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Social support packages in privatization

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A social support package, sometimes called a social pact, an agreement on social guarantees or an agreement on employee guarantees, and recently also a social contract is not a legal concept, i.e. it does not appear in any act of universally binding law. A social support package is a legal concept, used both in colloquial language as well as in jurisprudence and doctrinal circulation. The term “social packages” is applied to agreements concluded, in particular, by trade unions with an employer whose employees are represented by these unions, with a future employer of such employees or a so-called capital entity (investor). These agreements accompany the processes of organizational and ownership transformation of entrepreneurs, in particular – restructuring, commercialization and privatization of state enterprises and municipal companies¹. In Poland after 1989, due to political and economic changes, as well as privatization processes of state-owned and municipal enterprises, related to those changes, there appeared a need to conclude social support packages. It should be noted, however, that this type of social protection was not only created in connection with the privatization of enterprises (the so-called social contracts), but also concluded at the take-over of a non-privatized enterprise, as well

¹ B. Wagner, *Social package*, “Work and Social Security” 2006, no. 9, p. 1.

as without a takeover of the workplace – to stabilize employment conditions or enable restructuring of employers². Further considerations will concern social support packages related to restructuring, commercialization and privatization of state-owned enterprises, companies with State Treasury shareholding and municipal companies. There is no doubt about the huge role which is played by social support packages in practice. In these packages, a number of services important for employees of privatized enterprises are determined. Social packages are beneficial for employees who usually receive fixed-term employment guarantees and privatization bonuses. Such agreements often include guarantees of wage growth, maintenance of existing components of remuneration and benefits, and in addition to statutory regulations, they define rights in terms of working conditions, social protection, occupational health and safety, as well as employees' shareholding. As a rule, the level of protection of employees by trade unions also increases. Conclusion of a social pact in the case of privatization (taking over a company) is also beneficial for the investor (the acquirer), although this may result in additional costs on his part, which the investor usually includes in the purchase price. In return, the investor obtains the support of the crew and trade unions, and thus ensures that social peace is maintained³. At the beginning of the transformation process, the standard employment guarantee was two or three years. Later, people stopped wondering about the demands of a five-year employment guarantee for the entire staff, and in practice, in some sectors of the economy (e.g. energy) employment guarantees have been as long as 10 years. Sometimes an employment guarantee for employees was not enough and there were even postulates to guarantee the work of employees' children⁴.

² See among others Orange SA social contract for 2016–2017, Orange SA social contract for 2018–2019: <http://www.orange-ir.pl/pl>. (access 17.11.2018).

³ J. Wratny, *The role of employee shareholding in the indirect privatization of the state sector in Poland*, https://www.ipiss.com.pl/wp-content/uploads/downloads/2012/11/j_wratny_zzl_1s_2004.pdf (access 05.10.2018).

⁴ D. Zarzecki, *An attempt to determine the impact of employment guarantees on the value of shares*, *Finances, Financial Markets Insurances* no. 74, vol. 1 (2015), „Science notebooks of Szczecin University” no. 855, p. 333–340.

In the period when intensive privatization of state-owned enterprises was carried out, social pacts were an agreement conditioning the closure of privatization transactions⁵, although such agreements did not necessarily have to be concluded with trade unions.

1. Legal basis of privatization social support packages

When looking for the legal basis of social packages that are part of privatization agreements, reference should first be made to Art. 353¹ of the Civil Code, which states that “Contracting parties may establish a legal relationship at their own discretion, as long as its content or purpose does not oppose the nature of the relationship, the act or the rules of social coexistence.” This provision introduced to the Polish civil law system the so-called freedom of contract, which means that the parties to the contract can freely shape its content within the limits set out in this provision. As a consequence, in the case of privatization of enterprises, the State Treasury or a territorial self-government unit as a seller of shares may introduce into the sales agreement additional agreements, which for the parties are of material nature.

At the same time, the procedure for selling shares or stocks in companies with Treasury shareholding and the procedure of commercialization of state-owned enterprises is regulated by the Act on Commercialization and Privatization⁶ dated to August 30, 1996, which now – after the amendment, which entered into force on January 1, 2017 – is called the Act on commercialization and certain employee rights⁷.

⁵ B. Raczkowski, *What are social packages?* „Gazeta Prawna.pl” 2006, <http://praca.gazetaprawna.pl/artykuly/7874,czym-sa-pakiety-socjalne.html> (access 5.10.2018).

⁶ Act of 30.06.1996 on commercialization and certain employee rights (consolidated text: Journal of Laws of 2017, item 1055 with later changes).

⁷ *Ibidem*.

