

COLLECTIVE REDUNDANCIES: A COMPARATIVE STUDY OF THE LEGAL REGULATIONS OF THE EUROPEAN UNION AND THE REPUBLIC OF POLAND

Master of Law Szymon Kubiak

Jagiellonian University,
Grodzka 53, Krakow, 31-044, Poland
tel.: 227111

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*Recenzavo Lietuvos teisės universiteto Teisės fakulteto Darbo teisės ir socialinės saugos katedros
doc. dr. Juozas Tartilas ir Vilniaus universiteto Teisės fakulteto Darbo teisės katedros
doc. dr. Gintautas Bužinskas*

A b s t r a c t

This article is based on the assumption that Directive 75/129 EEC often creates problems for the Member countries' jurisdictions and for the European Court of Justice which are very similar to those caused by the Polish Act of December 28, 1989 on collective dismissals. I have come to this conclusion after consulting many publications concerning this topic, and also after researching the jurisdictions of the ECJ, particularly in cases such as: Commission of the EC v. Kingdom of Belgium (Case 215/83), Rockfon A/S v. Specialarbejderforbundet and Denmark (Case C-449/93), Commission of the EC v. UK of GB and Northern Ireland (Case C-383/92 and C-382/92), Commission of the EC v. Italian Republic (Case 91/81), Dansk Metalarbejderforbund and Specialarbejderforbundet and Denmark v. H. Nielsen & Son, Maskinfabrik A/S, in liquidation (Case C-248/83) as well as the relevant rulings of Polish Supreme Court.

Origins of both acts

I see the origins of both acts in a search for a 'golden solution' that takes into account employees' interests and rights as well as the fundamental requirements of the free-market economy, including labor market flexibility.

However, there are different approaches to the origins of Directive 75/129. Writers on European Labor Law generally distinguish between Directive No. 129 as a realization of goals laid down in the Social Action Program 1974-1976, and Directive No. 129 as a function of different economic factors, in particular the pursuit of uniform costs of employment.

Personally, I would rather support the later opinion, in light of the strong influence of the AKZO case on the passing of Directive No. 129[1].

The origin of Polish collective redundancies law is very different from the European one. After the symbolic year of 1989, a need for rationalization of employment relations became an immanent attribute of Polish economic reality. Moreover, this rationalization ended up with the necessity of dismissing a large number of people in a relatively short time. One could even call the situation which existed at that time an emergency.

It was an urgent necessity for 'establishing and introducing a specific legal mechanism – different from approaches already available in the Polish Labor Code – and granting employers much more freedom in dissolving employment contracts with their employees'[2].

I will now compare different priorities, which laid down the groundwork for both acts.

EU legislators took as a priority that 'it is important that greater protection should be afforded to the workers in the event of collective redundancies while taking into account the need for balanced economies and social development within the Community'[3].

On the contrary, the Polish collective redundancies law was created mostly to speed up the systemic changes to the national economy, which were indispensable after the symbolic year of 1989. Therefore, the Act of December 28, 1989 tries to reach, at the same time, two contradictory goals: increasing effectiveness of the national economy on the one hand, and on the other, limiting the social consequences of mass layoffs. This approach makes it a very original legal construction, but at the same time creates difficulties for its interpretation.

Moreover, the purpose of passing this Act is very interesting. The Act of December 28, 1989 had to deal with several, and to a large extent contradictory or even mutually exclusive, socio-economic goals. This fact demonstrates the importance of this Act as an integral part of the Polish labor law system now in force.

First of all, the Act allows the necessary reorganization of employment [4] by limiting workers' protection against dismissals with notice in undertakings where such processes take place. In other words, it makes it easier to dismiss employees under certain circumstances (i.e. by allowing termination of an employment contract within a shorter term than required by the Polish Labor Code and through the general exclusion of trade unions consultation procedure, established by article 38 PLC).

However, this is only one purpose of the Act. There is another, which is especially important from the workers' protection point of view. It safeguards employees against collective dismissals (i.e. by introducing a minimum 45 day period for information of trade unions as well as for the employment office).

The Act also provides, if due to the circumstances which occur in the undertaking, continuation of full employment is no longer possible, several guarantees and allows workers to make certain claims. In such a case, the Act stipulates, workers are entitled (under certain conditions described in article 8 point 1-4 and article 12 of the Act) to redundancy payments and the employer is obliged to reengage them. It is indeed a very original, but at the same time, taking into account the purposes of the Act's passing, a necessary combination.

