irregularities is impossible.

2. Extension of collective agreements by public authorities

2.1. Does a (public/semi-public) authority have the power to declare a collective labour agreement binding for a larger group than the members of the signatory parties?

Yes, the Minister of Labour has the power to extend or generalise a multi-company CLA to a larger group than the members of the signatory parties. However, since the amendment of the Labour Code in 1994, this provision has not been applied in practice. As such, consideration of this provision in what follows is limited to the doctrine.

2.2. Conditions of extension

According to Article 241[18] of the Labour Code, the Minister of Labour can, by means of an ordinance extend the application of a multi-company CLA, in its entirety or in part, on the condition that:

1. a joint request has been filed by the parties to a multi-company CLA to extend that CLA to another employer,
2. the employer to whom the CLA is to be extended is engaged in the same or similar economic activity as the employers covered by the CLA,
3. the employer is not covered by a multi-company CLA, or is covered only by a company CLA,
4. an important social interest necessitates the extension.

2.3. Procedure of extension and associated dilemmas

The extension procedure is initiated by the signatory parties acting together. They must file a joint request to the Minister of Labour. Importantly, these employers' and workers' organisations must have signed a multi-company CLA that they want to extend to yet another employer. Already at this point, the practical application of the provision is challenged by the lack of collective agreements of such scope that could be subject to extension[6]. It is worth noting, that this initiatory phase of the extension procedure might violate Article 2 of ILO Convention No. 98 on the application of the principles of the right to organize and collective bargaining, which provides that workers' and employers' organisations enjoy protection against any acts of interference by each other in their functioning. The action of one group of workers' and employers' organisations in seeking to extend – and thus impose – their CLA on another group might constitute such prohibited interference[7].

Once the request for extension has been submitted, the Minister of Labour must consult the project with the employer who is to be covered by the CLA (or that employer's organisation), as well as the unions that are present at that employer's workplace(s). These groups' opinions are no binding, what makes it feasible for the public authority to enforce the extension regardless of their will or engagement in the consultation process[8]. This aspect of the extension provision raises doubts in the legal literature. M. Skąpski has noted that "although the intended goal may be to standardize employment conditions" in a particular sector of the economy of territory "in order to prevent competition through social dumping", "[...] the mechanism might easily become a means for

[6] B. Mądrzycki, Ł. Pisarczyk, *Ekspertyza na temat aktualnej sytuacji oraz perspektyw rozwoju układów zbiorowych pracy w Polsce*, p. 13.

[7] K. Jaśkowski, in E. Maniewska, K. Jaśkowski, *Kodeks pracy. Komentarz aktualizowany*, LEX/el. 2023, art. 241(18).

[8] I. Sierocka, *Komentarz do niektórych przepisów ustawy - Kodeks pracy* in: *Zbiorowe prawo zatrudnienia. Komentarz*, Warszawa 2019, art. 241(18).

eliminating smaller or less prosperous entrepreneurs, unable to bear the burden of social obligations negotiated by dominant companies[9]".

Furthermore, power of extension by public ordinance may violate Article 3 of ILO Convention No. 87 on Freedom of Association and the Protection of the Rights to Organize, which guarantees workers' and employers' organisations the right to freely choose their activities without the interference of public authorities[10]. It might also violate Article 4 of ILO Convention No. 98, which lays down the general rule that negotiation with a view to the regulation of terms and conditions of employment by means of collective agreements must be voluntary. Extension seems all the more controversial in this regard if it concerns an employer and workers' organisations who have already negotiated and signed a single-employer CLA[11]. Finally, the workers' and employers' organisations discussed in this paragraph do not become signatory parties to the extended CLA. As such, the strictly contractual clauses of the extended agreement are not considered to apply to these groups[12].

The CLA can only be extended to an employer who satisfies the criteria listed above in points 2-4. Significantly, the requirement of engaging in economic activity limits the extension provision to registered entrepreneurs. In effect, the Minister of Labour could not extend a multi-company CLA to employers in the public sector who are subject to the rules of public financing[13].

Once formal criteria have been fulfilled, the Minister of Labour must decide whether an important social interest warrants extension of the CLA. Discretion in evaluating this general clause is left up to the public authority. An important social interest might involve maintaining social peace, equal treatment of employees performing similar work in similar or analogous conditions, or it might relate to economic factors[14]. It is argued in the literature that the public authority can use discretion in this regard to limit the scope of the collective agreement that is to be extended. As such, the minister might decide that important social interest only necessitates the extension of a part, as opposed to the entirety of the CLA[15].

2.4 The extension's binding effect

According to Article 241[18] § 4 LC, the extension is binding until the employer enters into another multi-company CLA. According to § 5, the signatory parties can jointly file to repeal the extended CLA in the same procedure as described above. Importantly, once the extended CLA enters into force by minister's ordinance its source is no longer the collective autonomy, but it becomes a source of generally applicable labour law[16]. Nevertheless, it has been argued in the literature that, because of the employer's financial situation, the workers' organisations and the employer may agree to suspend the extended CLA in whole or in part (in accordance with Articles 91 and 241[27] LC)[17].

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[9] M. Skąpski, *6.4. Elastyczność wynagrodzeń* in: *Ochronna funkcja prawa pracy w gospodarce rynkowej*, Kraków 2006 (translation from the Polish: M. Rozmysłowicz).

[10] K. Jaśkowski, in E. Maniewska, K. Jaśkowski, *Kodeks pracy. Komentarz aktualizowany*, LEX/el. 2023, art. 241(18).

[11] *Ibid*.

[12] L. Kaczyński, *Generalizacja układu zbiorowego pracy*, PiP 1998, nr 5, p. 3-16.