On the basis of the statutory delegation resulting from Art. 33 para. 2 of the Act of Commercialization and Privatization⁸, dated to August 30, 1996, the Council of Ministers issued a decree of 29 July 1997 on a detailed procedure for the sale of Treasury shares, the principles of financing the sale of shares and a form of payment for these shares⁹. The regulation specifies, among others, the conditions that should be met by the invitation to submit offers to purchase shares in the tender and an invitation to negotiations, including investment commitments, commitments related to environmental protection, as well as obligations related to the protection of the interests of employees and other persons associated with the company. The above regulation was replaced by the regulations of the Council of Ministers of December 20, 2004 on the detailed procedure for selling shares in the State Treasury¹⁰. Subsequently, the ordinance of 20 December 2004 was replaced by the regulation of the Council of Ministers of 17 February 2009 on the detailed procedure for selling shares of the State Treasury¹¹, and finally by the regulation of the Council of Ministers of May 30, 2011 with the same title¹². All these regulations, which are no longer valid today, were in principle repeated by the provisions of the first of them, i.e. the 1997 regulations as regards the requirement to include in the invitation to tender for purchase of shares in obligations related to the protection of employees. As a result, the Minister of Treasury was obliged in the privatization process to specify the manner in

⁸ Ibidem.

⁹ Regulation of the Council of Ministers of 29.07.1997 on the detailed procedure for selling Treasury shares, the rules for financing the sale of shares and the form of payment for these shares (Journal of Laws from 1997 No. 95, item 578).

¹⁰ Regulation of the Council of Ministers of 20.12.2004 regarding the detailed procedure for selling Treasury shares (Journal of Laws from 2004 No. 286, item 2871).

¹¹ Regulation of the Council of Ministers of February 17, 2009 regarding the detailed procedure for selling shares in the State Treasury (Journal of Laws from 2009 No. 34, item 264).

¹² Regulation of the Council of Ministers of 30 May 2011 on the detailed procedure for selling shares in the State Treasury (Journal of Laws of 2011 No. 114, item 664).

which the purchase offer was to take into account the interests of the staff of the privatized company.

In the case of municipal companies, the legal situation was a bit more complicated. The Commercialization and Privatization Act¹³ stipulated that commercialization consisted in transforming a state-owned enterprise into a company. In accordance with Art. 12 para. 2 of the Act of December 20, 1996 on Municipal Management (in force until December 31, 2016)¹⁴, the provisions of Section IV of the Act of 30 August 1996 on Commercialization and Privatization of State-owned Enterprises (indirect privatization) were required to sell shares in municipal companies, according to Art. 68 para. 1 of the Act on commercialization and privatization of state-owned enterprises (in the version applicable until 31 December 2016) its provisions together with executive acts should have been applied accordingly to the privatization of municipal enterprises. The provision of Art. 12 para. 3 of the Municipal Economy Act, it states that the competence of the minister competent for the State Treasury is exercised by the commune administrator (mayor, city president) who in the case of sole proprietors also acts as the owner's body (Article 12 paragraph 4). The sole property of the bodies constituting local government units was the adoption of binding resolutions regarding property matters in relations between municipalities, including representing companies and determining the rules for the withdrawal and sale of shares by the executive body acting as the owner's body (Article 18 paragraph 2 point 9 letter f and g of the Act of 8 March 1990 on local government¹⁵). It is important in this context that the legislator leaves the definition of these principles basically to the commune council, without imposing specific solutions¹⁶.

¹³ Currently: Act of 30.08.1996 on commercialization and certain employee rights (ie, Journal of Laws of 2017, item 1055, as amended).

¹⁴ The Act of December 20, 1996 on Municipal Management (Journal of Laws from 1997 No. 9, item 43).

¹⁵ Act of 08.03.1990 on local government (Journal of Laws of 2017, item 1875, as amended).

¹⁶ T. Machelski, Privatization of municipal enterprises., interent source <http://www.wspolnota.org.pl/aktualnosci/aktualnosc/prywatyzacja-przedsiębiorstw-komunalnych/> (access 5.10.2018).

In connection with the entry into force of the Act of 16 December 2016 on the principles of state property management¹⁷ and the Act introducing it of 16 December 2016 – Regulations introducing the Act on the management of state property¹⁸ changed the Act of 30 August 1996 on the commercialization and privatization of enterprises state law, as well as a number of other laws. The provisions of the Act of 16 December 2016 on the management of state property, as far as state legal persons are concerned, do not apply to companies (Article 3 para. 4). This is related to the assumption made by the legislator that the above-mentioned acts of 16 December 2016 are to lead to approximation of the model of exercising ownership rights in relation to companies to market rules, where both ownership supervision and the method of creating internal relations are to be based on corporate principles, taking into account the actual operational control of the Treasury over a given company, adequate to the ownership rights. Thus, in this case, the legislator withdrew from creating a special regime for companies with the State Treasury shareholding, which from January 1, 2017 are basically to operate on general principles. The above solution is consistent with the OECD guidelines on corporate governance in public enterprises (2015 edition), which indicate that “the state as owner should behave like any other majority shareholder when it has the opportunity to significantly influence the company and should be a conscious and active shareholder when it has a minority position. The state should exercise its rights in order to protect its property and optimize its value.”¹⁹

The grounds for concluding social packages in connection with privatization should also be found in the provisions of Art. 59 par. 2 in conjunction from Art. 20 of the Constitution of the Republic of Poland. The Supreme Court in its judgment of December 7, 2012,

¹⁷ The Act of 16.12.2016 on the principles of state property management (Journal of Laws of 2016, item 2259, as amended).

