MISSION REPORT

(Warsaw, Poland – 14-16 May 2014)

Purpose of the mission

1. An ILO Mission composed of Ms. Karen Curtis, Chief of the Freedom of Association Branch of the International Labour Standards Department, and Ms. Christine Bader, Legal Officer, visited Poland at the invitation of the Ministry of Labour and Social Policy from 13 to 16 May 2013.

2. The objective of the mission was laid down in the terms of reference provided by the Government which are annexed to the report (Appendix I). The programme of the mission is also enclosed (Appendix II).

Meetings held

3. The Mission met with the Secretary of State of the Ministry of Labour and Social Policy, Mr. Jacek Mecina, and other high officials and representatives from the Ministry of Labour and Social Policy. The Mission also met with representatives of the Chancellery and a representative of the General Labour Inspectorate.

4. The Mission had technical meetings on the issues raised in the terms of reference with the social partners separately, namely the representatives of trade unions, including the Independent and Self-Governing Trade Union (NSZZ) "Solidarnosc" and the All-Poland Trade Unions Alliance (OPZZ); and the representatives of employers' organizations, including the Polish Confederation of Private Employers Lewiatan (PKPP), Employers of Poland and the Polish Craft Association. The Mission shared concluding reflections with the Government together with the social partners in the framework of a tripartite meeting on the last day. A list of the representatives of trade unions and employers' organizations met is annexed to the report (Appendix III).

Summary of the discussions

5. By way of introductory remarks, the State Minister expressed the hope that the mission would help rebuild the trust between the social partners. The trade unions had left the Tripartite Commission one year ago. While he recognized that social dialogue in times of crisis (global economic and financial crisis, election period, etc.) always involved difficulties, he expressed concern that the Tripartite Commission was not being used as a venue to bring forward the views of the social partners as, in such cases, civil society often used shortcuts to advance its interests. Mechanisms were being put in place to

strengthen social dialogue. Meetings such as those organized at the occasion of the ILO mission, in particular the tripartite meeting to be convened at the end, were considered to be among the best measures to rebuild trust. The Mission welcomed the Government's recourse to the ILO for assistance in restoring the trust among the social partners, and pointed out that the efforts it had made in the area of international labour standards had been recognized by the placement of Poland on the list of cases for discussion at the 2014 ILC as a case of good practice concerning the Human Resources Development Convention, 1975 (No. 142).

Right to organize for all workers without distinction

6. First and foremost, the State Secretary highlighted the importance of the issue of the right to organize of workers under work arrangements other than traditional employment contracts. The ILO supervisory bodies had requested the Government to take the necessary measures to ensure that all workers, including self-employed workers and those employed under civil law contracts, enjoyed the right to establish and join organizations of their own choosing within the meaning of the Convention. The Government was ready to tackle the issue by modifying the Trade Union Act but needed to resolve a number of problems arising in case of extension of the right to association to these categories of workers. The Mission was asked to provide technical advice in this regard. A Government representative raised several specific questions, for instance, how to deal with privileges granted under the Trade Union Act, such as trade union leave (section 31(1) of the Trade Union Act) or ad hoc trade union leave for unplanned trade union activities (section 31(3)); how to provide effective protection against anti-union discrimination to trade union leaders elected for years if the contracts of these categories of workers were typically temporary; and which courts should be in charge of affairs related to civil law contracts (in Poland labour courts were competent for employment contracts and public courts were in charge of civil law contracts).

7. The Mission recalled generally that all workers in the broad sense of the term should have the right to organize, enjoy protection of their organizational rights and have a collective voice. The ILO supervisory bodies did not necessarily expect that this right be granted through the Trade Union Act or that all the rights therein be afforded to self-employed and persons working under civil law contracts. The only expectation regarding these categories was that they should be able to come together, be protected against anti-union discrimination due to their activities and have an avenue to express their collective voice – not necessarily through a collective agreement in the traditional sense of the term or via the traditional collective bargaining machinery but there should be no hindrance to collective negotiations; there should also be the possibility to exercise a form of industrial action in a collective way (work stoppage; protest action) but not necessarily under the Act on Collective Disputes. For example, the right to organize would allow musicians to engage collectively with the Government and the major players in the industry (since they did not have a single employer).