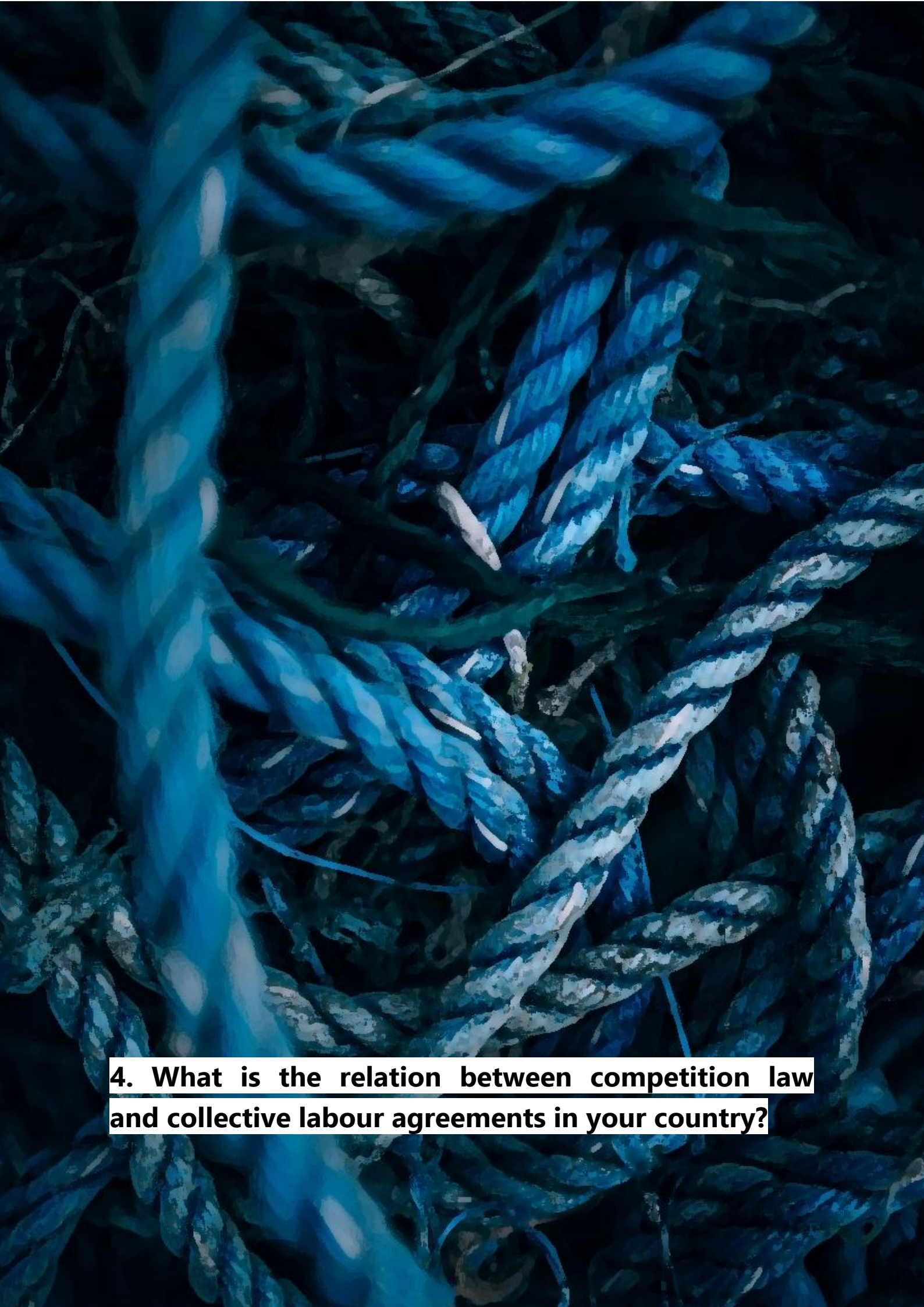
[13] J. Piątkowski, *Kodeks pracy. Komentarz. Tom II. Art. 94-304(5), wyd. VI*, red. K. W. Baran, Warszawa 2022, art. 241(18).

[14] L. Kaczyński, *Generalizacja układu zbiorowego pracy*, PiP 1998, nr 5, p. 3-16.

[15] *Ibid*.

[16] M. Skąpski, *6.4. Elastyczność wynagrodzeń* in: *Ochronna funkcja prawa pracy w gospodarce rynkowej*, Kraków 2006.

[17] K. Jaśkowski, in E. Maniewska, K. Jaśkowski, *Kodeks pracy. Komentarz aktualizowany*, LEX/el. 2023, art. 241(18).



4. What is the relation between competition law and collective labour agreements in your country?

4.1. General remarks

In Poland collective agreements are applicable to solo self-employed persons. As of January 1, 2019, workers hired on the basis of civil-law contracts as well as solo self-employed persons have the right to associate in trade unions, as well as the right to conclude collective agreements, among other collective rights. The problem of the interaction between competition law and the right of the solo self-employed to conclude CLAs has not yet been the subject of an explicit legislative response, nor has it been the subject of extensive consideration by Polish doctrine.

4.2. Solo self-employed persons and collective rights

The starting point for this important development was a 2015 judgement of the Constitutional Tribunal which extended coalition rights to workers, regardless of the basis of employment, thus fulfilling Poland's obligation to comply with ILO Convention no. 87[18]. This resulted in the 2018 amendment to the Trade Unions Act, which introduced in Article 1^1 (1) the notion of a "person engaged in gainful employment" (pl. *osoba wykonująca pracę zarobkową*), defined as:

- employee within the meaning of the Labour Code or as
- person performing paid work on a basis other than the employment contract, so long as they do not hire other persons for the performance of that work, regardless of the basis of employment, who have rights and interests related to the performance of work that can be represented and defended by a trade union.

In following, Article 2 (1) of Trade Unions Act grant the right to establish and join trade unions to any "person engaged in gainful employment". This amendment effectively allows solo self-employed persons to benefit from the collective labour rights provided for in the Trade Unions Act, so long as they do not employ others (they are solo self-employed) and if they share common rights and interests related to the performance of work with others in the same situation. This would undoubtedly include self-employed platform workers such as food delivery drivers. In recent years there have indeed been attempts by such groups to organise and bargain collectively with platforms[19].

4.1. Solo self-employed persons and collective bargaining agreements

The 2018 amendment to the Trade Unions Act also introduced Article 21 (3), which directly extends the provisions of Chapter 11 of Labour Code regulations on CLAs to "persons engaged in gainful employment". As such, the rules on CLAs that we have described in this report apply directly to all workers, regardless of the basis of employment, including self-employed persons. Thus, in Poland solo self-employed persons are considered "person engaged in gainful employment" and in effect, they can conclude CLAs.

[18] Judgment of the Constitutional Tribunal of 2 June 2015, ref. K 1/13.