¹⁸ The Act of 16.12.2016 – Provisions introducing the Act on the Management of State Property (Journal of Laws of 2016, item 2260).

¹⁹ Wider: justification for the bill of 16.12.2016 on the principles of state property management, <http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1053>.

held that the *ratio legis* of the provision of Art. 59 par. 2 of the Constitution of the Republic of Poland provides a guarantee to social partners for their right to conclude any collective agreements²⁰. The doctrine emphasizes that the subject of social agreements are individual and collective rights and obligations of employees and employers²¹. However, the limits of freedom of contract are set out by mandatory provisions, including through the resulting from art. 9 LC the principle of semiimperativeness of labor law provisions, i.e. the principle according to which the provisions of social agreements can not contain provisions less favorable to the employee than the provisions of the Labor Code and other provisions that constitute sources of labor law and can not violate the principle of equal treatment in employment.

The constitutional basis of social partners' activities – enabling the conclusion of, among others, social packages related to privatization – result from Art. 20 and Art. 59 of the Constitution of the Republic of Poland. The first of these provisions states that “a social market economy based on the freedom of economic activity, private property and solidarity, dialogue and cooperation of social partners forms the basis of the economic system of the Republic of Poland”. The development of this standard is Art. 59 par. 2 of the Constitution, which states: “Trade unions and employers and their organizations have the right to negotiate, in particular to resolve collective disputes, and to conclude collective labor agreements and other agreements.” The analysis of the above provisions allows the recognition that the social dialogue partners are employees represented by trade unions and employers or employers' organizations²². As a consequence, the basic normative act in the Polish legal system explicitly admits social partners (in particular trade unions, employers and their organizations) legitimacy to conclude social contracts.

²⁰ Judgment of the Supreme Court of 07.12.2012, II PK 128/12, Lex No. 1284749.

²¹ E. Kieś, *Collective agreements that worsen the conditions of work*, dissertation, University of Silesia in Katowice Faculty of Law and Administration, Katowice 2013, p. 24.

²² M. Głądoch, *Social dialogue in collective labor law*, Toruń 2014, p. 67–68.

2. The legal nature of social packages in privatization agreements

Lack of social packages frames, defined by the generally binding regulations raises questions about their legal character, in particular which of them may be considered as agreements in accordance with Art. 9 § 1 of the Labour Code. Thus, in practice, a problem arises as to which social contracts constitute a source of labour law. Judicial jurisprudence is not homogeneous in this matter (it constitutes the subject of several rulings of the Supreme Court), although the problem is important in practice, as it is about adjudicating of the admissibility of enforcement of social packages by way of individual employee claims. In several rulings, the Supreme Court recognized that social packages constitute a source of labour law, while in others it refused to do so.

Due to the controversy regarding the very legal nature of social packages, disputes over their interpretation have been and continue to be heard. The decision whether a social package is a source of labour law or a civil law contract, determines the entity from whom the employees can claim benefits from the social package (i.e. the company which is their employer, or the investor who signed the package, but is not the employer), or even the competence of the court.

It should be noted that social packages are usually concluded in the following configurations: 1) between the investor and trade unions, 2) between the management of the employer's company (acting on behalf of the company) and trade unions with the participation of the future investor, 3) between the investor and the seller of shares (stocks).

Turning to the analysis of social packages, it should first be pointed out that social packages are included in collective agreements which, in the doctrine, are divided into named and unnamed collective agreements, as well as normative and non-normative collective agreements.

A company consisting of more than one employer has the ability to conclude a social package, but the condition connected with important social packages containing provisions of a normative nature, defining the rights and obligations of the parties to the employment relationship is that the contract is concluded by the employer²³. However, doubts in doctrine and jurisprudence are raised by social agreements concluded by the investor (future purchaser of shares or stocks in the company), who then does not become the employer of the employees in the acquired company (the employer is still the company) in which he invested, or through the company which he subsequently created. In its judgement of August 12, 2004, the Supreme Court recognized this type of agreement as a source of labour law²⁴. However, the opposite rulings prevail in which other adjudicating panels than the Supreme Court assume that the agreement – a social package concluded between the trade unions operating in the company and the investor – the future buyer of the majority of shares in this company, is not a collective agreement containing labour law provisions within the meaning of Art. 9 of the Labour Code. According to the Supreme Court, the decision whether or not the social package concluded by the trade unions of the privatized state-owned enterprise with a strategic investor is a source of labour law is not determined by the will of the parties to the agreement. The parties to a collective agreement may “give” the social package a normative character only through the possible inclusion of its provisions in their entirety or in part in the collective agreement or the agreement being based on the act²⁵.

However, the position of the judicature regarding the legal nature of employee guarantee packages concluded by social partners is not

²³ Compare. Supreme Court judgment of 09.8.2006, III PK 42/06, OSNP 2007, No. 17–18, item 244.

