

Aneta Giedrewicz-Niewińska

University of Białystok, Faculty of Law

THE UNIFICATION OF TERMINOLOGY IN TERMS OF IMPACT OF EMPLOYEES ON DECISIONS TAKEN IN EUROPEAN BUSINESS ENTITIES AND POLISH LAW

Abstract. One of the consequences of improper management of European businesses, set solely on profit, is the global financial crisis, felt even today by many societies. Previous negative experience has led to a growing interest in the world at present, in the model in which employees are guaranteed involvement in the management of transnational entities. A new, universal legal framework for the functioning of this model has been created by the European Union. Instead of creating a single transnational legal system, it was decided to create a model for employee involvement in management by coordinating national systems. The aim of this study is to analyse the terminology related to the issue of workers' involvement in the management of European business entities. This analysis will aim to determine whether the legal language used in the EU regulations and directives relating to workers' involvement in management and implementing acts allows coordination between legal systems of the Member States. In this context, it is particularly important to determine whether the terminology used in EU acts is consistent with the terminology used in Polish implementing laws and how EU terminology fits into current understanding in the Polish legal tradition of institutions of employee involvement in the management of the workplace.

Keywords: industrial relations, involvement of employees, European Company.

General considerations

One of the manifestations of globalization is the transnational activities of economic entities beyond local markets. The positive results of this activity are, for example, the creation of new jobs or the improvement of the quality of services and goods in a given part of the world. Achieving these results is closely linked to the proper management of transnational business entities. The effects of mismanagement, set solely on profit, among other things manifest themselves in the form of global financial crisis, as perceived today by many societies (Blanpain, 2002, p. 569). One way to

counteract this phenomenon is to try to ensure that employees participate in managing transnational companies.

The idea of employee involvement in the management of domestic enterprises was born in the nineteenth century as a response to the bad working conditions and wages of hired workers caused by the prevailing rule of liberal politics. This policy primarily concerned the freedom of contract and the total dependence of the employee's position on the employer. The development of this idea took place, especially in Germany and England, after the First World War, along with the pursuit of the democratization of social life. For the same reason, a similar flowering of the idea of employee participation in business management is also noted after the Second World War. Employee co-management began to be seen as an expression of the idea of solidarity and the sense of community in the workplace. It served the development of the human individual, his sense of satisfaction and the desirability of work, and in the long run to ensure the profit of the enterprise. Since the 1970s, the right of employees to participate in business management has been perceived as a social right (Blackburn, 1993, p. 743). It was included in the 1989 Community Charter of the Fundamental Social Rights of Workers as a right to information, consultation, and participation. Over the years, this law has been raised to the level of a fundamental right. For the first time, this has been done in the Charter of Fundamental Rights of the European Union, which became effective in 2009 (Wróbel (ed), 2012).

It has also been recognized over the years that the implementation of the European Union's social objectives requires special provisions that will ensure the involvement of employees in management in certain transnational entities¹. To European business entities, which have sought to ensure the involvement of employees in management, belong the European company, the European Cooperative Society, and the company resulting from the cross-border merger. The legal framework of this venture has been created for a European company by: Regulation 2157/2001/EC of 8.10.2001 on the Statute for a European Company (SE) (OJ EU L 294/2001), regulating the functioning of a European company, Directive 2001/86/EC of 8.10.2001 supplementing the Statute for a European Company with regard to the involvement of employees (OJ EU L 294/22/2001) and the law of 4.03.2005 on the European Economic Interest Grouping and the European Company (Journal of Laws No. 62, item 551, as amended). An EU legislator regulated the involvement of employees in the management of a European cooperative in Regulation 1435/2003 of 22.07.2003 on the Statute of the European Cooperative Society (SCE) (OJ EU L 207 of 18.08.2003), Directive 2003/72/EC of 22.07.2003 supplementing the Statute of the European Cooperative So-

ciety with regard to employee involvement (OJ EU L 207 of 18.08.2003) and the Act of 22 July 2006 on European Cooperatives (Journal of Laws No. 149, item 1077 with amendments). The legal basis for the participation of employees in a cross-border company is Directive 2005/56 of 26.10.2005 on cross-border mergers of capital companies (OJ EU L 310 of 25.11.2005) and the Act of 25.04.2008 on Involvement of employees in a company created as a result of cross-border mergers (Journal of Laws No. 86, item 525).