8. In response to the questions raised, the Mission stressed that, as the contracts of these categories of workers did not imply an employment relationship, there would be no employer that would be expected to provide facilities such as union leave or premises to these categories of workers. If these categories of workers enjoyed the right to organize (right to establish and join), they could however use those groups to conclude collective agreements with major players in the field, and in this framework they could potentially negotiate premises and other facilities and privileges including the possible payment of full-time officers. For these categories of workers, these aspects were difficult to regulate by law and should rather be subject to agreement of the interested parties as in the example of musicians or freelance journalists. As regards the issue of protection against anti-union discrimination for self-employed or civil law contracts, there could not be a presumption or obligation to continue or extend temporary contracts due to (appointed or elected) trade union office. However, protection against anti-union discrimination should ensure that it would not be possible to discontinue, terminate or not give a contract due to trade union functions or activities. Such situations would need to be reviewed on a case by case basis. For instance, the president of a trade union of musicians, whose band had been assigned a certain concert every year since a long time, should be able to allege an act of anti-union discrimination if, after the assumption of trade union presidency, the band suddenly no longer got the assignment - such allegation to be examined by the courts. Regarding the appropriate type of court, labour courts might be more appropriate for such matters as they had greater expertise in labour relations. The Mission reminded the Government that it would be important to keep the Committee of Experts on the Application of Conventions and Recommendations informed about any work initiated on legislative amendments, so that it could acknowledge the efforts being made.

9. In the meeting with the trade unions, NSZZ "Solidarnosc" recalled that it had submitted a complaint before the Committee on Freedom of Association (CFA) on the issue (Case No. 2888). The number of self-employed persons and persons employed under civil law contracts amounted to approx. 2.5 million. In the union's view, they should enjoy full freedom of association. Recently, the request for the registration of a trade union of musicians working under civil law contracts had been refused by a court. It was worth noting that the statutes of NSZZ "Solidarnosc" and OPZZ did not correspond to the scope of the Trade Union Act but were in line with Convention No. 87, since, having been adopted under a previous law, they also provided for the right to organize of persons working under civil law contracts; but at present such persons affiliated to unions were not being counted as trade union members or for the granting of trade union privileges. OPZZ shared the position of NSZZ "Solidarnosc" adding that in June 2012, OPZZ had filed a complaint with the Constitutional Court on the issue. So far, there had been two opinions in its favour on this point (Prosecutor-General and Parliament) and the examination was being awaited.

10. The trade unions then raised similar questions to the ones brought forward by the Government as to how to adjust trade union leave to these categories of workers or how

to protect trade union officers in these categories against anti-union discrimination. Having listened to the Mission's response, NSZZ "Solidarnosc" was of the view that persons working under civil law contracts should be covered by the Trade Union Act and benefit from the privileges foreseen in that Act. The union referred in particular to some persons working under civil law contracts, such as ticket controllers or certain musicians, who had permanent jobs with the same employer (e.g. city transport authorities or Philharmonic orchestra); in their view, those cases should be regulated under the Trade Union Act. OPZZ confirmed that civil law contracts were sometimes concluded for an indefinite period; nonetheless, in the current circumstances, these workers could not engage in collective bargaining, initiate a collective dispute (mediation, arbitration, etc.) or file a complaint.

11. The Mission emphasized that it was an entirely different situation if persons working under civil law contracts were in a *de facto* employment relationship. If civil law contracts were (mis)used to avoid obligations stemming from a continual employment relationship, they would constitute disguised employment relationships that should come under the regulation of the Trade Union Act. In those cases, employers would have the same responsibilities and obligations as for employees. However, genuine civil law contracts with very different circumstances would be difficult to regulate under the Trade Union Act, which presumed a regular employment relationship – many sections of the Act would need to be amended to adapt to these different circumstances and this process would be very time-consuming. It might be preferable and simpler to grant broadly to all workers the right to organize in a global provision of the Trade Union Act and let the social partners and the courts address application issues. A provision could also acknowledge that all trade unions had the right to enter into collective disputes, since it would be difficult to apply the whole Act on Collective Labour Disputes to relations other than employment relationships. The parts of the Trade Union Act implying an employment relationship would be irrelevant and thus not applicable to persons working under civil law contracts and self-employed persons.