²⁴ See judgment of the Supreme Court of 12.08.2004, III PK 38/04, OSNP 2005/4/55.

²⁵ Compare.: Judgment of the Supreme Court of 29.06.2005, II PK 344/04, OSNP 2006 / 9-10 / 152; Judgment of the Supreme Court of 19.07.2005, II PK 386/04, OSNP 2006 / 11-12 / 173; judgment of the Supreme Court of December 12, 2001, I PKN 729/00, OSNP 2003/23/568; judgment of the Supreme Court of 29.07.2003, I PK 270/02, OSNP 2004/16/281.

stabilized. As indicated by Andrzej Świątkowski²⁶, this is confirmed by the rulings in which the Supreme Court supported the position that the agreements (contracts, pacts, packages) concerning employee guarantees are binding not only within the sphere of collective labour law, but also in that of individual workers' claims²⁷. The result of such approach to social contracts (collective agreements) as that presented in the above-mentioned judgements is that the discrepancies between Supreme Court rulings, according to which collective agreements (social packages, employee guarantee packages) concluded between trade unions and the future employer are regarded as collective agreements based on acts which have the quality of labour law as defined in Art. 9 § 1 of the Labour Code²⁸, or are not regarded as agreements containing provisions of labour law within the meaning of Art. 9 of the Labour Code²⁹ are no longer so meaningful. A similar standpoint is presented by L. Florek, who recognizes that, within the field of collective labour relationships it is irrelevant whether the agreement is based on statute or not, because it is only a criterion for recognizing the contract as a source of labour law within the field of individual relationships³⁰.

3. Provisions of social support packages

Agreements signed with employees' representatives in connection with the privatization process of companies with State Treasury shareholding or municipal companies' shareholding, usually take the form of the so-called social support package. The Act of August 30, 1996 on Commercialization and Privatization in the word-

²⁶ A. Świątkowski, *Labor Code. Comment*, Warsaw 2016, p. 7–8.

²⁷ Compare justification of the judgment of the Supreme Court of 29.07.2003, I PK 270/02, OSNP 2004/16/281; Judgment of the Supreme Court of 24 September 2004, II PK 27/04, OSNP 2005/10/142.

²⁸ See e.g. the judgment of the Supreme Court of 28 April 2005, I PK 214/04, OSNP 2006 / 1-2 / 8

²⁹ See e.g. the judgment of the Supreme Court of 28 April 2005, I PK 214/04, OSNP 2006 / 1-2 / 8

³⁰ L. Florek, *Law and contract in labor law*, Warsaw 2010, p. 226.

ing which was binding until December 31³¹, 2016 provided for the sale of a company by way of negotiations undertaken on the basis of a public invitation (Article 48 section 2) the requirement to include in the contract for sale of shares the buyer's obligations in terms of anticipated investments, environmental protection and cultural goods, as well as job protection, while social obligations agreed with employees' representatives were an integral part of the contract. It should be noted, however, that the conclusion of such an agreement was not and still is not a precondition for signing at share purchase agreement. In case of large discrepancies and lack of agreement between the investor and trade unions related to such discrepancies, it was sufficient that the scope of protection of employees' interests was included in the privatization agreement, i.e. the contract between the owner of the company (the State Treasury, a local government unit) and the investor. Thus, theoretically, the employees' were deprived of legal instruments which allowed for blocking privatization. In practice, however, this was not likely to happen, as the investors were interested in obtaining support from the employees during the negotiations to take control of the company and in addition to ensure good cooperation with the trade union in the future. Thus, the investors tried to propose solutions which would, to a certain extent satisfy the staff³².

Social support packages concluded in connection with privatization differ from each other in the subjective and objective scope of the regulations, as well as in the arrangement of entities that conclude them. The great diversity of social packages is primarily due to the fact that so far no legal regulation has been adopted to specify the procedure for them, or the framework of issues³³. Even the very concept of "social support package" is a kind of simpli-

³¹ Act of 30.08.1996 on commercialization and privatization (ie, Journal of Laws of 2016, item 981), amended by the Act of 6 July 2016 amending the Act on Commercialization and Privatization (Journal of Laws of 2016, item. 1174).

³² A. Kanthak, D. Łapiński ABC Consulting Ltd. Gdańsk, *Privatization of heating - need or coercion*, internet source: <http://www.abcc.com.pl/konferencja.pdf> (access 5.10.2018).

³³ Compare M. Gładoch, op.cit., p. 152–53.

fication, because usually one can talk about a few documents in which the employees' issues are discussed, not about a single one.

The legislator, showing understanding of employees' fears of privatization (in particular concerns related to the reduction of employment and deterioration of working conditions), and in order to overcome the reluctance of employees and trade unions to privatize enterprises, provided as early as in 1997 that the subject of negotiations with the investor should also include the issue of protecting the interests of employees and other persons associated with the company and the manner of securing the performance of these obligations.

