

SELECTED REMARKS ON EMPLOYEE REPRESENTATION ROLE IN LONG TERM SAVING PLANS IN POLAND – PPE (EMPLOYEE PENSION SCHEMES) AND PPK (EMPLOYEE CAPITAL PLANS)

Marcin Wojewódka
Instytut Emerytalny
marcin.wojewodka@instytutemerytalny.pl

1. Introduction

Collecting savings in a way organized by the employer should also include the role of employee representation. Therefore, in the functioning forms of additional saving, which are organized by employers, the legislator envisaged the participation of partners at the stage of implementation as well as program support.

The purpose of this article is to indicate the role and competence of the representation of employees in long-term saving. The study aims to answer research questions:

- what are the rights of people employed in long-term saving programs?
- how can employee representation block the implementation of long-term saving?
- what are the differences in the rights of employee representation in PPE and PPK in Poland?

The research method used in this study is based on the analysis of institutions representing employees. The institution's analysis allows answering the above-mentioned research questions. As a result of the analysis, the competences of the representation of employees will be determined, as well as legal possibilities to block or delay the implementation of PPE or PPK.

2. Introduction to PPE and PPK in Poland

2.1. A legal obligation to set up PPK or PPE

Recent years have been a period of increased activity of the legislator in Poland in many law areas, including individual and collective labor law and social security law. There are more and more acts which, among others, impose certain obligations on employers in relation to the employees they employ, and in particular provide for specific obligations of employers in relation to various employee representatives. One of such areas are pensions and long saving. As of today, in practice almost every employer in Poland has to provide to its employees a defined contribution long term benefit. The employer's choice is between two solutions. Namely between the newly introduced since 2019 an employee capital plan (PPK) and an employee pension scheme (PPE), that exist in practice in Poland since late 90-ies, but wasn't widely

distributed and used among employers. In both cases, PPK and PPE, the law imposes on employers' certain obligations in relation to employee representatives and provides those representatives with different powers. Moreover, there are differences that result from the legal form of employee representation, depending whether this is a trade union representation or a representation elected or selected directly among employees.

2.2. Main characteristics of PPK

Employee capital plan (PPK) is a mandatory solution for every employer in Poland, with some exemptions and is a kind of defined contribution long term savings plan with mandatory employer and employee monthly contributions that are rewarded by the State with additional payments into individual participant account within PPK. All contributions are managed externally within defined date funds by investment fund companies according to rigid rules of law. As a rule, payouts from PPK shall take place after the participant reaches age of 60 years. There are some fiscal incentives in place. From a legal point of view a PPK is composed by two agreements signed in practice by employer with the investment fund company. The most important agreement is a PPK management agreement.

2.3. Main characteristics of PPE

While in case of PPE there is only a mandatory employer contribution, with voluntary employee contribution and less rigid than in case of PPK, an investment policy. The time of payout from PPE is similar to this in case of PPK and starts when participant reaches age of 60. There are as well fiscal incentives in place. Establishment of PPE requires to run an administrative procedure of PPE registration. From a legal point of view a PPE is composed by two agreements. The most important agreement is a PPE company pension agreement, that is stipulated between employer and employee representatives.

3. Role of employee representation in PPK

3.1. Legal basis for employee representation in PPK

In the case of employee capital plans (PPK), which are an obligatory element of the system of additional pension security for employers and at the same time voluntary for employees, the legislator granted employees' representatives limited consultative rights. The legal basis in this case is the Act of October 4, 2018 on employee capital plans (PPK Act), which provides for mandatory participation of representatives of employees employed in the creation of PPK. It is, however, a compulsory but non-binding participation. Moreover, in this case, the legislator provided that shall the trade union organizations does not operate in a given workplace, then other representatives of employees must be obligatorily involved in the procedure of selecting a financial institution that will manage PPK in a given workplace. Thus, in practice for every employer that sets up an employee capital plan it is necessary to run a consultation on selection of provider (Wojewódka 2019, p. 35).