12. In the meeting with the employers' organizations, they expressed their doubts and concerns as to the extension of the right to organize to persons working under civil law contracts. These contracts did not involve an employment relationship and there was thus no ground for including these persons under the Trade Union Act. Since this Act granted certain privileges based on the number of trade union members, the issue was important to trade unions because they wished to reach higher numbers of trade union members so that they could increase their representativeness and be eligible for or be granted extended privileges (e.g. trade union leave, etc.). These categories of workers had the right to join professional associations, and there were thousands of such associations in Poland. Their contracts were not regulated under labour law but under civil law and often granted better conditions than employment contracts. The employers stressed that these categories refused to be covered by the Labour Code, and that the Trade Union Act had been elaborated for employees. As regards the use of civil law contracts to avoid employment relationships, this was prohibited by national law and combatted by courts. Trade unions

should signal this phenomenon, when it arose, to the labour inspectorate, as inspectors could even retroactively decide that a given person should have had an employment contract. The employers reiterated that, while large companies only sporadically used civil law contracts, small and medium enterprises would suffer a catastrophic burden if the extension of the right to organize to persons working under civil law contracts increased the number of trade union members. They emphasized that Poland was a young democracy with only 25 years of industrial relations history. The employers indicated by way of example that in one large company in the energy sector, which had 160 trade unions with more than 100 per cent trade union membership, the existence of the unions cost the company almost 10 million $US. An extension of the right to organize beyond employees would be premature.

13. The Mission observed that the issue of multiple trade union membership, as in the case just mentioned, had much more negative consequences for employers in industrial relations than the extension of the right to organize to persons working under civil law contracts. Given that this category of workers was not in an employment relationship, the parts of the Trade Union Act implying an employment relationship would be irrelevant and not applicable to persons working under civil law contracts and self-employed persons, and there would thus be no obligation on the employer to provide trade union leave and premises.

Right to strike (section 19 of the Act on Collective Disputes)

14. With respect to section 19(3) of the Act on Collective Labour Disputes (prohibition of the right to strike of persons employed in State authorities, government and self-government administration, courts and public prosecutor's offices), the Government stated that it was quite advanced in its reflections concerning the right to strike for civil servants not in executive positions.

15. The Chancellery stated that since 2006, seven collective disputes had been initiated by trade unions in national and local Government units which did not enjoy the right to strike. In terms of compensatory guarantees for public servants not enjoying the right to strike, the current situation provided for the use of mediation (person from list of the Ministry of Labour or any independent person trusted by the parties), submission of the dispute to the social arbitration college, engagement in other forms of protest (e.g. banners) or having other workers engage in strike action on their behalf (solidarity strike under section 22 of the Act on Collective Disputes).

16. The Mission confirmed that restrictions to the right to strike in the public sector should be limited to public servants exercising authority in the name of the State. However, the ILO supervisory bodies had not defined the exact meaning of the term. One means to establish which public servants would be exempted from the right to strike would be to set up a

tripartite body responsible for determining exactly which public servants were exercising authority in the name of the State. For those public servants considered as exercising authority in the name of the State and thus being denied the right to strike, compensatory guarantees should be provided, i.e. mechanisms enjoying the confidence of the parties that could make a final determination of the dispute.

17. In the meeting with the trade unions, NSZZ "Solidarnosc" indicated that it had filed a complaint with the Constitutional Court on the issue; but that it had doubts as to the court's independence. The trade unions stated that the exemption contained in section 19(3) of the Act on Collective Labour Disputes was too large (even comprising clerks) and violated article 51 of the Polish Constitution and Conventions Nos. 87 and 151. The prohibition of the right to strike should be limited to public servants in senior executive posts exercising administrative power. The term "civil service" was ambiguous in Poland as, unlike other European countries, it only concerned employees in the State administration which were covered by the Civil Service Act. There were also other acts concerning self-government units, chancellery of Parliament or courts, which all contained a prohibition of the right to strike. The very fact of being a public servant was perceived as a political function. Trade unions wished to be able to initiate collective disputes against the Government (State administration), since the salaries of civil servants had neither been raised nor adjusted over several years.

18. Furthermore, the trade unions denounced the lack of procedure to determine beforehand and in an objective manner the legality of an upcoming strike. In practice, the employer presented its opinion, the trade union did the same, the employer threatened to sue the union in the event of a strike, and trade unions paid legal firms high amounts of money to have an opinion on the legality of the strike. The absence of procedure limited the right to strike. In their view, both parties (including the employer) were interested in having a procedure instead of a court decision that would take months.