Social packages are strongly individualized, but most of them contain the following elements³⁴:

- 1) A guarantee of maintaining the level of employment or the maximum level of employment reduction in subsequent years. The length of the employment guarantee usually fluctuates between 12–36 months. In those sectors of economy where strong trade unions operate, such as heating and power engineering, due to the attractiveness of this type of enterprises for investors, in the past employment guarantees were granted for longer periods, up to 5 or even 10 years. An extreme option is to provide a guarantee of employment for individual employees – these are the so-called personal guarantees. Such a provision definitely reduces the possibilities of manoeuvre for an investor which can not only lower the level of employment, but can even replace the employees' data with others. For this reason, employment guarantees most often relate to the level of employment, but take the form of personal guarantees only in exceptional situations (i.e. they are granted to, for example, all employees employed in the company as on the date of signing the social package).
- 2) Remuneration liabilities – the most frequently applied solution to the issue of remuneration of employees of a privatized enterprise is to oblige the investor to take over system

³⁴ Describes the issue J. Zysnarski red., *Recommendations based on examples of social and investment packages from the heating sector*, Gdynia 2010.

existing the hitherto, possibly including salary increases and the option of including them in the basic remuneration. There are also provisions regarding procedures for shaping remuneration in the future, taking into account, for example, company results, maintenance costs and inflation.

- 3) Obligation to pay a one-off privatization bonus – In the same amount for all the employees or dependent, for example, on their seniority. In some cases, the investor transfers funds to a social fund or a special fund, agreeing on the rules for employees, which are connected with using such funds.
- 4) Social benefits, health and safety benefits and training-related benefits – provisions regarding training, social base and its financing, the use of the social fund (e.g. in consultation with trade unions), as well as specific issues: commuting, holidays, meals, cleaning products and protective clothing.
- 5) Trade union matters – rules of using by the unions the premises and equipment necessary for their activity, the number of full-time jobs, representation of employees, transfer of some documents to trade unions – for example, regarding employee matters and finances. Sometimes the parties' activities are limited to guaranteeing trade union freedoms in accordance with the legislation in force.
- 6) A commitment to ensure representation of employees in the company's bodies (supervisory board, board of directors).
- 7) Awarding a packet of employee shares (if the provisions of the Act on Commercialization and Privatization are applied to 15% of the company's shares), which the staff will receive free of charge when the shares are made available to the investor.
- 8) Obligation to buy back shares or stocks belonging to employees – the terms of redemption are not always precisely recorded, although their repurchase date is usually specified.

In the provisions of social packages, general statements about the employer's obligation to comply with labour law or the investor's statement on the meaning of the role of trade unions in the company and its commitments to cooperate with them are quite often placed, usually due to trade union demands.

Occupational programmes are sometimes accompanied by voluntary redundancy programmes, offering voluntary redundancy payments to employees during the guarantee period. The rule is that social packages, in which employment guarantees are provided, specify situations in which employment guarantees do not apply.

The quality of a negotiated social package usually depends on the degree of determination of potential investors. Where there is a fierce competitive battle for stocks or shares, employees can obtain very good conditions. Clauses on social guarantees are usually accompanied by sanctions for non-compliance – e.g. as an obligation to pay compensation, as well as reporting requirements.

It should be emphasized that the conclusion of social packages accompanying privatization is just one of its elements, and the whole process is usually long-lasting. In principle, the State Treasury or local government units did not engage in the process of negotiating social packages, leaving that issue to be agreed between a potential investor and trade unions or an investor, company management and trade unions. It was possible to encounter the practice of determination, by the bodies of the company (usually a resolution of the supervisory board or the general meeting was adopted) or by the body constituting a local government unit, of minimum requirements concerning the protection of social rights of the staff. In such cases, when submitting the offer, the investor had to take into account those minimum requirements, without which the share purchase agreement would not have been concluded.

4. Social packages concluded between trade unions and future investor

Collective agreements should be concluded by the employer, which issue has been discussed earlier in this study. Most doubts, however, arise from the nature of collective agreements which define the duties of entities other than the parties. According to numerous representatives of the doctrine and the rulings of the Supreme Court, in the case of collective agreements concluded between trade unions and investors, the necessary condition for recognizing the

agreement as a source of labour law is the investor, the future purchaser of shares of the acquired enterprise, and the employer's rights and obligations under Art. 231 of the Labour Code. According to this concept, an agreement concluded by the entity which subsequently does not become an employer of the employees taken over pursuant to Art. 231 of the Labour Code cannot be regarded as an agreement within the meaning of Art. 9 of the Labour Code³⁵.

As I have already pointed out, the case law of the Supreme Court regarding legal character of the so-called social packages concluded with the participation of a future investor is divergent. Sometimes the Supreme Court accepted that such agreements, i.e. agreements concluded between trade unions and a non-employer (the so-called "future buyer of shares in a joint-stock company which is an employer" or "future buyer of an enterprise, of company shares", "buyer of a workplace", "future buyer of a state-owned enterprise", "an investor – a future buyer of the majority of company's shares", "future buyer of shares in a joint stock company") is a substantive law or a source of labour law within the meaning of Art. 9 of the Labour Code³⁶.