The initial assumptions of the authors of the above regulation were that the regulation of employee participation in management should be achieved by harmonizing existing national systems. It was therefore sought to standardise information, consultation, and employee participation. The differences between the norms of individual countries prevented this from being achieved. Instead of creating a single transnational legal system, it was decided to create a model for employee involvement in management by coordinating national systems. The negotiated procedure became the primary method in this respect. The statutory rules were to be applied only when the social partners themselves decided so or in the absence of consensus between them.

This elaboration is devoted to the analysis of terminology related to employee participation in the management of European economic operators. The deliberations will focus only around the main concepts related to this issue, as they are crucial for the introduction in the Member States of the institution of employee involvement in management. The question arises whether the legal language used in the EU regulations and the directives relating to employee involvement in management and the implementing acts enables the coordination of the legal systems of the Member States. In this context it is particularly important to determine whether the terminology used in EU acts is coherent with the terminology used in the Polish implementing acts. Interestingly, from the point of view of the phenomenon of globalization, it also seems to consider how the terminology applied in EU acts takes into account the Polish national legal tradition of understanding certain definitions.

Terminological problems in terms of employee involvement in the management of European business entities

It should be noted that the solutions adopted in the directives on employee involvement in management are not intended to adjust national systems to the legal system of only one Member State. Such a temptation could

exist especially with respect to German and Dutch solutions, which have the longest tradition and the most extensive regulation, especially in the presence of employees' representatives in corporate bodies, in terms of employee involvement in management. Legal regulations concerning transnational entities combine different solutions present in the Member States with different levels of involvement of employees in management. This is evident in particular in the adopted two model institutions of employee involvement in management in transnational enterprises: the 'negotiating model' and the 'statutory model'. In the first instance, there are negotiated solutions that enable parties to autonomously shape the mechanisms of employee involvement in management. This has taken into account the interests of those Member States whose national law did not include rigorous solutions in this area, in particular the United Kingdom and Ireland (Keller, 2002, p. 426). These countries can therefore adopt solutions that are able to adapt to the traditions of their employees' involvement in management. The statutory model of employee involvement in management is generally applicable if the parties so agree, or no agreement is reached at the time, on the discussed employee involvement. The rule 'before and after' applies in this model, which implies that the rights of workers in force before the establishment of the transnational entity should provide the basis for employee rights of involvement of employees in the management of the entity (paragraph 18 of the preamble to Directive 2001/86/EC, paragraph 7 of the preamble to Directive 2003/72/EC). On the other hand, the forms of employee participation in the management of a transnational entity are essentially modeled on the German system, where there is employee representation at the plant level in the form of works councils, and at the employee level employees have the right to participate in its supervisory authority (Wratny, 2002, p. 28–29). A similar model has been adopted in the European company, the European Cooperative Society and the cross-border company, in which the involvement of workers in management is carried out by means of information and consultation, and through the participation of being able to elect or appoint some of the members of the supervisory body or transnational management entity or express opposition to the designation. For example information in SE means the informing of the body representative of the employees and/or employees' representatives by the competent organ of the SE on questions which concern the SE itself and any of its subsidiaries or establishments situated in another Member State or which exceed the powers of the decision-making organs in a single Member State at a time, in a manner and with a content which allows the employees' representatives to undertake an in-depth

assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the SE. For example consultation in SE means the establishment of dialogue and exchange of views between the body representative of the employees and/or the employees' representatives and the competent organ of the SE, at a time, in a manner, and with a content which allows the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the SE.