[19] In Autumn 2022, delivery drivers for the platform owned by Pyszne.pl, a Polish subsidiary of Just Eat Takeaway.com created a trade union and presented demands on work conditions to the platform owner. For more, see (in Polish): https://www.pulshr.pl/zwiazki-zawodowe/pierwszy-zwiazek-zawodowy-powstal-w-pyszne-pl-to-przetarcie-szlakow,93777.html

4.3. Legal dilemmas

While the broad application of collective rights to workers regardless of the basis of their employment and solo self-employed seems generally commendable, it also raises many doubts. Most importantly, besides the instruction to apply provisions of the Labour Code appropriately, no other legal instruments have been put in place that would account for the specific situation of non-employee workers, and which would ensure they can actually benefit from collective bargaining[20]. Further, there is no certainty as to how to apply the rules on CLAs, or on what basis the CLAs would be binding for workers who are not employees within the meaning of the Labour Code[21]. Concerns have been voiced, for example, that a CLA concluded by workers who are not employees would not be considered a source of law in the sense of collective autonomy, but as an element of contract law[22]. The legal basis that would make collective agreements binding for these workers would in effect be the Civil Code, rather than the Labour Code and ILO instruments on collective agreements.

4.4. Tensions between collective labour law and competition law

The conferral of collective bargaining rights on the solo self-employed, who are formally entrepreneurs, ignites tensions between collective labour law and competition law. If self-employed entrepreneurs reach an agreement that includes, for example, the rates at which their services are to be provided, their collective bargaining may in fact violate the prohibition of collective practices restricting competition. Article 101 of the Treaty on the Functioning of the EU (TFEU) prohibits agreements between undertakings that restrict competition. In a 2014 judgement the Court of Justice of the EU (CJEU) considered this tension and ruled that only the "false self-employed" have the right to bargain collectively[23]. As such, the broad scope of persons who can benefit from collective bargaining in accordance with Polish law would stand in contrast to the CJEU's more narrow view on the issue.

In September 2022, the European Commission took account of this problem and published guidelines on applying EU competition law to collective agreements regarding the working conditions of solo self-employed persons[24]. The guidelines clarify that EU competition law does not apply to the collective agreements of solo self-employed persons who are in a situation comparable to workers, i.e. when they:

- provide services exclusively or predominantly to a single undertaking,
- perform the same or similar work with workers of the same undertaking, or
- provide their services through a digital labour platform, such as a website or an app organising work carried out by individuals.

[20] Z. Hajn, *Collective Agreements in Poland in the Light of International Labour Standards*, in: Studia z Zakresu Prawa Pracy i Polityki Społecznej 4:377-385. p. 382.

[21] *Ibid.*, p. 383.

[22] B. Mądrzycki, Ł. Pisarczyk, *Ekspertyza na temat aktualnej sytuacji oraz perspektyw rozwoju układów zbiorowych pracy w Polsce*, p. 43.

[23] Judgment of the CJEU of 4 December 2014, C-413/13, FNV Kunsten Informatieen Media v. Staat der Nederlanden.

[24] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022XC0930%2802%29

The European Commission also specified in the guidelines that it will not enforce EU competition rules against CLAs made by solo self-employed who are in a weak negotiating position, for example when there is an imbalance in bargaining power in negotiations with economically stronger companies or when they bargain collectively following national or EU legislation. As far as Polish legislation is concerned, neither the Trade Unions Act nor the Competition and Consumer Protection Act or the Unfair Competition Act contain any anti-competition provisions relating to collective bargaining by the solo self-employed. It remains to be seen how these various problems will play out in practice.

4.5. Directive 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union[25]

Due to its likely great impact on labour law system in Poland, in this section we additionally consider the adoption of the Directive on adequate minimum wages in the European Union.

The Directive on Adequate Minimum Wages in the European Union (hereinafter: "the Directive"), which entered into force on November 14, 2022, aims to ensure fair minimum wages and strengthen collective bargaining across the EU. Towards this end, it obliges Member States to increase "collective bargaining coverage" and facilitate the exercise of the right to collective bargaining on wage-setting by applying appropriate legal instruments by November 15, 2024. Point 5 of the terms defined in Article 3 of the Directive explains that "collective bargaining coverage" means the share of workers at national level to whom a CLA applies, calculated as the ratio of the number of workers covered by CLAs to the number of workers whose working conditions may be regulated by CLAs in accordance with national law and practice.

4.6. Collective bargaining coverage at the 80% threshold

Importantly for countries like Poland, Article 4 (2) provides that each Member State in which the collective bargaining coverage rate is below the threshold of 80 % needs to provide for a framework of enabling conditions for collective bargaining, either by law after consulting the social partners or by agreement with them. Furthermore, Member States that fall into this category must also establish an action plan to promote collective bargaining. The action plan must be consulted with social partners and it must set out a clear timeline, with concrete measures to progressively increase the rate of collective bargaining coverage, in full respect for the autonomy of the social partners. The Member States will have to review and update their action plan regularly, also in consultation with social partners.

4.7. Towards increased collective bargaining coverage in Poland

Avenues for the development of collective bargaining coverage in Poland have been postulated in the legal literature. One notable proposal involves the integration of actual practices of social dialogue already taking place in the Polish setting with international regulations on collective bargaining.

As we have discussed in earlier parts of this report, in Poland, negotiations on working conditions between social partners lead to three types of agreements: collective agreements within the meaning of the Labour Code, collective accords based on the statue (*porozumienia zbiorowe oparte na ustawie*) and "other arrangements" that are not based on the law. The latter two forms are much less

[25] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022L2041

formalized, do not require registration and are not subject to the various rules described in this report. As such, these types of agreements or contracts between social partners are much more common and their number is far greater than the number of CLAs (although it should be noted, that their exact number is unknown since social partners do not have to report them and such agreements are not subject to registration).

The argument has been made by legal scholars, notably Z. Hajn, Ł. Pisarczyk and B. Mądrzycki, that all three of these types of treaties between social partners should be recognised as collective agreements within the meaning of international or EU law[26]. Such a broad understanding of the notion of collective agreement is confirmed in Article 3 (4) of the Directive as any written agreement regarding provisions on working conditions and terms of employment concluded by social partners.

Z. Hajn has additionally stressed that collective agreements (in the broader sense discussed here) must be concluded by representative trade unions[27]. This last element, the status of a representative trade union organisation is not necessary for the conclusion of a collective agreement or any other accord in the current legal setting in Poland. Z. Hajn argues nonetheless that it makes for a necessary distinction of the notion of collective agreement, since such is the fundamental understanding of the term in the ILO Collective Agreements Recommendation of 1951 (No. 91). Undoubtedly, recognizing the various types of treaties in practice between the social partners in Poland would serve to widen the scope of collective bargaining.

B. Mądrzycki and Ł. Pisarczyk argue in turn, that entry into force of the Directive will in fact make such recognition inevitable and that significant changes to the system of collective labour law in Poland can be expected in the coming years[28]. This sort of overhaul of the current system prompts questions about the future situation of smaller, independent trade unions that might not have the capacity to bargain collectively on a sector-wide level.