3.2. The method of selecting the representation of employees in the PPK

According to the art. 7 item 3 of the PPK Act, the employer is obliged, in consultation with the company trade organization operating in this employing entity, to select the financial institution with which the PPK management contract will be concluded. However, shall the trade union organization does not operate at this employer, the employer shall select the financial institution with which the PPK management contract will be concluded, in consultation with the representation of employees selected in accordance with the procedure adopted in the given employing entity. However, if one month before the expiry of the period within which the employing entity is obliged to conclude a PPK management agreement, no agreement is reached on the selection, the employer independently chooses the financial institution with which the PPK management agreement will be concluded. PPK (Kolek et al. 2019, p. 23). Act states in practice, that it is employer's obligation and right to set up the rule that shall enable the selection of employees representation for PPK purposes. The above results from the fact used in the provisions of the wording "in the manner adopted in a given employing entity", which means that in this respect the legislator leaves individual employers a certain degree of discretion (Jakubowski and Prusik 2019, p. 122). This means that the correct and lawful solution will be the organization by the employer of universal elections among the employees of the employees' representation in question, as well as the reception and appropriate documentation that such representation will be e.g. the employee council or the social commission operating at the employer's office (Kolek and Sobolewski 2019, p. 28). There is no doubt that for the successful selection of the representation it is necessary for the employer to provide employees with the opportunity to articulate their will.

3.3. Consultative competences of employee representation in PPK

In the case of PPK, the legislator equipped the representation of employees solely with the consultative powers (Jakubowski and Prusik 2019, p.120). It is the employer's obligation to include the representation of employees in the process of selecting a financial institution managing a given PPK, but this obligation only arises in the scope of submitting by the employer a representation of employees of a proposal to select a specific financial institution as the PPK manager in that employing entity (Kolek and Sobolewski 2019, p. 27). Moreover, the abovementioned consultation entitlement on the part of the representation of employees is only temporary. The employer is obliged to attempt to reach an agreement with the representation of employees only up to one month before the final date of the mandatory conclusion of a PPK management contract in this entity. However, after this date, it will be lawful for the employer to completely ignore the employee's representation (Wojewódka 2019, p. 39). Moreover, in the case of PPK, the representation of employees is not a party to any agreement constituting PPK and in practice has no impact on the content of the obligations and rights of PPK participants. The regulations of PPK Act also does not provide for any restrictions on the length of existence of such representation. It can be stated that the employee's representation in PPK has an *ad casum* character, what means that once in the future there will arise a need to run a new consultation

process on the selection on a new PPK provider it will be necessary to have a new employees representation.

4. Role of employee representation in PPE

4.1. Legal basis for employee representation in PPE

The issues of representation of employees' interests in the case of employee pension schemes are regulated by the Act of 20 April 2004 on employee pension schemes. In this case, the employee pension scheme consists of two agreements a company pension agreement and an agreement with the managing entity. In both cases, the party to these contracts is always the employer, but in the case of a company pension agreement, the employee representation selected for the purposes of PPE is by law a party of this agreement. The legal basis for the existence of employee representation is art. 11 of the PPE Act, which in para. 1 introduces the principle of empowering this representation to be a party of the company pension agreement.

4.2. The method of selecting the representation of employees in the PPE

According to the content of the instruction of art. 11 paragraph 2 of the PPE Act, employee representation is made up of all company trade union organizations operating at a given employer. However, as it is often mentioned the trade unions in Poland were not very supportive to the PPE, even in the light of their established by law supremacy in the area of decision process of setting up a PPE (Szczepański 2010, p 373). However, if within the employer does not operate a company trade union organization, the employer concludes a company pension agreement with employee representation, that should be selected in accordance with the procedure adopted at the given employer. Also, in this case, the legislator did not regulate in any way the rules for selecting the employee representation in question, limiting themselves only to the indication "*in the manner adopted by a given employer*". It must be deduced from the above that it is the employer's responsibility to work out and determine the rules or appropriate regulations for selecting the representation in question and to do so. As it is stressed within a doctrine an employer shall not in this case directly indicate a Work Council or any other existing body without employee's engagement in the decision on selection (Kopeć and Wojewódka 2005, pp. 78-79). By law it is not compulsory or even necessary to agree this mode of selection of with the employees themselves. Employers must, however, remember that the empowerment of employee representation for PPE purposes, and thus also indirectly the correctness of the process of selecting this representation, is subject to examination by the Polish Financial Supervision Authority in the process of PPE registration before this body. The above supervisory power of a state body, which de facto co-decides on the establishment of a given PPE, by issuing an appropriate administrative decision, indicates that employers should exercise due diligence within their duty to select an employee representation for PPE purposes. It should be stressed that some authors provide such employee representation with the ability to represent employees in front

of court in case of potential dispute with employer (Rycak and Derlacz-Wawrowska 2010, p. 131).