19. The Mission noted that section 19(1) of the Act on Collective Labour Disputes indeed prohibited work stoppages "where the interruption of work constituted a hazard to human lives or health or to security of the State", without establishing a procedure for determining whether the situation at hand was covered by this definition. This might lead to a situation where trade unions would call a strike without knowing whether the action was protected.

20. In the meeting with the Chancellery, they confirmed that minimum services were not referred to in the Act on Collective Labour Disputes, but were defined by the employer and the guidelines for the organization of strike action, which provided that the employer should not be hindered in the provision of minimum services. There was a trend towards fewer strikes, the reason being said to be the fear of losing jobs. In some cases, section 19(1) had been used to intimidate trade unions planning to call a strike through the issuance by the employer after or even before the strike referendum of extensive lists of

positions prohibited from participating in the strike (sometimes including junior guards or trainees).

21. The Mission suggested that consideration be given to establishing a procedure for determining ahead of time or, at the moment of dispute, the cases where an interruption of work would be deemed a hazard under section 19(1). For a determination ahead of time, consideration could be given to the procedure recommended by the ILO supervisory bodies for defining minimum services, i.e. negotiation of such a list involving the relevant employers' and workers' organizations; any disagreement to be settled by an independent body. For a swift determination at the moment of the dispute, it would be possible to establish an independent commission to this end or use a tripartite body. Any such procedure would protect workers and unions from intimidation by the employer as to the possible illegality of the upcoming strike action. Such a system could also be used to determine public servants exercising authority in the name of the State under section 19(3) and define where appropriate the minimum services.

Verification of number of trade union members

22. The State Secretary highlighted the importance of the verification of the size of trade union membership, since a number of privileges and facilities to be provided by the employer according to the Trade Union Act depended on the number of trade union members, e.g. trade union leave, protection from dismissal without trade union consent, etc.

23. The Mission observed that the mean for determining the representativity of trade unions often depended on the industrial relations system of the country and the manner in which workers organized. In some countries there was a bottom-up system (first there were company-level trade unions, which then federated into sectoral and national trade unions), in others a top-down system (main central organizations created trade unions at company level). In a top-down system there was often no notion as to the size of trade union membership at company level. Both systems seemed to exist in Poland. Determination of the quantitative representativeness of trade unions could be based on the number of members or on social elections.

24. A Government representative stated that it would be impossible for the Ministry to verify the number of trade union members at company level. The Ministry therefore simply followed the statements of the trade unions. However, the General Labour Inspectorate, which was independent from the State and had the protection of trade union rights within its mandate, could verify the number of trade union members.

25. In the meeting with the trade unions, they considered that the obligation to submit lists with the names of trade union members to the employers, as requested by the latter,

violated both the principles of freedom of association and the protection of personal data. The submission of such lists would enable employers not to extend the contracts of trade union members thus endangering the existence of trade unions. At present, verification of the number of trade union members was only possible via judicial proceedings where the court called on the trade union board to provide a list and examined the list without providing it to the employer. Employers were against the current practice as it took a long time and involved court proceedings.

26. At the meeting with the employers' organizations, they confirmed that it was difficult to verify the number of trade union members. There were important discrepancies in the trade union declarations concerning the numbers of their members. The employers requested a rapid and reliable method of verification as the use of courts was difficult, expensive and lengthy. In their view, one possibility would be to extend the power of the labour inspectorate to verify the number of trade union members.

27. The Mission recognized that court proceedings to verify the number of trade union members were long, costly and burdensome. As employers were under the obligation to provide the privileges linked to the size of trade union membership, it was only appropriate that a rapid procedure be put into place to verify the numbers in case of doubt. There were many different ways of verifying numbers in a manner compatible with freedom of association principles, e.g. in some countries social elections took place every few years for the various unions, with minimum floors to be reached for representativeness and benefits; in other countries the numbers were ascertained via the check-off system or via membership cards. Most importantly, the external body able to confirm union membership in case of doubt should be one that enjoyed the confidence of both parties. The General Labour Inspectorate could be a solution. In case of disagreement, an appeal to court should remain possible.

28. The General Labour Inspectorate confirmed that it would be possible for labour inspectors to verify membership figures in the event of challenge by the employer or another trade union. The General Labour Inspectorate stated that it collaborated closely with the trade unions and that there was no issue of credibility or confidence of trade unions vis-à-vis the inspectors. Names of union members would be treated in a strictly confidential manner. A legislative amendment would however be needed as at present this verification task was assigned to the courts. The Chancellery reiterated that solely the numbers of trade union members were important for the attribution of privileges.