However, in most judgements, the Supreme Court denied the social packages a normative character³⁷. In the cases where the Supreme Court recognized the so-called "social support packages" with the investor's participation as agreements which are not a source of labour law within the meaning of Art. 9 of the Labour Code, in order to justify the binding force of these agreements, it

³⁵ A. Świątkowski, *op.cit.*, p. 8.

³⁶ This view was expressed by the Supreme Court among others in the resolution of the Supreme Court of 23.05.2001, III ZP 25/00, OSNP 2002/6/134 and in the judgments of 28.07.1999, I PKN 176/99, OSNP 2000/21/788, dated 17/11/1999, I PKN 364/99, OSNP 2001/7/219, dated August 12, 2004, III PK 38/04, OSNP 2005/4/55 and April 28, 2005, I PK 214/04, OSNP 2006 /1-2/8.

³⁷ See among others: resolutions of the Supreme Court: of November 24, 1993, I PZP 46/93, OSNC 1994/6/131; of September 29, 1998, III ZP 27/98, OSNP 1999/8/265; of 29 November 2005, II PZP 8/05, OSNP 2006/5-6/72 and in the Supreme Court Judgments: dated 23/02/1999, I PKN 588/98, OSNP 2000/8/298, dated September 7, 1999, I PKN 243/99, OSNP 2001/1/8; of February 17, 2000, I PKN 541/99, OSNP 2001/14/464.

referred, in general, to civil constructions or contracts concluded for the benefit of a third party (reference to this construction was much more frequent than to a third party contract), or to contracts for services rendered by a third party. In the judgements referred to above, the Supreme Court recognized that the provisions of Art. 391 of the Civil Code. or Art. 393 of the Civil Code were to be respectively applied to social packages, pursuant to Art. 300 of the Labour Code³⁸. However, it happened that, by refusing the package a normative character, the Supreme Court stated that it is not (or only “may be”) a contract for a benefit to a third party, without considering whether – perhaps – it is a contract for services rendered by a third party³⁹. The Supreme Court also argued that the “social package” could become a source of labour law as a result of its inclusion in a collective labour agreement or other collective agreement based on statute⁴⁰. In the case law of the Supreme Court, one can find both the opinion that social packages can be normative and obligatory, so that they should be assessed and determined *in concreto*⁴¹, and that they form the basis of claims irrespective of the adopted legal structure⁴².

In support of the thesis of the non-normative nature of social packages, it is argued that:

- Art. 9 § 1 of the Labour Code is not contrary to Art. 59 par. 2 of the Constitution, also to the extent to which it limits the normative character of collective agreements only to being “based on the Act”,

³⁸ Wider describes the issues: B. Wagner, *op.cit.*, p. 6–9.

³⁹ See the judgments of the Supreme Court: of 23/02/1999, I PKN 588/98, OSNP 2000/8/298; of 30.05.2001, I PKN 435/00, OSNP 2003/7/175; from May 25, 2005, I PK 223/04, OSNP 2006 /3–4/36; of 29.06.2005, II PK 344/04, O SNP 2006 /9–10/152.

⁴⁰ Compare Judgment of the Supreme Court: of 12.12.2001, I PKN 729/00, OSNP 2003/23/568; of 29.07.2003, I PK 270/02, OSNP 2004/16/281.

⁴¹ See the judgment of the Supreme Court of 19.07.2005, II PK 386/04, OSNP 2006 /11–12/173.

⁴² See the judgment of the Supreme Court: of 29.07.2003, I PK 270/02, OSNP 2004/16/281; of September 24, 2004, II PK 27/04, OSNP 2005/10/142.

- Art. 59 par. 2 of the Constitution may not constitute an independent basis for creation of labour law provisions by way of collective agreements, and as a consequence, only collective agreements define the rights and obligations of employees and employers, which were concluded by social partners and are based on the ordinary law are normative in their character.

Resolving the legal character of social packages is of considerable practical importance, because if you opt for the concept of non-normative nature of such an agreement, the question arises whether it is an obligatory agreement, whether employees can file individual claims and what the legal basis for such claims will be.

In many of its judgements, the Supreme Court recognized that social agreements are not a source of labour law within the meaning of Art. 9 §1 of the Labour Code, and their provisions cannot be implemented by means of an action against the employer⁴³. However, in the judgement of 29 July 2003, in case I PK 270/02, the Supreme Court found that, in assessing legitimacy of workers' claims based on the provisions of the social package, it should be guided by the principle that such contracts are binding not only within the sphere of collective labour law, but also within the area of individual employee claims.

In connection with the above-mentioned discrepancies referring to the recognition of social packages concluded between trade unions and future investors, there emerged the need to answer the question whether Art. 26¹ of the Act on Trade Unions may constitute a statutory basis for social packages⁴⁴.

The Supreme Court in its ruling of May 23, 2006⁴⁵, responding to the legal issue presented to it, stressed that the decision concerns the circumstances in which the trade unions operating with the

⁴³ Judgment of the Supreme Court: dated 29.07.2003, I PK 270/02, OSNP 2004/16/281; from 24/09/04, II PK 27/04, OSNP 2005/10/142.