On the other hand, between the Polish Act and the Directive there certainly are important differences. For example, it is indisputable that the Polish Act in relation to the Polish Labor Code introduces more detailed regulation. On the contrary, it can be said that the Directive plays a role of a so-called 'General European Code of Conduct in Case of Collective Redundancies'. In conclusion, these two acts exist on very different levels. But, if any Member State of the EU implementing Directive 75/129 passes its own legal regulation then these differences would be reduced.

Although it is evident that the law of December 28, 1989 has been fashioned after Council Directives 75/129 EEC, it is equally obvious that, due to social concerns at the time, Polish legislators have exceeded the frameworks of the 75/129 EEC Directive.

Additionally, it is worth stressing that the legal approaches used in the Polish Act are generally convergent with the 17 February 1975 guidelines of the Council of European Communities on approximation of laws relating to collective redundancies. These guidelines were stated more precisely in the document of 24 June 1992.

Comparison

To analyze effectively, from a EU regulations perspective, problems of collective redundancies in Poland, I particularly took into consideration legal definitions, the scope of the normative regulations, exclusions, the procedures for information and consultation of Workers' Representatives and the role of Governmental Institutions (i.e. public law bodies).

Doing this, I again kept in mind that the EU and Polish laws exist on two different levels. Whilst the Directives were issued on the basis of the article 249 EC Treaty, and are binding as to the result to be achieved for the Member States, national provisions have to be seen only as executive acts related to the Directives. Therefore, the choice of form and method of their implementation is left to the national authorities.

Consequently, to expose in full the nature of the EU regulations it is necessary not only

to analyze the Directives as such, but also to compare in detail the national provisions concerning collective redundancies existing in the different Member States. While adopting the Directive No. 129, EU legislators tried to minimize dissimilarities in regulating collective dismissals, which existed between Member States' legal systems. What kind of dissimilarities? There are several basic differences between Member States legal regulations concerning e.g., the minimum number of employees constituting a collective dismissal, the time period over which dismissals occur and the number of employees in an establishment (for details *vide* table 1.0 and 1.1.) [5]. All data presented in table 1.0 are based on Social Europe 4/92 and the Report by the Commission to the Council on progress with regard to implementation of the Directive No.129.

As we have already noticed, besides evident similarities between the Polish Act of December 28, 1989 and Directive No. 129, there are several important differences. It is worth mentioning that the Polish Act of 28 December relates not only to collective dismissals, but also to dismissals that occur because of reasons related to an employer, that is, to individual (or as it is sometimes named in Polish labor law doctrine, quasi-individual) dismissals.

In particular, the Polish Act of December 28, 1989 did not make the same mistake of dealing with only collective dismissals, which existed in the original version of Directive 75/129, and was corrected later by amendment 92/56/EEC of June 24, 1992 [6].

This amendment expands the article 4 (b) scope of the Directive by adding that for the purpose of calculating the number of redundancies 'termination of an employment contract which occurs on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies'.

Inclusion in the scope of the Directive of 'individual dismissals' was definitely the most important and striking novelty. Such a novelty was the legislators' answer to a practice of so-called stretching/dividing collective redundancies in time, just to exclude them out of the 75/129 Directive's scope of protection. This gap was eliminated.

Furthermore, the main goal of this amendment was to make uniform rules of conduct and procedures preceding final decisions about dismissing collectively. On these bases employers, after making a decision of dismissing collectively were obliged to provide trade unions with more complex information and 'all relevant information'[7] relating to the projected reduction of employment. This was particular information concerning the reason for the redundancies, the number of workers to be made redundant, the number of workers normally employed, and the period over which the redundancies were to be effected. Thanks to that regulation there is now a better possibility for the expression of opinions about the dismissals by the worker's representatives.

Due to the economic and social changes, the process of amending Directive No 75/129 has been carried forward, in particular, by Directive No 59 of July 20, 1998. The main goal of this Directive was to emphasize the necessity of guaranteeing clarity and uniformity of European Labor Law's regulations concerning collective redundancies. What is most important is that Directive No 59 is treated as an uniform legal text, regulating rules of conduct in case of collective redundancies. The Directive was passed on the basis of article 94 of AT, which regulates issuing directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market. Such a qualification of the collective redundancies issue signifies clearly that the EU legislator understands the importance of the problem which is dealt with. However, one must remember the necessity to meet the unanimity requirement while passing acts on the basis of article 94.

TABLE 1.0. Differences between Member States of the EU.