Other issues raised by the tripartite partners

Tripartite Commission

29. The Mission noted the trade unions' indication that, while they had no confidence in the Tripartite Commission as a forum and no expectation that it could tackle the problems presently being discussed, it would be both necessary and desirable that the tripartite partners agree on all these issues. The Mission also noted the employers' statement that there had been too few tripartite compromises in the last years due to diverging interests, that talks were being held at present to change the institution of the Tripartite Commission, and that in the employers' view the establishment of a tripartite body with decision-making powers as was being proposed by the trade unions would undermine the political system. The Mission considered that while the interruption of the work of the Tripartite Commission was not part of its terms of reference, its impact on social dialogue could not be ignored. The tripartite meeting proposed at the end of the mission would be a good opportunity for all parties to come together.

Promotion of representative unions and collective bargaining at company level

30. The State Secretary stressed the need to strengthen and promote representative unions at company level, possibly by increasing the representativeness requirement of ten per cent of affiliated employees employed in a single establishment (cf. section 241/25a of the Labour Code). Sometimes there were a dozen trade unions in one enterprise. In this context, he also highlighted the importance of promoting collective bargaining at company level. As regards statistics on the number of collective agreements and their coverage, a Government representative indicated that the Ministry of Labour only registered collective agreements concluded at a higher level than company level, and that such information would rather be with the General Labour Inspectorate which was competent for local and regional companies. At the meeting with the employers' organizations, the representative of a company with 15,000 employees stated by way of example that at present 20 trade unions were operating in the enterprise of which six were representative. It was extremely difficult to engage in collective bargaining because of a provision requiring all trade union organizations conducting the negotiations concerning an agreement or at least all representative trade unions of an establishment participating in the negotiations, to sign the collective agreement. Moreover, many collective agreements contained an "eternity clause" providing that the collective agreement remained valid until new provisions applied. Although the Constitutional Court had held that the clause was null and void, the ruling was only valid for collective agreements concluded after the ruling. As a result, the collective agreement currently in force for the whole workplace had been signed in 1997 and had only been modified three times. The Mission observed that it might be more conducive to harmonious industrial relations to

conclude collective agreements at company or sectoral level which could be dynamically readjusted every 2-3 years.

Promotion of sectoral collective bargaining

31. The State Secretary signalled that the promotion of collective bargaining at sectoral level as requested by the trade unions encountered difficulties. In many Western countries sectoral collective bargaining was the basis for industrial relations; in Poland this was not the case for historical reasons. There were three national trade unions left over from socialism with strong sectoral and regional representativeness as well as company-level representativeness. When looking closer at the sectors, they often had a public and a private component. While there were many strong and representative trade unions in the public component, there were much fewer in the private component, with low representativity. Private sector unions were usually weak as they had been created from scratch. As regards the employers' side, there was a lack of sectoral differentiation of employers' organizations. Moreover, public and private employers were often part of the same employers' organization with very divergent interests. PKPP, the biggest employers' organization, included mostly private sector enterprises; 98% of the enterprises were micro and small enterprises; but the medium and large enterprises employed 40% of the workforce. Employers in the private sector were generally unwilling to engage in sectoral collective bargaining. In the Government's view, it was difficult in these circumstances to promote sectoral collective bargaining. The employers confirmed that collective bargaining mainly took place at company level. Collective bargaining was not common at a higher level because each employer preferred specific regulations regarding wages, etc. Moreover, the "eternity clause" was still valid for collective agreements at a level higher than company level. The Mission, observing that Poland seemed to have both the bottom-up system (company-level trade unions federating into sectoral and national unions) and the top-down system (main central organizations creating trade unions at company level), suggested that both company-level and sectoral collective bargaining be promoted.

Right to access premises

32. The trade unions raised the issue of the right of trade union officers to enter premises if not employed in the company, as well as the issue of the right of trade union activists to enter premises, for promotion purposes, where no trade union existed in the company. The Mission responded that the ILO supervisory bodies had never explicitly pronounced themselves on the latter scenario. Usually, provisions in national legislations required as condition for access at least one trade union member inside the enterprise. Once there were trade union members at the enterprise, there should be a right to access the premises, including the parking lot (see CFA Case No. 1523), for trade union leaders regardless as to whether they were employed or had been dismissed by the company, with due respect for the rights of property and management. Where no trade union existed inside the

enterprise, trade union activists still had the right to carry out their promotional work outside the premises (e.g. meeting workers, distributing flyers, etc.).