⁴⁴ See an overview of the representative function of trade unions: K. W. Baran red., *Collective labor law. Comment.*, Warsaw 2016, p. 47–48.

⁴⁵ Resolution of the Supreme Court of 23.05.2006, III PZP 2/06, OSNP 2007/3–4/38.

previous employer (a sole shareholder company) concluded with the investor (the future buyer of the company's shares) an agreement on social, employee and trade union guarantees. In this ruling, the Supreme Court confirmed that only an employer (or an employers' organization) can be a party to a collective agreement. At the same time, the Court considered as erroneous the standpoint in which an employer is perceived within the meaning of Art. 3 of the Labour Code (an organizational unit, even if it does not have legal personality, and also a natural person, if they employ employees) and stated that the agreement binds the employer only when he himself concludes it (acting through the persons or bodies listed in Article 3¹ of the Labour Code). The problem boiled down to the question whether an investor (a purchaser of shares of an employer being an employer) can effectively conclude a collective agreement on behalf of and for the benefit of that company, and so, whether the company (employer) becomes a party to a collective agreement concluded by the investor (as a rule the provisions included in social packages are formulated in this way, because the investor makes them the subject of employer-company obligations towards employees, and not his own liabilities). The Supreme Court ruled that an investor could effectively enter into a collective agreement on behalf and for the privatized company, but such an agreement would become effective once the investor took over the control of such a company. Such understanding of the concept of "reliance on the act" of another collective agreement is apt, because it is justified by systemic considerations (regulations of Article 20 and Article 59 paragraph 2 of the Constitution of the Republic of Poland, Article 23 paragraph 1 and Article 261 paragraph 3 of the Act on trade unions, and the provisions of ILO Convention and EU law), as well as by functional considerations (effectiveness of legal regulations and implementation of the protective function of labour law.) Broad understanding of the phrase "basing on the act" allowed the Supreme Court to recognize that in the case of privatization conducted pursuant to the provisions of the Commercialization and Privatization Act, the conclusion of a collective agreement (social package) was based on Article 33 paragraph 2 of the Act, according to which the legislator authorized the Council of

Ministers to specify, by regulation, the detailed procedure for selling shares and the conditions which should be fulfilled: an offer to sell shares, an invitation to bid for shares and an invitation to negotiations which may concern investment commitments, commitments related to environmental protection, as well as obligations related to the protection of the interests of employees and other persons associated with the company. On the basis of this authorization, the Council of Ministers issued a series of regulations (currently not in force), specifying a detailed procedure for selling the State Treasury shares, which includes the conditions which should be fulfilled by an invitation to tender offers for purchase of shares, and an invitation to negotiations, *inter alia* in relation to obligations connected with protection of the interests of employees and other persons associated with the company⁴⁶. The Supreme Court stated that the substantiation in this respect takes place in Article 59 paragraph 2 of the Constitution, according to which trade unions, employers and their organizations have the right to negotiate, in particular to resolve collective disputes, as well as to conclude collective labour agreements and other agreements. The simple reading of this provision could lead to the conclusion that, within the scope of concluding collective labour agreements and other collective agreements, only employers and their organizations are a social partner on the employer's side. However, if the concept of "employer" as understood in Art. 59 par. 2 of the Constitution, was given the meaning specified in Art. 3 of the Labour Code, it would result in the situation where numerous provisions of labour law, including the provisions of the Labour Code on collective agreements would be contradictory to this constitutional pattern. According to the Supreme Court, when using the term "employer", the Constitution refers to existing concepts and legal constructions, but does not define them; therefore it should be recognized that the concept of employer as understood by the Constitution is wider than that which appears in the Labour Code and, in its constitu-

⁴⁶ Resolution of the Supreme Court of 23.05.2006, III PZP 2/06, OSNP 2007/3-4/38.

tional sense the employer as a party to negotiations should be more broadly understood. The contents of Article 9 of the Labour Code do not directly indicate which entities may be parties to collective agreements. From the statement that only those legal acts which define the rights and obligations of employees and employers may constitute the source of labour law, it is therefore necessary to draw the conclusion that one of the parties to such collective agreements can only be employers or employers' organizations, depending on the level at which the agreements are concluded. However, this provision does not specify who can enter into a collective agreement in a way which binds the employer as a party to the relationship (within the meaning of Article 3 of the Labour Code). In the opinion of the Supreme Court, it should be acknowledged that this can be done by the employer in the above-mentioned constitutional meaning, as the authorization to do so results from Art. 59 par. 2 in conjunction with Art. 20 of the Constitution. This means that the "employment side" (employer in the constitutional sense), pursuant to Article 59 paragraph 2 of the Constitution may enter into a collective agreement which will bind the employer as a party to the employment relationship (within the meaning of Article 3 of the Labour Code). A "constitutional employer" is defined with the use of the concept of an "ownership" employer ("factual", "real"), in accordance with which, with regard to determining the employer's party (social partner – Article 20 of the Constitution) as entitled to concluding collective agreements, the method of "lifting the veil of legal person" can be used. The purpose of this method is to counteract the situation in which the actual owner, who takes over the employee's benefits, abuses the structure of the legal person or the construction of the employer under Art. 3 of the Labour Code, in order to formally bind the employee under the contract concluded with a dependent entity, deprived of ownership rights⁴⁷.