COUNTRY	MINIMUM NUMBER OF EMPLOYEES NEEDED FOR QUAILIFICATION OF DISMISSALS AS COLLECTIVE ONE	PERIOD OF TIME OVER WHICH DISMISSALS OCCUR	NUMBER OF EMPLOYEES IN ESTABLISHMENT
BELGIUM	10 10% of all employed 30	60 days 60 days 60 days	20-100 100-300 300
DENMARK	10 10% of all employed 30	30 days 30 days 30 days	20-100 100-300 300
FRANCE	10 30	30 days 6 months	
GERMANY	5 10% of all employed or at least 25 30	30 days 30 days 30 days	20-59 60-500 500+
GREECE	5 2-3% of all employed but with maximum of 30		20-50 50+
IRELAND	5 10 10% of all employed 30	30 days 30 days 30 days 30 days	21-49 50-99 100-299 300+
ITALY	There is no reference made to number of dismissals	No references	No references
LUXEMBURG	10 20	30 days 60 days	
NETHERLANDS	20	Simultaneously or up to a period of 3 months	
SPAIN	Similar as laid by 75/129/EEC	Similar as laid by 75/129/EEC	Similar as laid by 75/129/EEC
PORTUGAL	2 5	3 months 3 months	2-50 51+
UNITED KINGDOM	100 10	90 days 30 days	

TABLE 1.1. Definition of collective dismissals in Poland on the basis of Act of 28 December 1989.

COUNTRY	MINIMUM NUMBER OF EMPLOYEES NEEDED FOR QUALIFICATION OF DISMISSALS AS COLLECTIVE ONE	PERIOD OF TIME OVER WHICH DISMISSALS OCCUR	NUMBER OF EMPLOYEES IN ESTABLISHMENT
POLAND	10% OF ALL EMPLOYED AT LEAST 100	SIMULTANEOUSLY OR UP TO A PERIOD OF THREE MONTHS	UP TO 1000 1000+
	AND ALSO INDIVIDUAL DISMISSALS IF NOT MORE 10% OF ALL EMPLOYED OR UP TO 100	UP TO A PERIOD OF THREE MONTHS	UP TO 1000 1000+

Last but not least, as stated in article 137 point 5 of AT, ‘ [t]he provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent protection measures compatible with this Treaty’. I have used this quotation just as an example of the ‘minimum of protection rule’ which applies to directives, and which makes most of the ‘more stringent’ legal solutions present in the Polish Act of December 28 concordant with provisions of Directive No 75/129.

Now, how are all these issues regulated in Poland? The Polish Act, unlike the Directive, regulates not only the procedure of conduct in cases of collective dismissals, but also provides limited protection to employees who, on the basis of the Polish Labor Code, are granted special protection in the employment relation. I assert that the existence of this difference is explicable by the number of dissimilarities between labor law systems of the EU Member States and the impossibility of their full unification in one EU directive. For example, it would be impossible to unify a definition of ‘employees who are granted special protection’. Of course, I clearly see a way to expand the scope of the Directive on those employees, on the basis of article 5. It is worth stressing that article 5 of the Directive, which states the ‘minimum of protection’[8] rule, is an example of an interesting approach of UE legislators. I believe, it is essential to understand fully the legislative technique used in the Directive.

The Polish Act provides benefits for employees dismissed collectively. This approach is absent in the Directive. Again, however, article 5 can be applicable here. The Directive also, unlike the Polish Act, does not obligate the employer to reengage workers dismissed in the framework of collective dismissals. The Polish Act’s approach to this problem is not, however, both clear and effective.

Nevertheless, I would like to stress that there are some arguments in favor of the Directive. It is possible for the Member States, by applying article 5, to extend the scope of the Directive’s protection, for example by introducing the obligation to reengage workers or even to provide benefits similar to those stipulated by the Polish Act. It is incontestable that introducing these kinds of benefits or obligation to reengage would be, as stipulated in article 5, a provision more favorable for workers.

The obligation to inform local employment offices about an intent to dismiss collectively, which exists in the Polish Act, does not grant them any authority to prevent dismissals. On the other hand, the Directive also does not provide such authority. However, again, Member States, based on the provisions of article 5 of the Directive, can grant a competent public authority the ability to mitigate the effects of the collective dismissals. But it

must be stressed here that under no circumstances does the Directive allow any public authorities of the Member States to prohibit an employer from dismissing collectively.

In fine, in both acts there are evident similarities. First of all, in both acts under consideration, competent public authorities are practically powerless to prevent collective dismissals.