[26] Z. Hajn, *Collective Agreements in Poland in the Light of International Labour Standards*, in: Studia z Zakresu Prawa Pracy i Polityki Społecznej 4:377-385. p. 383, and B. Mądrzycki and Ł. Pisarczyk at no. 1, p. 54.

[27] *Ibid.*

[28] B. Mądrzycki, Ł. Pisarczyk, *Ekspertyza na temat aktualnej sytuacji oraz perspektyw rozwoju układów zbiorowych pracy w Polsce*, p. 6.

5. How does the system of collective labour agreements work in practice?

5.1. General remarks

In today's dynamic environment, it is undeniable that not only theory but also practice play a key role. This is particularly important in the context of collective bargaining and CLAs, where practical aspects determine the effectiveness of the phenomenon in question. Studying and understanding CLAs from a practical perspective allows not only to identify potential challenges, but also to develop effective adaptation strategies.

CLAs have not been very popular in Poland in recent decades. From a practical point of view, there has been a tendency to dissolve them rather than conclude them. In Poland, CLAs have not found many supporters on the labour market for many decades. In the light of these observations, analysing the factors that have contributed to the decline in the popularity of CLAs becomes an important research issue. The question should be asked what is the actual position of CLAs in Poland and what are the causes of the current crisis.

5.2. A statistical portrait of collective bargaining in Poland

The statistics best reflect the weakening state of collective bargaining . For 2022, 174 multi-company CLAs have been registered under the current legal procedure. As for the dynamics of the conclusion of multi-company CLAs, after 2014, activity in this area basically stopped (in 2014, the last two company agreements were registered)[29]. A large number of CLAs have recently been terminated. There are also those cases where trade union does not exist anymore and CLAs concluded before can be considered inactive.

76 multi-company CLAs concluded for different entities and with a very diverse subjective coverage can be considered valid ("active")[30]. These agreements cover only approximately 2 619 employers (these figures are considered to be overestimated) and approximately 196 000 employees[31]. Taking into account the research conducted by Business Insider, we can conclude that there are about 15 million people working in Poland[32] , so it can be concluded that only about 1.3 % of them are covered by multi-company CLAs.

The specific nature of the CLAs involved is also characteristic[33]. They are most often concluded by local government bodies, e.g. for school employees who are not teachers and have the status of local government employees. They are also concluded by competent ministers for employees of the lignite mining and aviation and defense industries.

[29]Ł. Pisarczyk, B. Mądrzycki, *Expert opinion on the current situation and prospects for the development of collective labor agreements in Poland*, 2022, p. 15.

[30]Ibidem.

[31]Ibidem, p. 16.

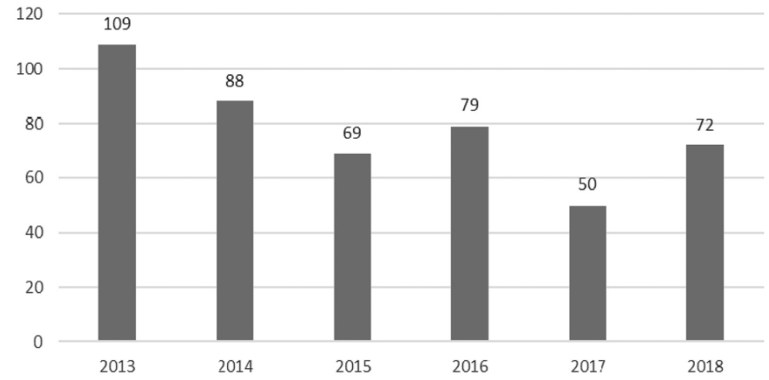
[32]Businessinsider,https://businessinsider.com.pl/gospodarka/ile-osob-pracuje-w-polsce-oto-najwazniej-statystyki/pkm62wp , accessed on 02/01/2024.

[33]Ł. Pisarczyk, B. Mądrzycki, *Expert opinion on the current situation and prospects for the development of collective labor agreements in Poland*, 2022, p. 16.

As far as company CLAs are concerned, more than 14 000 agreements were registered between 1995 and 2019[34]. The trend (although there are exceptions) is to reduce both the number of agreements concluded in particular years and the number of employees covered by these agreements.

Looking at the data for some years, one might have expected a revival in the practice of agreements, but this was not confirmed in subsequent periods. For example, in 2015, 69 CLAs were concluded covering 105 046 employees. In 2016, however, 79 CLAs were concluded, but they covered only 38 227 employees, and in the following years, 2017 and 2018, there were 50 and 72 registered CLAs, respectively, with less than 30 000 employees covered.

Figure 1. Number of registered collective labor agreements in particular years.



Source: Ł. Pisarczyk, J. Rumian, K. Wieczorek "Company collective agreements - hope for social dialogue?"

Since then, the number of CLAs has fallen. According to the data for the first half of 2020, the number of people covered by company CLAs in the whole country was estimated at 1 621 251[35]. Research has shown that in the first half of 2020 only 12.5% of all employees employed in Poland were covered by the provisions of company collective labor agreements. For all people performing paid work, the percentage will be even lower[36].

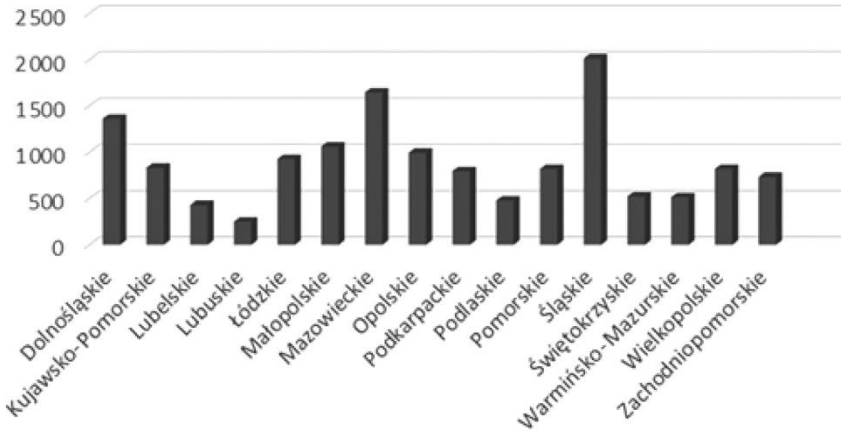
[34]Ibidem, p. 17.