Definition of the party to a collective dispute

33. The trade unions expressed concern at the legislative lack of clarity as to who was party to a collective dispute (e.g. in case of firemen, it was unclear whether it was the regional or national Chief of the Fire Brigade or the competent Minister). Employers used this lack of clarity to claim that the relevant party was not the appropriate party to the dispute and that the strike was therefore illegal. The declaration of collective disputes as illegal had nasty consequences for trade unions. Moreover, the definition of employer in the Act on Collective Disputes was too narrow as it did not comprise the employer with real power (e.g. in the education sector, the party was the school principal who had no responsibility for wages). The legislation should be amended to ensure that a party to the dispute could be an employer, the Government, the local Government or another entity on which the relevant group depended economically. The Chancellery signalled that it had already considered the question of representation tabled by the trade unions and envisaged the possibility of replacing the term "employer" in section 1 of the Act on Collective Disputes by the term "employing entity". The Mission observed that the restrictive understanding of the term "employer" would need to be extended if the rights under the Convention were to be granted to persons working under civil law contracts. The Mission suggested amending section 1 to read "employer or responsible authority", which would also take into account possible amendments to section 19(3). Moreover, trade unions could not expect to always deal with the top employer representative; but it should be ensured that the party to the collective dispute on the employer side had the authority to make concessions and take decisions.

Social inspection

34. Finally, the employers raised the issue of social inspection, i.e. inspections of working conditions conducted by trade union officials. Together with the labour inspection, this amounted to a dual inspection mechanism being in place. The Mission confirmed that such a system did not exist in other countries and highlighted the need to strengthen labour inspection and facilitate the ability of trade unions to notify problems to labour inspectors.

Concluding meeting

35. At the final tripartite meeting, the State Secretary expressed the hope that the gathering of all three partners would constitute a new beginning for social dialogue in Poland. The social partners welcomed the opportunity to come together and present their views.

36. The Mission thanked the three major parties of social dialogue for having devoted their time to assist the Mission in its understanding of labour relations in Poland and of the challenges that they faced. The presence of the tripartite partners at the concluding meeting of the Mission's visit to Poland was highly appreciated. The honest, frank and constructive exchange of views in which all parties had engaged with the Mission constituted the key pillar of engagement for the nearly centenary tripartite organization that the Mission represented – the ILO. The Mission also extended special thanks to the State Secretary for his initiative to reach out to the ILO for guidance and technical advice in relation to some issues that had been raised by the ILO supervisory bodies over the years. This demonstrated important political will on the part of the Government. The Mission expressed the hope that the tripartite partners would together successfully translate this political will into tangible concrete progress. It was important however to recall that the issues that the Mission had been asked to consider and provide guidance on, did not appear in a vacuum. They concerned recommendations from the ILO supervisory machinery which had been made following an analysis of specific complaints of non-compliance with freedom of association. It was also critical to bear in mind that the ILO recommendations were not merely academic reflections detached from daily realities but had also been the result of tripartite consensus at the international level as to what was expected from a labour relations system which fully respected freedom of association principles, while bearing in mind the concerns of governments, business and labour. Subsequent to the clear recommendations from the ILO supervisory machinery, two main trade union confederations represented at the present meeting (NSZZ "Solidarnosc" and OPZZ) had further raised these matters to the highest national level by petitioning the Polish Constitutional Court. This context was significant. The discussions held over the last few days were not the fruit of philosophical ruminations but the necessary consequence of an assessment concerning compliance with obligations at the international level. The highest court of Poland would now also weigh in on these matters. The current tripartite dialogue had however created the space for possible solutions to these matters in a manner which would bear in mind the legitimate concerns of all the interested parties. The request for ILO assistance had further introduced the element of an external partner – the ILO, to provide the space for each of the parties concerned to be fully heard with a view to finding mutually acceptable solutions. The Mission expressed its deep appreciation for the trust the tripartite partners had confided in the ILO by requesting assistance in this important task and by sharing their views in such a full and frank manner.