But, undoubtedly, the obligation of an employer to conclude an agreement with trade unions or, if this is impossible, to issue rules defining collective dismissals, present in the Polish Act, goes beyond the scope of the consultations and negotiations required by the EU Directive. The Polish Act requires that employers' rules defining collective dismissals must include provisions agreed to trade unions through consultation and negotiation.

Elements of individual labor law, present in the Polish Act [9], allow employees, if their employer violates regulations in force under an agreement or rules defining collective dismissals, to object to unfounded termination of employment on the basis of article 45 § 1 of the Polish Labor Code [10]. A similar conclusion arises from rulings of the Polish Supreme Court [11]. This is one of the main arguments supporting the thesis on a very specific character of the Polish Act, a character which places it between collective and individual labor law. However, the Directive also creates very similar problems with its qualification. It is out of the question that the primary version of the Directive, which in article 1 part 1 did not include the term 'individual worker', belonged evidently to collective labor law. The focus in Directive No 129 was clearly put on a collectivity of workers. Nevertheless, amendment by Directive No 56 and uniformed text of Directive No 59 in article 1 paragraph 1 letter a, uses the term individual worker. This change was achieved by extending the scope of collective redundancies by the Directive No 56 to 'individual dismissals'. I assert that in the light of those amendments, Directive No 129 must be qualified as a legal act that falls *in between* individual and collective labor law regulations, as it has features characteristic for both groups of legal regulations. The same opinion, for example, is presented by Andrzej Swiatkowski [12].

The Polish Act of 28 December, 1989 provides the same level of protection to all workers, regardless of whether they are employed by public administrative bodies, by establishments governed by public law, in co-operative bodies or in the private sector. On the contrary, the Directive excludes 'workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where this concept is unknown, by equivalent bodies)'. Here, I would like to stress strongly, that in this particular case, it is not possible to fall back upon the provision of article 5 of the Directive. The Polish Act in this aspect seems more favorable to employees.

The comparison of Directive 75/129 and the Polish Act of 28 December, 1989 demonstrates that adaptation of Polish labor law relating to collective dismissals to the EU standards should not create any dramatic problems. This is so because Polish law fulfills the general requirements of the Directive.

Therefore, I maintain that the current projected amendments to the Polish Act's regulations, which change the periods of time within which dismissals are seen as collective ones, are not justified by requirements of the process of accession. In my opinion, Polish law here is simply more favorable for employees. Not to mention that the Polish Act's approach is allowed on the basis of article 5 of the Directive. So why should we change it?

Ergo, from the perspective of the future accession of Poland to the EU, those amendments are not necessary. Nevertheless, Polish legislators have already drafted a new version of the Polish Act's article 1 [13]. It is article 3 of The Project of amendments to the Polish Labor Code and to some other laws, changing the article 1.1's provisions of the Law of 28 December, 1989 into:

Article 1. 1. Laws' regulations are binding in case of necessity to dissolve employment relation because of the reasons related to the employer, if within a period not exceeding 30 days, the number of dismissed workers is at least:

- 1) 10, if employer employs more than 20 and less than 100 workers,
- 2) 10% of the number of workers, if employer employs at least 100 but less than 300 workers,

3) 30, if employer employs at least 300 workers or more,

It is simply a copy of the first (out of two) alternative regulations, which are present in the Directive, referring to time periods in which collective dismissals take place. I doubt if this approach is needed or even correct from a pragmatic point of view as well as from the employees' protection point of view. First of all, present Polish collective dismissals regulation introduces time periods up to 3 months (see table 1.1.), while the amendment allows only 30 days.

Particularly unintelligible is the draft amendment's omission of the second part of the Directive's alternative, which guarantees a 90 day protection period, just as the Polish Act does.

Conclusions

In sum, the procedure for consultation and information, introduced by article 2 of Polish Act of 28 December, 1989, even exceeds the requirements of article 2 of the Directive. Moreover, the Polish regulation guarantees an exchange of information at least 45 days before the intended collective redundancies, while the Directive only requires such an exchange at least 30 days before¹. Other characteristics of consultations and negotiations, present in the Directive, also seem to be fulfilled by the Polish procedure.

In general, in comparison with regulations existing both in Member States and on the level of the EU, Polish law relating to collective dismissals is, in many matters, more favorable to employees. I assert, that this favorable treatment of employees was determined by two main factors: firstly, the very strong and specific role of trade unions in the Polish process of systemic transition and secondly, the scope of changes taking place in the Polish economy. If in western European countries collective redundancies occur mainly due to technological reasons, in Poland they are related to the total rebuilding of the economy, in particular to changes of ownership, and the reorientation of global markets. However, simultaneously, there is no doubt that several Polish legal regulations in the area of collective dismissals favoring employees, are the price paid by Polish legislators for mitigating social tensions.