[35]Ibidem, p. 19.

[36]Ł. Pisarczyk, J. Rumianek, K. Wieczorek, *Company collective agreements - hope for social dialogue*, "Praca i Zabezpieczenie Społeczne" 2021/6, p.10.

As regardsthe geographical distribution of CLAs concluded in 2017-2021, the current trends continue. Most CLAs are registered in Katowice and Warsaw. In some voivodeships (Podlaskie, Świętokrzyskie, Warmian-Masurian, and even Lodzkie) there were years (even before the outbreak of pandemic) when no CLA was registered[37].

Figure 2. Number of registered collective bargaining agreements by voivodeship.



Source: Ł. Pisarczyk, J. Rumian, K. Wieczorek "Company collective agreements - hope for social dialogue?"

As far as the subjective scope of CLAs is concerned, the agreements retain their employee nature with a possible extension to former employees (pensioners and retired employees) and family members. In particular, some CLAs provide for priority in employment for family members of an employee who died as a result of an accident at work[38].

The most systemic activity was in industrial processing, water supply, sewerage and waste management, energy, gas and steam production and supply, and transport and storage. Company CLAs also cover a large number of employees in finance and insurance. There is little systematic activity in commerce, culture, sport and recreation (hotels and restaurants). It should be noted that there is no major systemic activity in the broadly defined education sector, where union representation is quite strong. As a rule, CLAs are not concluded in public administration[39].

The analysis of the CLAs concluded in the period 2013-2022 shows that these were mainly agreements concluded by State Treasury companies, including entities belonging to capital groups. Agreements were also concluded by research institutes, entities providing municipal services and cooperatives (including housing cooperatives)[40].

[37]Ł. Pisarczyk, B. Mądrzycki, *Expert opinion on the current situation and prospects for the development of collective labor agreements in Poland*, 2022, p. 19.
[38]Ibidem.
[39]Ibidem, p. 20.
[40]Ibidem, p. 21.

In fact, there are no CLAs for small and medium-sized employers. Only for the larger ones. They are more likely to be signed by employees than by people working on the basis of another employment relationship. The vast majority of company CLAs are concluded for an indefinite period[41].

It is important to note that there are a large number of other agreements that are not strictly CLAs, but there are no statistics on their number. The fact that an agreement exists only becomes apparent in the course of proceedings, particularly when an employee claims some rights under such an agreement.

5.3. The main shortcomings of the national collective bargaining system

5.3.1. Popularity where systemic regulation already existed

When analysing the decline in interest in concluding CLAs, one should start with the origins of the units in which such an agreement would be concluded. CLAs are most popular in units where collective agreements already existed (e.g. before privatisation). The existence of a CLA is then perceived as a traditional and permanent element of the functioning of the organisation. A rare phenomenon, however, is the conclusion of CLAs in units that were created from scratch or as a result of the entry of foreign units into the Polish market that did not participate in the privatisation processes of the 1990s[42].

5.3.2. Insufficient culture of social dialogue

Another problem is the lack of a culture of dialogue and negotiation, which presupposes the need to make concessions and seek compromises, whereas the reality of collective relations is characterised by a focus on one's own (particular) interests and a desire for confrontation. The essence of negotiating a CLA is that the participants jointly consider the issues that interest them in order to define the conditions that should be met by the content of the employment relationship and the mutual obligations of its parties. Therefore, the conclusion of a collective agreement requires the unanimous will of the parties.

It should be remembered that Poland has a relatively short tradition of shaping industrial relations through genuine and responsible collective bargaining. According to the relevant provision, negotiations on collective agreements should be conducted in good faith and with respect for the legitimate interests of the other party. Of course, negotiating in good faith does not mean that each of the social partners gives up or unjustifiably restricts its own interests, but it does mean seeking a compromise. "Respecting the legitimate interests of the other party" means taking into account not only the interests of the trade unions or, for example, employers' organisations as parties to the agreement, but also the interests of the workers' side, represented by the trade unions, and the interests of the employers' side, represented in particular by the employers' organisation[43].

In most cases, attempts to establish CLA do not reach the stage of formalised negotiations.

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[41]Ibidem, p. 17.

[42]Ibidem, p. 21.

[43]K. Rączka "*Negotiating collective labor agreements*" [in:] Z. Hajn , D. Skupień, The future of labor law. On the 50th anniversary of Prof.'s scientific work M. Seweryńskiego, Łódź 2015, p. 499.

The lack of appropriate units and structures specialising in the issues surrounding CLAs means that trade unions are not involved in negotiations. In many cases, union bodies do not feel strong enough to take collective bargaining initiatives.

5.3.3. Fear of the employer losing competitiveness on the market

Another problem is the employer's fear of losing competitiveness on the market. The consequence of being covered by a multi-company CLA would be a stiffening of the situation and a reduction in the competitiveness of the enterprise. Employers want to be able to maintain various strategies for shaping employment conditions and various social policies. No employer wants to be limited by another. Although multi-company CLAs involving employers' organisations are characterised by a relatively high degree of universality, there is still a fear of standardisation.

5.3.4. The current shape of the registration procedure

The current form of the registration procedure has often been one of the reasons for the reluctance to negotiate CLA. There have been cases where registration has been refused on formal grounds, wasting months of negotiation. The fear of the CLA being challenged is so great that the parties are afraid to take action to establish a collective agreement. The allegations also concern the waiting time for registration. Registration takes place within three months - in the case of a multi-company CLAs, one month - in the case of an company collective labor agreements - from the date of submission of an application in this matter by one of the parties to the CLA[44].

5.3.5. Alternative possibilities

In most cases, the Labor Code provides for alternative modes of introducing specific solutions - through other collective labour accords, regulations, and even in an employment contract.

When CLAs and regulations are drafted at the same time, a specific relationship is often created. They often regulate the same subject matter. In a way, the regulations complement the content of the CLA by specifying its content. This makes a CLA less necessary.

Employers are primarily concerned with making profits and implementing solutions to develop their business. They believe that most objectives in the area of employment can be achieved through other autonomous sources of labour law (other agreements, regulations) and even through unspecified acts, which allow much faster action than in the case of collective bargaining.

They care not only about speed, but also about efficiency, which is why they choose collective acts of a fragmentary and dispersed nature, which is often a significant advantage for social partners - they can negotiate in certain areas without the need to open comprehensive negotiations.

Particularly in small companies, which account for a significant proportion of the Polish economy, working and pay conditions are governed by regulations, the form of which is almost exclusively determined by the employer[45].

