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THE LEGAL STATUS OF AN INTERCOMPANY TRADE UNION FOLLOWING AMENDMENTS TO THE TRADE UNION ACT: SELECTED ISSUES

Abstract

This article is devoted to the inter-company trade union organization after the amendment to the Trade Union Act. The inter-company trade union organization is relatively rarely subject of studies in labour law. Usually it is considered that the arrangements made for the company trade union organizations relate also to intercompany trade union organisation. Meanwhile, a more detailed analysis shows that the inter-company trade union organization is characterized by far-reaching specificity, and its regulation based largely on references to regulations governing the legal status of the company trade union organization is not always adequate. This generates numerous practical problems. In this text, the author analyzes several particularly important issues regarding inter-company trade union organization in connection with the amendment to the Trade Union Act, which entered into force on January 1, 2019.

Słowa kluczowe: międzyzakładowa organizacja związkowa, reprezentatywność, obowiązek informacyjny, szczególna ochrona, działacz międzyzakładowej organizacji związkowej, nowelizacja ustawy o związkach zawodowych

Keywords: intercompany trade union, representativeness, obligation to inform, number of members, special protection, activist of the intercompany trade union, amendment of Trade Union Act

1. Introductory comments

The legal status of intercompany trade unions is governed in quite a specific manner. There are relatively few provisions dedicated specifically to intercompany trade unions; in fact only Art. 34¹ to 34² of the Trade Union Act (hereinafter referred to as: “TUA”) speak of them directly. Otherwise, intercompany trade unions’ legal status is governed by reference to provisions that concern company trade unions contained in Art. 34 of the TUA. Moreover, this reference does not require provisions on company trade unions to be applied accordingly, which suggests they should be applied to intercompany trade unions directly (Baran 2019, comment on Art. 34). The recent amendment

to the Trade Union Act added new provisions governing the status and operation of company trade unions. Thus, the actual scope of the reference resulting from Art. 34³ of the TUA—was substantially broadened.

The legal status of an intercompany trade union is thus the effect of, on one hand, its relatively limited subordination to separate provisions in the Trade Union Act and, on the other hand, the application of a number of provisions that govern the legal status of company trade unions. This results in a number of practical and theoretical problems. Further, decoding of the legal status of an intercompany trade union that—in the Author's opinion—were only clarified to a limited extent in the amended Trade Union Act.

This text is an attempt to present a number of issues concerning the operation of an intercompany trade union in the context of the amended Trade Union Act, which came into force on 1 January 2019. The Author focuses on several legal aspects of an intercompany trade union: its representativeness, obligation to inform employers, and special protection of intercompany trade union activists. In the Author's opinion, these particular issues cause the most practical problems and require an in-depth analysis.

It should be noted that in this article an intercompany trade union means a trade union that operates with more than one employers in the meaning of Art. 3 of the Labour Code (hereinafter referred to as: "l.c.") and, at the same time, operates with each of them in its entirety; in order for a union to operate with a given employer, at least one person who performs paid work for that employer needs to be a member of the trade union concerned (see: judgment of the Supreme Court of 20 May 2011, II PK 295/10; Latos-Miłkowska 2012; Baran 2019, p. 238).

2. Representativeness of an intercompany trade union

The issue of representativeness of intercompany trade unions has raised many doubts. This is probably due to a complete lack of legal provisions governing the issue. The legislator failed to provide for separate criteria of representativeness of an intercompany trade union, nor did he include a direct reference in any legal regulation to Art. 241^{25a} of the l.c.—which, until now, governed the representativeness of company trade unions. A reference to the criteria of representativeness set forth in Art. 241^{25a} of the l.c. was made, indirectly and only in matters of special protection of intercompany trade union activists, in Art. 34² of the l.c. Accordingly, a number of doubts were raised as to the problem of representativeness of intercompany trade unions. According to one interpretation—presented especially by the trade unions concerned—representativeness of an intercompany trade union should be determined by taking into account the union's members working with all the employers where the union operates. Another interpretation has it that if an intercompany trade union has the status of a representative union with one of the employers where it operates, it acquires the same status with all other employers (see: statement of reasons for the judgment of the Supreme Court of 10 March 2011, III PK 48/10). Another position is that the criteria of representativeness

referred to in Art. 241^{25a} of the l.c. should be applied to the members of intercompany trade unions with the respective employers where the union operates.