The basic grid of concepts related to the subject matter is contained in the directives. The involvement of employees in the management of transnational companies was defined in the Polish translation of Directive 2001/86/EC, Directive 2003/72/EC and Directive 2005/56/EC by the term 'uczestnictwo pracowników'. Since the indicated Directives 2001/86/EC and 2003/72/EC constitute 'a necessary complement to regulation' (paragraph 19 of the preamble to Regulation 2157/2001/EC, paragraph 17 of the preamble to Regulation 1435/2003/EC), the term 'uczestnictwo pracowników' is also present in these Regulations.

Terminology used in foreign language versions of directives is coherent and consistent. For example, the term 'involvement of employees' (English version), 'Beteiligung der Arbeitnehmer' (German version), 'Implication des travailleurs' (French version), 'coinvolgimento dei lavoratori' (Italian version), 'rol van de werknemers' (Dutch version), 'udeležba delavcev' (Slovenian version) in the broadest sense, including grades such as in English: 'Information', 'consultation', and 'participation'; in German 'Unterrichtung', 'Anhörung', 'Mitbestimmung der Arbeitnehmer'; in Italian - 'informazione', 'consultazione', 'partecipazione'; in French - 'information', 'consultation', 'participation'; in Dutch - 'informatie', 'raadpleging', 'medezeggenschap'; in Slovenian - 'obveščanje', 'posvetovanje', 'soodločanje'. Member States are consistent in the translation used by the legislature of the EU terminology, which can be seen in the use of the same terminology in all three directives. This is particularly evident in the example of Directive 2005/56/EC, in which the Member States properly use the term 'participation' to indicate the degree of employee participation in the management of a cross-border company.

Certain objections can only be made to the lack of consistency between the language versions of some of the directives in question and the Treaty on the Functioning of the European Union. It provides in Article 153 sec. 1 point f, among the fields of Member States supported and supplemented by the European Union, 'the representation and collective de-

fence of the interests of workers and employers, including co-management'. In the English version, the term 'co-management' is replaced with the term 'co-determination', in other language versions for example – French 'la cogestion' with 'la participation', Italian 'la cogestione' with 'la partecipazione'. Only in the translation into German, both the Treaty and the directives consistently provide the term 'Mitbestimmung'.

The Polish interpretation of the concept of 'uczestnictwo pracowników' in Directive 2001/86/EC, Directive 2003/72/EC and Directive 2005/56/EC should be assessed negatively. Special criticism is deserved for use of the term 'uczestnictwo pracowników' in the definition of different institutions. In Directive 2001/86/EC this concept has gained the widest meaning, as it implies a mechanism that also includes information, consultation, and participation through which employees' representatives may exercise influence on decisions to be taken within the company (Art. 2 point h).

In turn, in Directive 2003/72/EC 'uczestnictwo' of employees is defined as the influence of the body representative of the employees and/or employees' representatives in the affairs of a legal entity by way of: a) the right to elect or appoint some members of the legal entity's supervisory or administrative organ, or b) the right to recommend and/or oppose the appointment of some or all members of the members of the legal entity's supervisory or administrative organ (Art. 2 point k). The last of the above-cited definitions is also contained in Directive 2001/86/EC, but it is assigned to explain the concept of 'participation' (Art. 2 point k).

This leads to the conclusion that the 'uczestnictwo pracowników' in Directive 2003/72/EC implies only one of the degrees of involvement of employees in the management of a transnational enterprise. Similarly, the definition of 'uczestnictwo pracowników' creates the last of the three directives in Directive 2005/56/EC referring to the definition of 'participation' in Article 2 point k Directive 2001/86 (Art. 16, paragraph 2). This means that at the level of the Polish translation of the directives is visible inconsistency, and the use of the term 'uczestnictwo pracowników' is extremely misleading. The use of this wording leads to misunderstandings caused by the use of one term for different phenomena. This results in the involvement of employees in the decision-making process through information, consultation, and participation, and other times – participation only.