[44] I. Sierocka, *Collective labor agreements*, Białystok 1996, p. 32.

[45] R. Terlecki, N. Szok, *Labor law in practice*, Warsaw 2023, p. 9.

5.3.6. Include the minimum level of protection adopted in the Labor Code

It should also be added that such CLAs do not compete with labour law. Some of the provisions contained in CLAs are characterised by a high degree of repetition of statutory provisions. As a result, the employee cannot be sure whether the terms and conditions of employment are informative or whether the employer is simply repeating the provisions of the law, which significantly reduces the willingness to conclude such a collective agreement.

It has been noted in the literature that the activity of social partners is limited to concluding additional protocols, or withdrawing agreements. The current situation leads to the domination of the statutory method and the increase in the importance of the employment contract, which does not guarantee balance between the parties[46]. Unfortunately, this leads to the weakening of democratic mechanisms. CLAs must cover this minimum level of protection, but it is up to them whether they also cover the standard level.

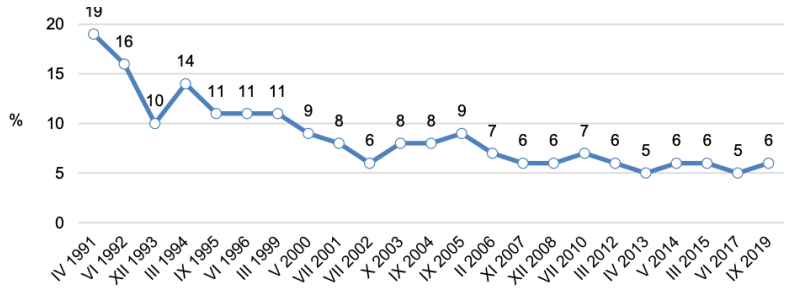
5.3.7. Union monopoly

There is also a trade union monopoly in Poland, which means that only a trade union can represent workers in collective bargaining and be a party to a CLA. It cannot be another organisation representing employees, e.g. an association. It must be a trade union at the appropriate level, e.g. the company CLA is concluded by the company trade union.

If the employees for whom an CLA is to be concluded are represented by more than one trade union organization, negotiations may be conducted by each organization or by their joint representation. This representation is determined by the statutory bodies of individual trade union organizations by concluding an agreement on this matter. Trade union organizations that do not join negotiations within the prescribed period lose the right to participate in them. Negotiations may be initiated and conducted only if at least one representative trade union organization has joined them. To conclude A CLA, a unanimous position of all representative trade union organizations participating in the negotiations is necessary. The CLA is concluded when it is signed by authorized trade union organizations: all representative company organizations participating in the negotiations[47].

The rate of unionisation in Poland is low, making collective bargaining impossible in some workplaces. It is worth noting that in 1991 almost one in five adults (19%) were members of a trade union. Over the

Figure 3. Declared membership in trade unions according to research dates.



Source: Public Opinion Research Center – „Trade unions in Poland"

[46] Ł. Pisarczyk, *The crisis of the systemic method. Legal issues*, "Work and Social Security ", Warsaw 2017, no. 7, pp. 2-10.

[47] K. Jaśkowski, E. Maniewska, *Labor Code. Comment*, Warsaw 2023r, p. 1326.

next few years, this figure fell by almost half, and in the 21st century the percentage of people belonging to this type of organisation did not exceed 9%[48].

5.4. Concluding remarks

Collective agreements cover a relatively small number of workers. The weakening position of CLAs raises questions about the causes of the crisis. If we want to increase the attractiveness of CLAs and encourage employers to conclude them, we should move towards making these legal acts more flexible. They should allow employers and trade unions to regulate workers' terms and conditions of employment differently from what is laid down in the statutory law, by adapting them to the specific nature and current needs of the workplace. The idea is that by giving employees more in one area, you can take something away in another. So that both sides can see the benefits. Within the limits clearly set by the law, of course. Otherwise, employers will not enter into agreements and cannot be effectively forced to do so.

[48] Fundacja Centrum Badania Opinii Społecznej, *Trade unions in Poland*, Warsaw 2019, p. 2.

6. Characterization of the system of collective labour agreements in Poland

6.1. The freedom of parties to contract

In the first section of this report, the parties to CLAs are fully described. However, it should be remembered that only the specific legal entities can enter into CLAs. Moreover, the freedom of the parties to contract is based on the contractual nature of CLAs. This contractual nature manifests in two aspects:

1) he requirement for all parties to agree on all terms - typical of a wide range of contracts;
2) the freedom of the parties to conclude an agreement - in the case of CLAs, this means that the initiator is obliged to inform each trade union representing the employees for whom the agreement is to be concluded of its intention to conclude the CLA. This information must be given at least thirty days before the start of negotiations. In this way, all interested unions have the opportunity to enter into the agreement..

However, this freedom is not unlimited. Pursuant to Article 241^2 § 3 LC, the party with the right to conclude a CLA shall not refuse the other party's request to negotiate:

1) to conclude a CLA for employees not covered by the agreement
2) to amend the CLA if this is justified by a significant change in the economic or financial situation of the employers or a deterioration in the material situation of the employees;
3) if the request is made no earlier than 60 days before the expiry of the period for which the CLA was concluded or after the date of termination of the agreement.

The freedom of the parties is subject to three types of restrictions:

- on form of CLA;
- regarding content of CLA and
- regarding registration of CLA.

There are also relevant principles relating to the behaviour of the parties during negotiations.

The form of a CLA is not a matter of discretion. This issue is regulated by Article 241[5] LC. First of all, it is important to note that all CLAs must be concluded in writing. This principle also applies to the parties' declaration on the termination of the agreement. In addition, every CLA must specify the domicile of the parties and the terms of the agreement. A CLA may also be concluded for an indefinite period of time. In addition, before the CLA expires, the parties may amend its terms - extend its duration or decide to make it an open-ended CLA.

Another aspect of CLAs that is not entirely discretionary is their content[49]. The content of a CLA can be divided into two parts - mandatory and optional. Mandatory content includes the normative and obligatory parts described in the first part of our report. Optional content generally concerns the social part of a CLA.

[49] J. Stelina, Specyficzne źródła prawa pracy [in:] Prawo Pracy, red. J. Stelina, ed. 6, Warsaw 2023, p. 72-73.