Over and above, added to all the problems that have been named already, all European labor law experts should ask themselves if the scope of normative regulations which are now in force are adequate to a changing reality and, if the answer is negative, what kind of amendments to Directive 75/129 EEC might be needed in the foreseeable future? I believe that a convincing answer to this question would be impossible if the situation in countries knocking at the EU's doors will not be taken seriously into account.



LITERATURE

1. **Blanpai R.** European Labor Law, Kluwer 1999: 334 (Directive No. 75/129 of 17 February 1975 on the approximation of laws of the Member States relating to collective redundancies finds its origins in the AKZO case. In 1973 AKZO, a Dutch-German multinational enterprise, was engaged in a process of restructuring and wanted to make some 5,000 workers redundant. As AKZO had a number of subsidiaries in different European EC Member States, it could in a sense compare the costs of dismissal in those countries and choose to dismiss in that country where the cost was the lowest).
2. **As** it is accurately named by Gerard Bieniek in his article Legal problems concerning collective dismissals from work (on the basis of law on specific rules of dissolving with workers employment relation because of the reasons related to the undertaking), ("Problematyka prawna grupowych zwolnień z pracy (na tle ustawy o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn dotyczących zakładu pracy)), PIZS, 1990, No 1-3.

¹ However, article 4 allows Member States to 'grant the competent public authority the power to reduce the period provided for in the preceding subparagraph (this is 30 days)'.

3. **'Whereas'** (2) to the Directive No. 98/56.
4. **This** is the opinion presented by Ludwik Florek and Tadeusz Zieliński in their Labor Law (Prawie pracy), C.H. Beck, Warsaw, 1999, p. 104 and latter.
5. **Original** version of this table was published in Catherine Barnard's, EC Employment Law, Chichester, New York, 1995 r., p. 387. For the purpose of comparing EU collective dismissals law with Polish Act of 28 December 1989, I updated table 1.0 with information relating to Poland (*vide* table 1.1).
6. **98/59/EC**, OJ 1998 L 225/16, 92/56/EEC, OJ 1992 L 245/3
7. **Article** 3 of Directive point 1.
8. **Directive** No 129, Article 5 states that, 'This Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favorable to workers or to promote or to allow the application of collective agreements more favorable to workers'.
9. **In** particular article 10, which introduces protection in case of quasi individual dismissals.
10. **Article** 45 stipulates possible claim for 'ineffectiveness of notice of the termination of an employment contract' and for 'reinstatement in one's job' or at least for compensation.
11. **Vide** e.g. ruling of Polish Supreme Court of 23.01.1991 r., I PR 452/90, PiZS 1991/5/64, states (Law of 28.XII.1989 concerning collective redundancies), no matter if in case of employment reduction (article. 1 section 1), or liquidation or bankruptcy of undertaking (article. 1 section 2), stipulates special procedure of conduct lied down in article 2, 3 and 4. Violation of this procedure, while dismissing with notice workers employed on open-ended employment contract, allows for claim on the basis of article 45 § 1 of Polish Labor Code).
12. **In** his European Social Law vol. II, European Labor Law (Europejskie prawo socjalne, tom II, Europejskie prawo pracy) Publishing House ABC, Warsaw, 1999, p. 427, he writes: 'after the passing amendment No 56, Directive No 129 should be qualified to category of 'mixed' labor law norms, which represent elements characteristic for both collective and individual labor law'.
13. **Governmental** project of 15.06.2000., vide system of electronic legal information, LEX, number 2013



***Kolektyviniai atleidimai. Teisinio reglamentavimo Europos Sąjungoje ir
Lenkijoje lyginamoji studija***

Szymon Kubiak

Teisės magistras, Jogailos universitetas, Lenkija

SANTRAUKA

Straipsnyje nagrinėjamos praktinės problemos, kylančios taikant Direktyvą 75/129 EEC, reglamentuojančią kolektyvinių atleidimų procedūrą Europos Sąjungoje, bei taikant 1989 m. gruodžio 28 d. Lenkijos įstatymą dėl kolektyvinių atleidimų.

Autorius analizuoja abiejų aktų priėmimui įtakos turėjusias priežastis, juose derinamus laisvos rinkos ir darbuotojų apsaugos interesus. Straipsnyje lyginamas kolektyvinių atleidimų reglamentavimas Europos Sąjungos valstybėse ir Lenkijoje.