4.3. Rights representing employees' representation in PPE

Pursuant to the provisions of the PPE Act, the basic right of each employee representation in PPE, regardless of whether it is a trade union organization or a representative office selected in accordance with the procedure adopted by a given employer, is being a party to the company pension agreement under PPE. (Wojewódka 2015, p. 99). This agreement can be somewhat simplified as a kind of PPE constitution. Being a party to the company pension agreement means the right not only to sign it, but also to have a real impact on its content, e.g. in the form of negotiations with the employer, the amount of the basic contribution obligatorily paid by that employer to the PPE. The competences of employee representation under PPE also include issues related to the change in the content of the agreement (and thus the terms of the PPE), as well as limited possibilities of co-deciding on the existence of PPE as such a solution in a given employing entity. In practice the employer is not able to set up unilaterally a PPE in case when the employees representation refuses to sign a company pension agreement.

4.4. Temporary aspect of non-trade union employee representation in PPE

In the case of provisions on PPE, the legislator applied a new solution, practically unknown in other cases, in the form of a specific term of office of non-union representation of employees. From the content of art. 11 paragraph 3 of the PPE Act shows that the authorization of such representation to take all actions provided for by the Act after 24 months from the date of selection of the representation (Kopeć and Wojewódka 2005, p. 80). However, it will expire sooner if at least half of the employees' representatives cease to be employees of the employer or the employer's trade union organization starts operating at the employer.

5. Comparison of selected areas

5.1. Similarities

The comparison of the representation of employees for the purposes of PPE with the representation of employees for the purposes of PPK indicates both similarities as well as significant differences between these bodies. Certainly, the common feature is the fact that both representative offices can function only if the employer does not have trade union organizations. The second common feature of both representations is the fact that they are selected in the mode adopted autonomously at a given employer, and de facto the employer decides how to select them. However, the list of similarities does not outweighs the list of differences between the two bodies.

5.2. Differences

The most important difference between employee representation in PPE and PPK is the nature of the competences held by the body. While in the case of PPK they are in practice only consultative competences, it is actually the employer, who can independently make all decisions regarding PPK. In the case of PPE, the employee representation has decisive competence and co-decides on the creation of PPE as well as on its individual parameters. In addition, the procedure for selecting an employee representation for PPE purposes is the subject of a supervision of the Polish Financial Supervision Authority, which is not the case for the representation of persons employed for PPK purposes. Another significant difference is the lifetime of the employee representation. In the case of PPK, we are dealing with a body appointed in principle *ad casum*. However, in the case of PPE, the legislator introduced a specific 24-month term of existence to this body. The above list clearly shows that just as you cannot put an equal sign between PPE and PPK, it is also not possible in the case of employee representatives in these solutions for long-term additional saving.

6. Conclusion

In the present paper there were discussed both main similarities as differences between employees' representations in both PPE and PPK, that are forms in place of long-term savings organized by employers for employees.

The research questions set out in this article have been answered using the institutional analysis method. Thanks to legal and organizational analysis of the principles of functioning of the representation of employees, the main rights and possibilities of employees employed in implementing and servicing PPE and PPK were indicated.

The comparison shows clearly that in case on PPE the legal position of employee's representation is much stronger, that the one in case of PPK. However as, due to the recent changes in law a PPE system will not develop substantially in future, in practice the main way to deliver long term savings in Poland will be PPK, where the position of employee representatives is respectively less important.

References

- Kopeć A., Wojewódka M., (2005), *Pracownicze Programy Emerytalne. Komentarz*. Beck, 73-82.
- Kolek A., Sobolewski O., (2019), *Jak prowadzić PPK. 50 porad dla pracodawców*. Wiedza i Praktyka, 27-28.
- Kolek A., Sobolewski O., Wojewódka M., (2019), *PPK w firmie*. Wiedza i Praktyka, 23-24.
- Jakubowski S., Prusik A., (2019), *Pracownicze Plany Kapitałowe. Komentarz*. Wolters Kluwer, 120-124.
- Rycak M., Derlacz-Wawrowska M., (2010), *Związki zawodowe a nie związkowe przedstawicielstwa pracowników*, IPISS, 130-131.
- Szczepański M., (2010), *Stymulatory i bariery rozwoju zakładowych systemów emerytalnych na przykładzie Polski*, Wydawnictwo Politechniki Poznańskiej, 300-311, 370-374.

- Wojewódka M., (2011), *Pracownicze Programy Emerytalne jako forma dodatkowego zabezpieczenia na starość w Polsce* (Ph.D. thsesis, unpublished).
- Wojewódka M., (2015), *The impact on occupational pension schemes in Poland*. [in:] *Social Security Systems in the light of demographic economic and technological challenges*, Wydawnictwo Politechniki Poznańskiej, 99-107.
- Wojewódka M., (2019), *Pracownicze Plany Kapitałowe. Komentarz*, Beck, 32-40, 64-69.