The last of the above restrictions relates to registration, which is a prerequisite for a CLA to enter into force[50]. An unregistered CLA is not legally binding and has no legal effect. Registration is carried out by the Minister of Labour (for multi-company agreements) or the district labour inspector (for company level agreements). The registering authority checks that the CLA complies with the law and the procedure for its conclusion. There are two types of defects in CLAs: defects related to the terms and defects related to the procedure. If the terms of the agreement are incorrect, the registering authority registers the agreement without these terms (only if the parties agree) or obliges the parties to amend the terms within 14 days. The parties may also challenge the decision of the registering authority in court. In addition, the Labour Code provides for the possibility of contesting an agreement by anyone who has a legal interest in it. In the event of an error in the procedure for concluding a CLA, the registering authority obliges the parties to eliminate the error, if possible. The registering authority then decides on the deletion of a CLA from the register. In its decision of 23 May 2001 (ref. III ZP 17/00), the Supreme Court ruled that there is no possibility of judicial nullity of a registered CLA[51].

At this point, it is important to mention that even after the registration of a CLA, the principle of interpretation by the parties to the CLA remains in force (Article 241[6] LC). Therefore, in the event of any doubt as to the manner of interpretation of particular clauses of a CLA, the parties will be able to settle the interpretation of the disputed clauses on their own[52]. Furthermore, during negotiations the parties must observe the principles mentioned in Article 241[3] § 1 LC. According to this provision, the parties must negotiate in good faith, in particular by"

1) taking into account trade union demands that are justified by the employer's economic situation;
2) avoiding demands that clearly exceed the financial possibilities of the employers;
3) respecting the interests of employees not covered by the agreement.

6.2. The place of CLAs in labour law and the relations between the CLAs and statutory law

At the beginning of this section it is necessary to present the historical aspects of CLAs in Poland.

Polish collective bargaining institutions are objectively new and there is no long tradition of collective labour law in Poland. Before the First World War in Poland, the practice of concluding CLAs was not so rare. However, there were no regulations dedicated to CLAs and their functioning was based on general provisions of the Civil Code, which were not suitable. After 1945, due to the historical situation of Poland, there was no possibility to develop the idea of CLAs based on such aspects as consent of the parties and respect for employees' interests[53]. There were sectoral CLAs for almost every industry, but they were insignificant. Poland's nationalised system meant that the state was the main employer in every industry. CLAs were either not challenged or their provisions were extremely unfavourable to

[50] Ibidem, p. 73-74.

[51] T. Kuczyński, Glosa do uchwały SN z dnia 23 maja 2001 r., III ZP 17/00, OSP 2002, nr 10, p. 131.

I. Sierocka, Glosa do postanowienia SN z dnia 8 lipca 2015 r., I PK 250/14, OSP 2018, nr 5, p. 52.

[52] P. Pieczonka, Zasady wykładni porozumień zbiorowych w rozumieniu art.9 Kodeksu pracy oraz innych porozumień prawa pracy, Studia Iuridica Toruniensia, Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika w Toruniu, vol. 31, 2022

[53] Ł. Pisarczyk, *4.2. OKRES MIĘDZYWOJENNY (LATA 1918–1939)* [w:] *System Prawa Pracy. Tom XIV. Historia polskiego prawa pracy*, R. *Babińska-Górecka i in., Warsaw 2021.*

workers. As a result, CLAs began to emerge after 1989, when the communist system collapsed and Poles became more independent and had a real influence on the legal institutions and functioning of Poland. Before that, despite the end of the Second World War, communist ideas dominated the country and it was not possible to create legal bases and well-functioning CLAs[54]. Most sources of employment were controlled by the state authorities. CLAs refer to agreements between employers and employees. There was no place for agreement, focus on the workers' situation or the will to ensure social peace in the communist reality where the country had the possibility to dictate all the conditions of employment.

Today, after all the historical changes in Poland, collective agreements are explicitly regulated by the Labour Code as a generally applicable source of labour law[55]. Furthermore, detailed provisions on collective agreements are contained in Chapter Eleven of the Labour Code..

The place of CLAs in the hierarchy of sources of law is set out in Article 9 of the LC. The sources of labour law in Poland are:

1) statutory acts: the Labour code and relevant statues;
2) implementing acts,
3) CLAs and other collective accords based on the statue,
4) regulations and statutes specifying employers and employees' rights and obligations.

The sources mentioned are presented in a hierarchical order. Provisions of collective agreements and other collective agreements, regulations and statutes may not be less favourable for employees than provisions of statutory and implementing acts. In addition, provisions of regulations and statutes may not be less favourable for employees than provisions of CLAs and other collective accords. In addition, Article 9 § 4 LC emphasises the principle of equal treatment in labour law, as provisions of CLAs, other accords, regulations and statutes that contradict the principle of equal treatment are invalid.

There are doubts as to the real meaning of Article 9 LC. There are two schools of thought on the interpretation of less favourable provisions of CLAs or other hierarchically subordinate acts. The first view is that no clause can be less favourable than the provisions of the Code. The second opinion is that the collective agreement as a whole cannot be less favourable, regardless of individual clauses[56]. It seems that the Labour Code does not provide a clear answer. On the other hand, many lawyers argue that such a solution is a deliberate action of the legislator and ensures appropriate flexibility of the term[57]. Due to the vagueness of the wording, it is necessary not only to thoroughly analyse each individual case, but also to consider how specific terms determine the employee's situation.

With this in mind, it is worth considering the relationship between the CLA and the employer-employee contracts. According to Article 18 LC, the more favourable provisions of the CLA automatically replace the less favourable provisions of the employer-employee contracts. On the other

[54] Ł. Pisarczyk, 4.3. OKRES POWOJENNY I PRL (LATA 1945–1989) [in:] *System Prawa Pracy*. Tom XIV. Historia polskiego prawa pracy, R. Babińska-Górecka i in., Warsaw 2021.

[55] Ł. Pisarczyk, *Autonomiczne Źródła prawa pracy*, Warszawa 2022, p. 46.

[56] Supreme Court resolution of 15.09.2004 (ref. III PZP 3/04).

[57] Z. Ziembiński, *Logika Praktyczna*, Warsaw 1998.

hand, it is possible to include in the CLA provisions that are less favourable than the provisions of the employer-employee contract. In this case, it is necessary to amend the employer-employee contract by subsequent agreement between the employee and the employer or through termination of working conditions by an employer (Article 241[13] LC). Moreover, termination, notice or expiration of a CLA does not mean that the employer will be relieved of the obligation to apply such CLA. The terms and conditions of employment under such a CLA remain in force and binding on the employer in respect of existing employees, and the employer who wishes to be released from the application of those terms and conditions will have to terminate them individually with respect to each employee or unilaterally impose more favourable terms and conditions.