The amended Trade Union Act, to a large extent, clarified the situation in terms of representativeness of intercompany trade unions. Since the Trade Union Act (Art. 25³ of the TUA) comprehensively governs the issue of representativeness of trade unions, the reference contained in Art. 34.2 of the TUA also encompasses the requirement to apply these criteria to intercompany trade unions. Thus, *de legata lata*, there is evidently a basis to apply the criteria of representativeness relevant to company trade unions to intercompany trade unions as well. This reference also seems to clarify that fulfilment of the criteria of representativeness of an intercompany trade union is determined for a given employer where an intercompany trade union operates in association with the number of members of such union that he employs. Thus, an intercompany trade union does not acquire the status of a representative union with all employers where it operates, but only with those where it meets the criteria set forth in Art. 25³.1 or 25³.2 of the TUA. As a result, the status of representativeness of an intercompany trade union may differ in the respective companies where it operates. This argument is supported by Art. 34.2's reference to provisions that govern the criteria of the representativeness of company trade unions directly, and it does not require them to be applied accordingly. The situations where the status of an intercompany trade union is determined takes into account the members working with all the employers where it operates are listed *expressis verbis* in Art. 34.2 of the TUA. This provision is exceptional and should not be applied broadly. Thus, there are no normative bases for interpretation other than that according to which an intercompany trade union has the status of a representative trade union with an employer where it has the number of members referred to in Art. 25³ of the TUA.

This solution should be evaluated positively—the idea of representativeness on the level of a company is to identify the unions that have the most potential measured by the number of members working in a given company rather than in general. Thus, an intercompany trade union will have the status of a representative union with the employer where its members are at least 8% of the persons performing paid work (in the case of a union that is an organizational unit or member of a supra-company trade union representative within the meaning of the Act on the Council for Social Dialogue) or a union whose members with a given employer are at least 15% of persons performing paid work for that employer. An intercompany trade union will also have the status of a representative union with the employer—if there are no representative unions based on the criteria set forth in Art. 25(3).1—where it has the most members among the persons performing paid work. In the cases where the legislator introduces the additional criterion of at least 5% of member employees, this number will also relate to the number of employees employed with a given employer.

The new representativeness verification mechanism will also apply to intercompany trade unions. It is worth noting that, in this case, the double reference construction applies and the verification mechanism of company trade union representativeness is

also governed by Art. 25³8's reference to Art. 25¹1 to 25¹12 of the TUA, which requires these provisions to be applied accordingly. An intercompany trade union is governed by Art. 25³8 of the TUA by the reference contained in Art. 34.1 of the TUA. According to these references, an intercompany trade union submits to each employer where it operates information on the number of members referred to in Art. 25³.1 or 25³.2, in order to enable verification of compliance with the representativeness criteria. This is done every six months according to the status as on 30 June and 31 December, until the 10th day of a month. Accordingly, information covers persons employed with the employer, performing paid work who, first of all, have been employed with the employer for at least six months and, secondly, have been members of a given intercompany trade union for at least six months (more on the mechanism of representativeness verification: Latos-Miłkowska 2019). The employer and another company (intercompany) trade union operating with the employer will have the right to question the intercompany trade union's compliance with the representativeness criteria. The wording of the provisions suggest that the respective employers where an intercompany trade union operates will have this right only with respect to the number of persons referred to in Art. 25³.1 and 25³.2, employed with a given employer. In other words, each employer where an intercompany trade union operates will be able to verify, in accordance with the procedure referred to in Art. 25¹.7, compliance of the intercompany trade union with the representativeness criteria in its company. Nonetheless, an employer, where an intercompany trade union operates, does not have the right to effectively question compliance by the intercompany trade union with the representativeness criteria with another employer where it operates. *Prima facie*, this is a reasonable solution—as noted above, representativeness of an intercompany trade union is not universal, but it is determined for a given employer where it operates due to the fact of having its members there. However, it is worth noting in this context that the respective employers where an intercompany trade union operates may have a reasonable legal interest in determining whether an intercompany trade union complies with the representativeness criteria with another employer. For example, the number of protected activists of an intercompany trade union depends on the union's compliance with the representativeness criteria with at least one of the employers where it operates (Art. 34⁴ of the TUA). Thus, it may be that an employer, where an intercompany trade union enjoys special protection for continuation of employment relationship but where it does not meet the representativeness criteria, is not able to verify how many activists of the intercompany trade union are entitled to special protection for continuation of employment relationship. Thus seems to be a certain drawback of the existing regulation.