Important objections also cause translation of terminology used in these directives in the implementation of Polish laws. This is due to the non-uniformity of the used terminology. This leads to confusion and makes terminological regulation concerning the involvement of employees in management confusing and difficult to apply in practice. Particular doubts arise

in the context of the implementation of Directive 2001/86/EC by the act of 4.03.2005. The terminology used in the implementing act does not correspond to the translation in Directive 2001/86/EC. In art. 58 point 8 of the Act of 4.03.2005, there is a completely new term 'zaangażowanie pracowników' in the labeling of employees' right to information, consultation, and participation, enabling them to influence decisions taken in a European company. It introduces chaos, given that in Directive 2001/86/EC the same right of a worker is described with one expression 'uczestnictwo'. In turn, in the Act of 4.03.2005, 'uczestnictwo' means only one form of employee involvement in management, i.e. the influence of employees' representatives on the affairs of a European company by the law of selecting a certain number of members of the governing bodies. Similarly, 'uczestnictwo' also defines the Act of 22.7.2006 on the European Cooperative Society and the Act of 25.4.2008 on the involvement of employees in the company resulting from the cross-border merger of companies.

It should also be noted that the term 'zaangażowanie' is used by the Polish legislature with some consistency in implementing acts and Directives 2003/72 and 2005/56. According to these acts, 'zaangażowanie' includes the three forms of employee influence on decisions made within the company or cooperative, and the 'uczestnictwo' formula as one of those forms. Strange, therefore, is the fact that in Directive 2001/86/EC and in the implementation act, were not only the terms 'zaangażowanie pracowników' and 'uczestnictwo pracowników', but also the notion of 'partycypacja'. It is difficult to find any logic in the proceedings of the legislature. Perhaps this is due to the trend in the literature for many years for the interchangeable use of these phrases.

The concept of employee participation in the Polish legal tradition

The concept of employee involvement in management is not uniformly understood in the Polish legal tradition. It depended above all on the existing political and socio-economic system of the country at that time. However, there was a concept that sought to create employee self-government, i.e. a form of employee representation in an enterprise where the staff (its representative) was the authority in the enterprise. In employee self-government, the crew has the authority to supervise and control the company's operation; it decides on all matters that are important to the company. The idea of employee self-government in this sense was implemented,

however, in a very limited way (Winczorek, 1984, p. 47), immediately after the Second World War, in the form of the participation of employees in the work councils and the delegation function (Decree of 6.02.1945 on the establishment of work councils, Journal of Laws No. 8, item 36, as amended).

It is worth noting that the representation represented the entire crew, which was due to the adopted mode of nomination of members of work councils and delegates by direct election. In this way, the decree strengthened the new position of the crew and its representatives in the management of the workplace, giving it legal status (Gromski, Grzegorzczuk, 1980, p. 132).

The adoption of Soviet patterns and the emergence of authoritarian governments and stiff, central management of the economy led to far-reaching changes in employee representation in the workplace. Gradually, the position of the company's corporate representation was gradually taken over by the company council, initially by transforming it into a trade union body, and then by making the right to stand for election to the council dependent on the fact of having trade union membership.

The idea of employee self-government was tried to be implemented again by the Act of 19.11.1956 on workers' councils (Journal of Laws No. 53, item 238, as amended). The Yugoslav economic management system was the model in this regard (more on Yugoslavian self-government ideas by P. Winczorek, 1989). In addition to existing work councils, the law provided for the creation of a workers' council as another representative body of the crew. Despite the fact that the law did not use the term 'employee self-government', the adopted regulations resembled the characteristic of this form of solution. They expressed a certain degree of autonomy in decision-making. For example, the law clearly stated that the council should be working on behalf of the management crew. The crew was entitled to a direct influence on the decisions taken in the company on matters of major importance and the ability to control the workers' council. In turn, the company director's responsibility was to organise the day-to-day operations of the company rather than the management.

Inconsistency of the implemented solutions with the planned economy caused their life to be short-lived. In 1958 there were changes in the existing regulations limiting the competence of the workers' councils (Act of 20.12.1958 on workers' self-government, Journal of Laws No. 77, item 397).