37. Of the specific matters that the Mission had been asked to consider, two had been raised by the ILO supervisory mechanisms. They concerned first the need to extend the right to organize to all workers including self-employed and those working on civil law contracts, and secondly the need to enable civil servants that were not exercising authority in the name of the State to exercise industrial action. The discussions held with all three partners had led the Mission to believe that the positions were not as far apart as each partner separately might consider, and that there were a number of options for bringing the law and practice into line with ratified Conventions on these points that could be acceptable to

all parties. Having listened to the concerns of the tripartite partners, the Mission had no doubt that the simpler the solution the more likely it would be to attain tripartite agreement, leaving the question of practical application up to the national courts in order to review each specific scenario where appropriate. As regards the two above-mentioned issues, this would mean in the first instance the possibility of including a general sentence in the Trade Union Act which would enable all workers, and not just employees, to form and join the organizations of their own choosing. This would be fully in line with international standards and in harmony with most legislative frameworks in Europe. Further queries about the facilities and privileges that should be provided to non-traditional employees within this framework would be most efficiently and effectively dealt with through practical application and with a view to the determination as to whether there was an employer who might be legitimately held responsible.

38. On the second point, the Mission observed that none of the parties appeared to consider that granting the right to strike to some civil servants would be an insurmountable challenge. The more complex issue related to the determination of who might or might not be considered to be a public servant exercising authority in the name of the State. The Mission again believed that an attempt to obtain agreement from all parties as to how to respond to each case scenario would be extraordinarily difficult and most likely ineffective. The simpler scenario would be to substitute the restriction in section 19(3) of the Act on the settlement of collective labour disputes with the reference only to public servants exercising authority in the name of the State. This approach would however also require an additional subsection whereby a procedure could be established for identifying those cases envisaged in section 19 where strike action could be restricted. Such a procedure could be an option which all parties could agree to and which would ensure a mechanism that could help to develop tripartite confidence in the process. The information provided by all the tripartite partners had led the Mission to believe that in all events a mechanism to assess in a quick and efficient manner the lawfulness of a strike where this was being contested, would be in the interest of all parties concerned. Additionally, a minor adjustment to section 1 of the Act to include "the responsible authority" as a party to a collective dispute could assure the necessary coherence to take on board the inclusion of some civil servants in the scope of the Act.

39. The Mission further indicated that other issues that had been raised touched upon the need for a rapid verification of the representativity of trade unions as regards certain privileges that they were afforded under the Trade Union Act. All parties had understood that individual name verifications by the employer could carry the risk of possible anti-union intimidation and would not be in conformity with international standards. On the other hand, it had clearly emerged that recourse to the courts on this question was costly, burdensome and lengthy. It would therefore be important to determine a procedure for verification of trade union density via a rapid and effective mechanism that had the confidence of the parties. There were many possible options in this regard. But the credibility accorded to the General Labour Inspectorate had indicated that such a responsibility could fall under its authority in the event that trade union membership was

being contested. The trade unions had highlighted another point that was of importance to them concerning trade union representatives who did not work at the enterprise being granted reasonable access to the workplace. They considered that this aspect was essential for ensuring that trade union representatives could exercise their functions, communicate with union members and apprise workers of the potential advantages of unionization. While this might be more a problem of practical application rather than a need for legislative amendment, the ILO was ready to provide any further advice that could be desired in this regard including examples of good practices.

40. In conclusion, the Mission highlighted the importance of all the social partners in the tripartite social dialogue making efforts to engage with each other, to hear each other's concerns and to endeavour to find mutually beneficial solutions. This represented the ILO tripartite heritage which was critical to the development of sound social and economic policies that had the buy-in and commitment of all concerned and could thus be translated into concrete proposals corresponding to real market realities. While the issue was not part of the terms of reference of the Mission, all of the parties had expressed in one way or another concerns about the effectiveness of the Tripartite Commission or about its current longstanding interruption. The Mission expressed the hope that the present meeting could signal the beginning of a reengagement of all three partners in a forum determined by the tripartite partners themselves, as each of them had recognized that matters affecting their socio-economic interests needed tripartite dialogue and ideally the consensus of all parties.