3. Obligation to inform about the number of members

An intercompany trade union, by virtue of reference to Art. 25¹.1 to 25¹.7 of the TUA, is obliged to inform employers of the number of members who are employees or perform

paid work, other than in the basis of employment relationship, that are employed with the employer for a period of at least 6 months. In the case of an intercompany trade union, however, information concerns not the number of members working with a given employer, but rather the number of members referred to in Art. 25¹.1 working with all the employers where the intercompany trade union operates. According to Art. 34.1 of the TUA, the number of members referred to in Art. 25¹.1 and the right to an exemption from the obligation to work referred to in Art. 31.1 are determined on the basis of the number of members of an intercompany trade union employed with all the employers where the union operates. Information on the number of members should be submitted, within the dates set forth in Art. 25¹.2 of the TUA, to all the employers where an intercompany trade union operates, regardless of the number of members of the intercompany trade union working with the respective employers (see also: judgment of the Supreme Court of 10 March 2011, III PK 48/10). Information addressed to all employers will thus contain the number of members of the intercompany trade union with all the employers where it operates who have been employees and persons performing paid work for the employer, other than on the basis of employment relationship for at least six months, if they are employed by one of the employers where the intercompany trade union operates.

In the case of a new intercompany trade union, the obligation to inform the employers where it operates becomes valid within the time limit in Art. 25¹.3 of the TUA. However, what is unique for an intercompany trade union is the time limit to perform the information obligation with an employer after he has been covered by the operation of an already existing intercompany trade union. This is a somewhat different situation than that referred to in Art. 25¹.3 of the TUA. The characteristic feature of intercompany trade unions is that, in the period of their existence, they can cover new employers. To do this, it is sufficient to gain at least one member who performs paid work with a given employer. It seems that in this case, the provisions of Art. 25¹.3 cannot be applied. However, the provisions concern a different situation and, moreover, pursuant to Art. 34, Art. 25¹ is to be applied to an intercompany trade union not accordingly but indirectly (Baran 2019, p. 239). For a lack of different regulations, it should be assumed that the information obligation with respect to an employer newly covered by an intercompany trade union will become valid only in the first time limit following coverage by the intercompany trade union arising from Art. 25¹.2 of the TUA. Meanwhile, an employer newly included in an intercompany trade union is deprived of the possibility to verify whether a union, at the time of his being included in it, complies with the criteria set forth in Art. 34.2 in association with Art. 25¹.1 of the TUA. The employer's obligation to cooperate with an intercompany trade union is conditioned by compliance with these criteria.

An intercompany trade union is also subject to the verification mechanism of the number of members determined in Art. 25¹.7 of the TUA. In such case, the right to question belongs to every employer where an intercompany trade union operates, and to all trade unions operating at these employers. Thus, it is possible that, in the case

of verifying compliance by an intercompany trade union with the criteria set forth in Art. 34.2 in association with Art. 25¹.1 of the TUA, there will be a number of parallel proceedings before a number of courts in the locations of respective employers where an intercompany trade union operates.