6.3. The autonomy of the social partners

The idea behind CLAs in Polish labour law was to give the social partners as much autonomy as possible, since the autonomy of the parties provides the greatest certainty of regulating conditions of real significance to the problem, as these provisions would be formulated by people who would be directly affected by them. Therefore, it gives the social partners a relatively wide autonomy in drawing up CLAs, i.e. freedom of contract, regulation of labour matters and mutual relations between the social partners. Nevertheless, the Labour Code contains provisions that restrict this freedom to a certain extent.

Article 240 § 1 LC lists the general matters that can be regulated in the content of a CLA, including the conditions of employment and the mutual obligations of the parties with regard to the application of the agreement and compliance with its provisions. However, it also specifies certain restrictions. Firstly, Article 240 § 2 LC states that the parties are free to regulate other matters in addition to those mentioned in the first paragraph, as long as they are not regulated by strictly binding labour law provisions. Secondly, Article 240 §3 LC states that a CLA may not violate the laws of third parties.

Further, art. 241[2] § 3 LC identifies cases when it is forbidden to refuse to collectively bargain. According to that provision, the party entitled to conclude an CLA may not refuse the other party's request to enter into negotiations:

1) to conclude an agreement for employees not covered by the agreement;
2) for the purpose of amending the agreement justified by a significant change in the economic or financial situation of the employers or a deterioration in the material situation of the employees;
3) if the request is made no earlier than 60 days before the expiry of the period for which the agreement was concluded or after the date of termination of the agreement.

The parties are also obliged, on the basis of Article 241 [3] LC, to negotiate with respect and good faith towards the legitimate interests of the other party. Each party is obliged to conduct negotiations in good faith and with respect for the legitimate interests of the other party. This means in particular

1) taking into account the demands of the trade unions which are justified by the economic situation of the employers;

2) refraining from making demands that are clearly beyond the financial capacity of the employers;

3) respecting the interests of employees not covered by the agreement.

When it comes to the bargaining process, the Labour Code sets out a number of restrictions and obligations on the information provided by the parties. Article 241 [4] §1 of the LC imposes an obligation on employers to provide the union representative with information about their economic situation that is relevant to the negotiation process. The second paragraph of the same article prohibits trade union representatives from disclosing information that is considered a trade secret.

The Labour Code recognises the autonomy of the social partners in collective bargaining with regard to CLAs. This is also reflected in Article 241[3] § 2 of the LC, according to which the parties to an agreement may even establish a procedure for settling disputes relating to the subject matter of the negotiations or other contentious issues that may arise during negotiations on CLAs. In this case, the provisions on the settlement of industrial disputes do not apply, unless the parties agree to apply them to a certain extent. In other words, the social partners have the option of adopting their own autonomous procedure for resolving disputes relating to CLAs.

It's also important to note that while autonomy is the distinguishing feature of trade unions and the collective bargaining model in Poland, at the same time the Polish labour law system does not provide for any kind of mechanism to verify whether social partner organisations are autonomous or not. This particularly affects the trade union movement. Neither in the process of registering a trade union, nor in the process of negotiating a CLA, is it checked whether a given workers' representation is not controlled or instructed by an employer. As a result, a CLA concluded by a yellow trade union is not considered invalid in the current state of the Polish labour system.

In conclusion, the social partners have a relatively high degree of autonomy in the Polish legal system. The Labour Code gives them room for manoeuvre in the process of drawing up a CLA, in the belief that this will lead to better regulation of working conditions. The State focuses mainly on creating a legal framework for the activities of the social partners, leaving them room for autonomous action and intervening only to a limited extent in respect of collective rights and freedoms.

6.4. The place of the workers in the collective bargaining system: the free-rider problem and the concept of negative freedom

The individual freedom of the employee as an individual is protected in the Polish legal system. In the context of participation, the Polish system of collective labour law is based on the freedom of an employee to choose whether or not to join a trade union. Forced unionisation would undoubtedly contradict freedom of association, and the Polish model of the trade union movement is based on voluntarism and non-discrimination against non-unionists. However, the freedom to choose whether or not to participate in the trade union movement does not mean that a worker who remains outside the union is at the same time completely free from its influence on their employment situation.

This is because Article 7 sec. 1 of the Trade Unions Act establishes a principle of general representation, on the basis of which trade unions represent all workers in a given undertaking in terms of collective rights and interests, regardless of their trade union affiliation. Therefore, a trade union participating in

collective bargaining on a CLA should represent all workers of a given employer-to-be a party to a CLA - and should refrain from any attempts to favour its members in terms of negotiated working conditions. This is also directly confirmed by the provision of Article 3 sec. 1 of the Trade Unions Act, which prohibits unequal treatment of workers in employment because they are not members of a trade union. It is also important to note that under Article 9(4) LC, provisions of CLAs and other relevant autonomous labour laws that violate the principle of equal treatment in employment are simply not applicable.

In principle, a CLA is binding on all employees of the employer who has concluded the agreement. An employee has no influence on the binding nature of the agreement. The only way for an employee not to be bound by a particular CLA is to terminate the employment relationship with the employer or to try to change the content of the relationship by means of a modification agreement with the employer. An employee cannot invoke their negative freedom to remain outside the influence of a CLA concluded by the trade union movement. This is a consequence of the classification of CLAs as autonomous sources of law.

There are, of course, exceptions to this rule. The parties may exclude certain categories of employees in a CLA, but the Supreme Court sets a limit to this right, stating that the exclusion cannot lead to a violation of the principle of equal treatment in employment[58]. This violation would occur, for example, if a CLA would exclude employees on the grounds of age, gender, disability or trade union membership[59]. Exclusion is possible, for example, on the basis of a significantly specific type of position or the fact that a group of employees is already bound by another CLA.

When analysing the Polish labour law system, we come to the conclusion that labour law does not really encourage workers to be trade union members. The mere status of being an employee of a particular employer who has entered into a CBA is sufficient to confer certain rights or obligations under the employment relationship. The Polish legal system does not allow for any form of punishment or disadvantage for so-called "free riders" who, in the area of collective representation, fully benefit from trade union activities without having to bear any burdens or costs of these activities. The union represents all workers and carries the costs of this activity. This may be one of the many reasons for the decline in collective agreements in Poland.

[58] Verdict from 11.10.2005, ref. I PK 42/05.

[59] H. Tulwin [in:] Patulski, Orłowski, Komentarz dla menedżerów HR, p. 871.

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