⁴⁷ Resolution of the Supreme Court of 23.05.2006, III PZP 2/06, OSNP 2007/3–4/38.

5. Social packages concluded between the management board of an employer company (acting on behalf of this company) and trade unions with the participation of a future investor

The situation is slightly different in the case of a social package concluded between the trade unions and the employer (company management) with the participation of an investor, who usually guarantees that the company will perform certain obligations. In this case, social package provisions are, in my opinion, a source of labour law, with the employees being entitled to two separate claims – one in relation to the employer, i.e. the company, based on the provisions of labour law, and the second one in relation to the investor, based on the provisions of civil law. It cannot be ruled out that the investor will also be considered as an employer in this case, based on the “real” employer⁴⁸ concept. In this case, however, a number of procedural problems arise, such as who to sue – a company with which an employee has concluded a contract of employment or the investor who controls this company? The employee will not be able to sue both the company and the investor effectively because no legal provisions give them joint and several liability. Only in the case when the social package concluded with the investor’s participation explicitly includes the joint and several liability of the company and the investor, the employee is able to sue both of these entities in one set of proceedings, if it is agreed that the basis for their liability are the provisions of labour law.

It has also happened that reprivatisation social packages were concluded before the end of the process of privatization between the management board of the company being an employer (acting on

⁴⁸ Resolution of the Supreme Court of 23.05.2006, III PZP 2/06, OSNP 2007/3–4/38.

behalf of the company) and trade unions. In such a case, however, the investor in the share sale agreement either explicitly accepted the conclusion of such an agreement or at least acknowledged it and, as a consequence, accepted it implicitly.

6. Social packages concluded between the investor and the seller of stocks or shares

In the case of social packages concluded between the investor and the seller of shares (stocks), there are no normative agreements which constitute a source of labour law. In this case, neither of the parties is an employer and therefore has no ability to conclude a collective agreement. It is possible to take advantage of the aforementioned concept of the “real” employer⁴⁹, but the investor would only be treated as such after the stocks or the shares in the privatized company were sold. Regardless of the above, on the other side of the contract there is no entity capable of entering into a collective agreement, because the party in this case is not a trade union but the current owner of shares or stocks (State Treasury, local government unit)⁵⁰. Therefore, in the case of agreements concluded in such a way and aimed at safeguarding the rights of employees, it seems that we are dealing with agreements of a mandatory nature. Sales contracts usually contain the entire mechanism to control the implementation of their provisions, including reporting principles in connection with obligations relating to social security, inter alia sanctions for the breach of such obligations (consisting, among others, in payment of contractual penalties or the obligation to sell shares or stocks at a specified price). Irrespective of the claims of the sellers of stocks or shares, arising from the sales contract, the employees may claim from the investor, on the basis of such a contract, the performance of provisions included in social packages which constitute a part of the share sale agreement, on the

⁴⁹ Resolution of the Supreme Court of 23.05.2006, III PZP 2/06, OSNP 2007/3–4/38.

⁵⁰ Compare Judgment of the Supreme Court of 08.06.2010, I PK 23/2010.

basis on civil law, which is unfortunately more complicated than in the case of claims based on social packages of a normative nature.

It should be noted that we rarely deal with such agreements, as investors usually tried to reach an agreement on social packages directly with trade unions, which increased the probability of having their offer selected, and of restructuring the company after taking control of the company.

STRESZCZENIE

Okołoprywatyzacyjne pakiety socjalne

Artykuł skupia się na analizie występujących w praktyce porozumień zawieranych w Polsce w związku z prywatyzacją lub restrukturyzacją przedsiębiorstw. W polskim systemie prawnym nadal nie został ostatecznie przesądzony charakter pakietów socjalnych. W zależności od stron, które zawierają tego rodzaju porozumienia, oraz treści tych porozumień wyróżniamy normatywne i nienormatywne porozumienia socjalne. Charakter prawny porozumienia socjalnego determinuje reżim prawny, który będzie miał do niego zastosowanie, a w szczególności czy stosować będziemy przepisy prawa pracy czy też przepis kodeksu cywilnego.

Słowa kluczowe: prywatyzacja; restrukturyzacja; pakiety socjalne; porozumienia socjalne

SUMMARY

Social support packages in privatization

The article focuses on the analysis of the agreements concluded in Poland in connection with the privatization or restructuring of enterprises. In the Polish legal system, the legal nature of social packages has not been finally determined. Depending on the parties that conclude such agreements and the content of these agreements, we distinguish between normative and non-normative social arrangements. The legal nature of a social agreement determines the legal regime that will apply to it, and in particular whether we will apply labour law or the provisions of the Civil Code.

Keywords: privatization; restructuring; social support packages; social agreements

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