4. Special protection of the activists of an intercompany trade union

Special protection of the activists of an intercompany trade union is, in part, independently governed by Art. 34² of the TUA. At the same time, according to Art. 34, intercompany trade unions are also governed by Art. 25¹ to 33¹ of the TUA, with the exception of Art. 34².

The issue of the relationship between Art. 34² and 32 of the TUA causes certain doubts in the doctrine. In the literature on the subject, there is an interpretation according to which Art. 32 applies with respect to an intercompany trade union only insofar as the body of Art. 34² of the TUA makes a direct reference to it (Książek 2019, pp. 246–247). According to this interpretation, only §§ 1, 2, and 3 of Art. 32 apply to an intercompany trade union. The body of Art. 34² makes a direct reference to these provisions. An argument for such an interpretation is the principle of not applying an extensive interpretation to exceptions; Art. 34² of the TUA is exceptional, and as such, it cannot be interpreted extensively (Książek 2019).

It should be noted, however, that adoption of the above position, especially following amendment of Art. 32 of the TUA, would have far-reaching and hard to accept consequences. Its adoption would mean, in particular, that an intercompany trade union is not covered by the new § 1¹ governing the mechanism of special protection for the continuation of the employment relationship for trade union activists, § 1² governing claims available to persons performing paid work other than on the basis of employment relationship in the event of violation of said protection, § 2 governing the period of special protection and extending the protection to former members of the board of a company trade union, and §§ 7 and 9 governing special protection of an intercompany trade union's founding committee members and intercompany trade union members elected to a trade union function outside a company trade union. This would lead to the adoption of a completely different scope and model of protection compared to company trade union activists. It seems contrary to the overarching intention of the legislator to equalize the status of a company and an intercompany trade union. Thus, it may be doubtful whether such limited protection would be operational. In my judgment, Art. 34² and 32 of the TUA are inseparable, and it is impossible to interpret the institution of special protection for continuation of employment relationship for an intercompany trade union activist independently of Art. 32 of the TUA. In fact, Art. 34² somewhat differently governs special protection for the continuation of the employment relationship for intercompany trade union activists, but the difference concerns a rather narrow aspect of the institution—namely determining the number of intercompany

trade union activists entitled to protection (see also: Orłowski 2009, p. 96). Otherwise, Art. 32 of the TUA should be applied. This is also confirmed by the wording of Art. 34 of the TUA, which also refers to Art. 32 (subject to Art. 34²). If Art. 34² of the TUA was to be the only provision governing special protection for continuation of employment relationship for intercompany trade union activists, the reference to Art. 32 should be omitted from Art. 34.1. It should be concluded then that special protection for continuation of employment relationship for intercompany trade union activists, insofar as not otherwise governed by Art. 34², is governed—by virtue of the reference contained in Art. 34—by Art. 32 of the TUA (similarly, judgment of the Supreme Court of 13 July 2011, I PK 17/11).

Art. 34² of the TUA provides three alternative methods for determining the number of intercompany trade union activists entitled to special protection. In order to be able to use one of them, an intercompany trade union must have the number of members required to achieve the status of a representative union within the meaning of Art. 25³.1 or 25³.2 with at least one employer where it operates. The fourth, subsidiary method applies when an intercompany trade union does not have the number of members referred to in Art. 25³ of the TUA with any of the employers where it operates.

The first two methods are the same as for a company trade union; Art. 34² contains reference to Art. 23.3 and 23.4 of the TUA. The number of protected activists thus depends on either the number of the employer's managerial personnel or on the number of trade union members performing paid work. Despite the lack of explicit provisions, it should be acknowledged that the number of the managerial personnel with all the employers where an intercompany trade union operates should be taken into account when determining the number of protected trade union activists by the parity method. However, insofar as application of the parity criterion with respect to a company trade union is justified by the principle of the balance of power, in the case of an intercompany trade union, its application may lead to an "overestimation" of the intercompany trade union and, consequently, violation of the balance (Latos-Miłkowska 2012, p. 118). This may occur especially if an intercompany trade union operates with a large number of employers but has few members with the respective employers. It should be noted that, in order for an employer to be covered by an intercompany trade union, one member of the union performing paid work with that employer is sufficient. In an extreme case, it may also be that the number of persons entitled to special protection for continuation of employment relationship resulting from the parity method is higher than or equal to the number of intercompany trade union members (Latos-Miłkowska 2012, p. 118). With the progressive criterion, the number of protected intercompany trade union activists is a derivative of the number of its members performing paid work. In this case, too, the number concerned is that of the members performing paid work with all the employers where an intercompany trade union operates; special protection for intercompany trade union activists is determined for the entire union, rather than independently for the respective employers where it operates. The legislator designed the third criterion, defined in Art. 34².1.2 of the TUA, specifically for the needs of intercompany