Compared to previous regulations, the crews' powers were extended, which through their bodies acquired more competence, which strengthened its position in relation to the company director. This was a formal expres-

sion of the new solution – the establishment of self-government bodies of the crew of the company. The regulation contained in this act did not reflect the substance of the term ‘workers’ government’ in its title. This was demonstrated, among other things, by the fact that the role of the crew is to actively participate in the workplace by working with management to meet the tasks concerning the satisfaction of the living, social, and cultural needs of the employer. Moreover, this view is further confirmed in Article 13 introduced in 1976 to the Constitution of People’s Republic which grants companies the right to participate in enterprise management.

The idea of employee self-government also did not implement the Act of September 25, 1981 on the self-government of the crew of a state-owned enterprise (Journal of Laws No. 24, item 123); an act associated with the Act of 25.9.1981 on state-owned enterprises, (Journal of Laws No. 24, item 122) and the Act of July 10, 1985 on mixed enterprises (Journal of Laws No. 32, item 142, as amended), introduced in the 1980s. This assessment appears despite the fact that the position of the staff towards the company director was strengthened. Its reinforcement is reflected, among other things, in the establishment of crew self-government bodies (a general assembly of employees and employee councils, and in large enterprises: meetings of delegates and workers councils) as corporate bodies. It stressed the purpose of the action of the government of the crew, which is not only to protect workers’ rights, but also concern for the interests of the company. As indicated above, it was not authorized to use the term ‘self-government’ despite the fact that the system introduced by the self-government act was similar to the Yugoslav economic management system (Bar 1980; Wierzbicki, 1982, p. 16; Winczorek, 1989; Świątkowski, 1982). The concept adopted by the law did not make a self-governing body of the executive body (Wierzbicki, 1982, p. 16). Article 1 of the Act on self-government of the crew of a state-owned enterprise provided that the crew only participates in the management of a state-owned enterprise on the terms and conditions laid down in this Act. According to this provision, the crew acts as a management body together with other entities (workplace and trade unions; Jarzynski, 1988, p. 36; Jończyk, 1983, p. 107; Sowinski, 1990, pp. 155–157)².

Economic and political changes in Poland in 1989 showed that the model of workers’ participation in management of enterprises present in the socialist system was not sufficient. New forms of employee participation in governance, present in capitalist regimes, were needed. With the restructuring and privatization of state-owned enterprises, such forms of employee management as employee shareholdings and minority participation of employee representatives appeared in companies’ governing bodies.

Final remarks

The above considerations indicate the discrepancies occurring in the Polish translation of Directive 2001/86/EC, Directive 2003/72/EC, Directive 2005/56/EC and implementing laws.

First, this leads to the use of a terminology different from most Member States to determine the involvement of employees in the selection of members of the organs of transnational corporations. Most often it is a form of involvement combined with return of participation. In contrast, in the Polish implementation laws it is referred to as ‘uczestnictwo’.

Secondly, the Polish translation of Directive 2001/86/EC is not consistent with the law of 4.03.2005. The Directive is entitled to refer to employees’ involvement and provides a broad definition of that term covering three forms of management involvement. In turn, the implementing act in the title refers to the term ‘zaangażowanie pracowników’, and so defines three forms of worker involvement in the management of a company in Europe.

In my opinion, the use of the term ‘zaangażowanie pracowników’ present in the Polish translation of Directive 2003/72/EC and Directive 2005/56/EC and in three implementing acts is incorrect in the context of the formula adopted in the Polish Labour Code. This act establishes one of the principles of collective labour law, namely ‘uczestnictwo pracowników’ in the management of an establishment (Article 182 of the Labour Code). According to this regulation, employees’ ‘uczestniczą’ in the management of a workplace are in the scope of and on the principles set out in separate regulations. The content of this provision indicates that it does not have an intrinsic dimension and is fulfilled by the applicable legal regulations. Accordingly, various legal forms, including those indicated in the implementing acts on the involvement of employees in the management of transnational entities, fall within its scope. However, there is a problem with understanding the scope of the code for ‘uczestnictwo pracowników’ in the management of a workplace in the case of a European company, since the law of 4.03.2005 indicates information, consultation, and ‘uczestnictwo’ as forms of ‘zaangażowanie’. It is not entirely clear whether the codified form of ‘uczestnictwo pracowników’ in workplace management encompasses only the participation of employees in the body (i.e. ‘uczestnictwo pracowników’ which means ‘participation’), or this phrase refers to all forms of involvement (information, consultation, and ‘uczestnictwo pracowników’, which means ‘participation’).