trade unions. The number of protected trade union activists is determined with one employer indicated by an intercompany trade union from among those with whom it complies with the conditions to achieve the status of a representative union within the meaning of Art. 25³.1 or 25³.2 of the TUA by means of the parity or progressive method referred to in Art. 32.3 or 32.4 of the TUA. The number is then increased by the number of the other employers where the union operates who employ at least 10 persons performing paid work and being its members. It should be noted that the legislator introduced a mechanism that in a way prevents extensive “growth” of the number of activists using special protection and required that only those employers with whom an intercompany trade union has at least 10 members as referred to in Art. 25¹.1 should be taken into account.

The fourth method for determining the number of protected intercompany trade union activists is subsidiary—it applies only when an intercompany trade union does not have the number of members performing paid work required to achieve the status of a representative unit with any of the employers where it operates within the meaning of Art. 25³.1 or 25³.2 of the TUA. In this case, the number of protected intercompany trade union activists cannot be higher than the number of employers who employ at least 10 persons performing paid work where the union operates.

In the literature on the subject, there is an indisputable opinion that it is up to an intercompany trade union to decide with which of the employers it wants to use special protection for continuation of employment relationship for its members. Such protection does not have to be distributed evenly (Książek 2019, p. 245), or even proportionally to the number of intercompany trade union members employed with a given employer. This means that with a single employer where an intercompany trade union operates, special protection of the employment relationship may be enjoyed by more intercompany trade union activists than it would be based on the number of union members employed by that employer or based on the parity criterion. It may also be that all the protected intercompany trade union activists are employed with a single employer. This causes a certain imbalance in encumbering respective employers with the effects of the operation of an intercompany trade union. Nonetheless, it should be acknowledged that such is the autonomy of trade unions, and it should be accepted. Making more use of special protections for the continuation of employment relationship with a given employer may be justified by the fact that a specific employer employs the most intercompany trade union board members, which is an objective and, to some extent, predictable circumstance. More flexibility in identifying activists entitled to protection concerns the other category of persons referred to in Art. 32.1, namely intercompany trade union members authorized to represent the union before the employer. In this case, there is the risk of an intercompany trade union making more “instrumental” use of special protection for continuation of employment relationship with specific employers where it operates.

In association with the abovementioned issue, there is the question of the possibilities a given employer has to effectively verify regarding whether an intercompany trade

union is authorized to enjoy special protection for the continuation of the employment relationship to the extent it declares and wishes. Insofar as it is in general possible to determine in the case of a company trade union (however, there are also some practical problems here, too; Latos-Miłkowska 2017), verification mechanisms in the case of an intercompany trade union prove to be insufficient. The number of intercompany trade union activists enjoying special protection for the continuation of the employment relationship is determined using the prerequisite of having the number of members that complies with the representativeness criteria referred to in Art. 25¹.1.1 or 25¹.1.2 with at least one employer where a union operates and at least 10 persons performing paid work for an employer. The question is how an employer may verify compliance with these criteria with another employer, which may condition the number of protected persons that an intercompany trade union declares in the company. The employer will not find the answer from information submitted in accordance with Art. 25¹.2, applied in association with Art. 34.1 of the TUA, which, according to Art. 34.2, covers the number of employees and non-employees who have been performing paid work for at least six months, employed with all the employers where the union operates. The relatively best situation is that of the employers who, due to discharging board members of an intercompany trade union from work pursuant to Art. 31.1, receive from the intercompany trade union information on the number of members with respective employers per full-time jobs. From this information, they can also determine how many employers the intercompany trade union has with at least 10 members within the meaning of Art. 25¹ of the TUA.