I believe that it is necessary to unify the terminology used in the Polish translation of the directives concerning the involvement of employees in the

management of transnational entities as well as in the implementing acts. In addition, it is desirable to standardize the terminology used in Poland with the terminology adopted by the Member States. This requires abandoning the term 'zaangażowanie' to the term 'uczestnictwo' (in the broadest sense) and introducing a wording for 'participation' in a narrow way as one of the forms of employee involvement.

The above brief analysis of legal regulations in the field of workers' participation in management of enterprises in Polish conditions shows that they have failed to fully implement the concept of worker self-management. For example, the 1945 decree on the establishment of company councils started in the entire territory of the country only limited the involvement of employees in the management of workplaces. It granted the employee's office the opportunity to influence only one of the relevant spheres of the plant's operations, namely production management. Similarly, the regulation contained in the workers' self-government Act of 1958 did not reflect the essence of the term 'workers' government'. In the case of this regulation it is justified to assume that the concept of 'employee involvement in management' used in the law is understood as a model of co-management, and not as reflected in the act of self-government of the crew. The above assessment was then confirmed by the provisions of the Polish Constitution and the Labor Code.

The above-mentioned considerations lead to the conclusion that the extent of employees' influence on the management of a company in Poland has changed over time, approaching or moving away from the idea of self-government. In the end, however, it must be assumed that we did not have to deal with local government, as the employees did not have a real and decisive influence on the decisions they made. The way of managing companies in Polish conditions can be described as 'involvement in management'. In such a model, employees were forced to share power with other company bodies.

The key element of the concept of 'employee involvement in management' was the recognition that the entity in the enterprise was the staff, or all its employees. This was due to the adopted concept of property ownership. In general, state ownership was a part of society, which on the company's premises was expressed in employee participation in management.

Political and socio-economic changes in Poland in 1989 were associated with a lack of political will to continue work on regulation involving employee involvement in the management of the workplace. These issues did not exhaust the rules concerning the privatization and commercialization of state-owned enterprises. In my view, this leads to the conclusion that in Poland the involvement of workers in the management of a company was somehow 'forced' in connection with accession to the European Union, not

reached by domestic regulation. It seems legitimate to say that existing regulations are not the result of a deliberate legislative decision and are a combination of diverse, not always coherent solutions.

In answering the question put at the beginning of the considerations, the definition of the concept of ‘employee involvement’ in Directive 2001/86/EC, Directive 2003/56/EC and Directive 2005/56/EC and implementing laws is in the Polish tradition of understanding this expression³. In both cases we are dealing with the right of employees to co-management issues and decisions affecting the company. It is worth pointing out, however, that Polish law has granted workers’ representatives sometimes broader powers than does the present implementing regulation. In some cases, native solutions have provided employees with a decisive influence on decisions made in the enterprise. Granting employees broader powers than EU regulations resulted from different origins and assumptions of Polish solutions.

N O T E S

¹ As the social goals of the European Union, the Treaty on the Functioning of the European Union indicates the promotion of employment, the improvement of living and working conditions, so as to enable them to be compensated with simultaneous progress and the need to maintain the competitiveness of the Union economy (Article 151).

² It was also emphasized that ‘management’ should be understood as admitting to participation – mainly by deciding – entire social groups (crews of enterprises). Its characteristic feature is that it concentrates not on individual employee interests, but on social and economic group interests combined with the pursuit of general economic and social interests.

³ It should be noted that the Polish legislature did not create a legal definition of the concept before 2005.

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