Moreover, an employer does not have an instrument to verify whether a company trade union complies with another employer with the conditions necessary to acquire the status of a representative union. Information on the number of members required for the status of a representative union is provided by an intercompany trade union pursuant to Art. 25³.8 in association with Art. 34, and in association with Art. 25¹.2 to 25¹.7 to the respective employers where it operates. Such information concerns the members referred to in Art. 25³.1 and 25³.2 with a given employer. There is also no tool to verify how many total intercompany trade union activists enjoy special protection with all the employer where the union operates.

Thus, the employer has no instruments to verify whether an intercompany trade union is authorized to present a given number of activists for special protection for the continuation of the employment relationship. It is a very unfavorable situation for employers where intercompany trade unions operate and, unfortunately, it leaves the field open for misuse. It seems evident that the mechanism of referencing provisions that govern company trade unions' information obligation is, in this case, insufficient. Thus, it should be considered whether it would be reasonable to introduce additional information obligations dedicated to intercompany trade unions. It may be noted that such specific information mechanisms have been provided for with respect to, for example, exemption from work of intercompany trade union activists.

5. Conclusions

Following an in-depth analysis, the method for governing the legal status of intercompany trade unions by reference to provisions governing the operation of company trade unions (Art. 34.1 of the TUA) reveals a number of major weaknesses. This concerns, in particular, the ability of employers where intercompany trade unions operate to verify their compliance with certain criteria determining their rights. The most important are lack of the employer's ability to effectively verify circumstances that are decisive in determining the number of activists enjoying special protection for the continuation of the employment relationship to which a given intercompany trade union is entitled. I think no one needs convincing that this issue is of vital importance to employers. Verification mechanisms designed for company trade unions in this case prove insufficient.

This condition was not changed in any major way by the amended Trade Union Act. The legislator left the provisions specifically governing the status of an intercompany trade union (Art. 34 to 34² of the TUA) virtually unchanged despite the evident—in the context of the entire amendment—replacement of the term “employees” with the term “persons performing paid work.”

Also, the extension contained in Art. 34 of the TUA, achieved through the addition of new provisions among those to which Art. 34 of the TUA refers, eliminates the problems observed only to a limited extent. It should be noted, however, that questions concerning the representativeness of an intercompany trade union have been clarified. In light of the new regulation (Art. 25³ in association with Art. 34.1 of the TUA), there should be no more doubts that the status of a representative union belongs to an intercompany trade union with that employer where it has the number of members referred to in Art. 25^{3.1} and 25^{3.2} of the TUA. The other issues identified previously in the literature remain unsettled.

The question is thus about the direction of further legislative changes in terms of governing intercompany trade unions. It does not seem very likely that the problems signaled in this text will be solved through development of practical solutions. The case law may provide some answers, though it is not certain. Thus, it is up to the legislator to take action. It should be noted, however, that this will require the introduction of a number of provisions that will separately govern the status of intercompany trade unions, and in particular impose on intercompany trade unions additional—compared to company trade unions—information obligations. The result would be a separate, elaborate regulation concerning the legal status of intercompany trade unions. It seems contrary to the existing assumptions of that regulation, which is based—as it seems—on maximum approximation of provisions governing company and intercompany trade unions. An expression of such assumption is, for example, the fact that Art. 34.1 refers to Art. 25¹ to 33¹ not accordingly, but indirectly. Thus, subsequent elaboration of a separate regulation dedicated to intercompany trade unions will require the legislator to redefine the original assumptions that he had when creating and governing the status of intercompany trade unions. It seems, however, that the complexity of the problem of

intercompany trade unions and of the interrelations between the stakeholders—a trade union and the employers where it operates—require further provisions from the legislator.

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