41. The trade unions recalled that the denial of the right to freedom of association to persons working under civil law contracts and self-employed was discriminatory and stressed that a legislative amendment was necessary as a matter of priority. The draft prepared by the Government should also guarantee to these categories of workers protection against anti-union discrimination, the right to collective negotiations and the possibility to receive premises against payment. In return, they agreed with the verification of trade union membership by labour inspectors as long as the names of the trade union members were not conveyed to the employer, as well as with a more frequent verification because of the short duration of civil law contracts. With respect to the right to strike, they highlighted the importance of an amendment to section 19 of the Act on Collective Disputes but stated that the determination of the extent of restrictions to the right to strike of public servants and of the legality of the strike should be made by a tripartite body other than the Tripartite Commission in which they lacked confidence. They also emphasized the need to ensure that the real employer with responsibility for wages was party to the collective dispute. The trade unions requested that national law be brought into full conformity with ILO Conventions ratified by Poland without further delay.

42. The employers expressed disagreement with the suggested legislative amendment concerning persons working under civil law contracts and self-employed. They preferred to retain the current legislation and to remedy deficiencies in its application in practice as regards disguised employment relationships. The rights to organize, to bargain

collectively and to strike as provided for by the Trade Union Act were not appropriate for those categories due to their autonomy and independence (entrepreneurs) as well as their rights and duties of a different nature than employees covered by labour law (different legal system). These categories already enjoyed the right to association under the Act on Associations. Trade unions should notify problems (such as disguised employment relationships through abuse of civil law contracts) to the labour inspectorate. The employers also denounced several negative aspects of the Polish legal system, e.g. multiple trade union membership and social inspections, which had been acknowledged as uncommon by the Mission.

43. The State Secretary recalled that it had been the Government who had turned to the ILO requesting technical assistance. Poland needed to ensure respect for fundamental rights such as freedom of association. Many experts had pointed out that the 1991 Trade Union Act had been elaborated during the transition phase with different parameters in mind and ignoring the new forms of employment existing at present. Large parts of the Act would need to be amended. However, the effectiveness of the new regulation would depend on the collaboration and agreement of the social partners. Although the existing social dialogue mechanism was currently not working, the Government aimed at bringing all three parties to the table and reducing tensions and divergences. The Government would focus on the report and the advice given by the ILO Mission to ensure compliance with the fundamental right of freedom of association.

44. The Mission hoped that its report, aimed at assisting the parties, would help show a way forward that could be acceptable to all. The ILO remained at the parties' disposal for any further assistance they might desire including the provision of information on comparative law practices, especially as regards the provision of freedom of association rights to self-employed workers or those working under civil law contracts.

KAREN CURTIS

CHRISTINE BADER

APPENDIX I

Issues to be discussed as part of technical support by the International Labour Office

(Terms of reference)

Introduction

Recently doubts have arisen as to the compliance of Polish legislation on the freedom of association with the provisions of the Constitution of the Republic of Poland and the provisions of the fundamental Convention of the International Labour Organisation No. 87 on Freedom of Association and Protection of the Rights to Organise of 1948 and No. 98 on the Right of Organise and Collective Bargaining of 1949. Requests have been filed with the Constitutional Tribunal to check the compliance of the following Acts with the Constitution of the Republic of Poland: on trade unions (the right of association of persons employed under civil law contracts and sole proprietors) and on resolving collective disputes (right to strike by civil servants). The solutions provided in Polish law – in particular in Art. 2 of the Act on Trade Unions, restricting the right of coalition to persons employed under employment contracts – was negatively assessed both by the Expert Commission on the application of conventions and recommendations, as well as by the Trade Union Freedom Committee.

The Ministry of Labour and Social Policy started analytical work to identify the required modifications and it was decided that technical support of the International Labour Office would be required in the development and approval of the new legislation. Such external assistance would support the Government in developing appropriate solutions and would further be of assistance in solving disputes and reaching a compromise.

The issue of approaching the International Labour Office with a request for technical assistance in the areas of:

- right of coalition for persons employed otherwise than under employment contracts;
- regulations concerning the rights of trade unions, in particular protection mechanisms of persons employed otherwise than under employment contracts (protection of sustainable employment vs. the specific nature of civil law contracts);
- protection against anti-trade union discrimination;
- verification of the number of trade union members;
- right to strike by civil servants and employees of public administration without positions of power;

has been consulted with social partners.

The current legal status and problems to be discussed:

1. **Right of coalition for persons employed otherwise than under employment contracts.**

Pursuant to Art. 2 of the Act of 23 May 1991 on Trade Unions (Journal of Laws 2014.167 – uniform text), the right to establish and join trade unions is available to employees irrespective of their underlying employment relationship, employees of agricultural production cooperatives and persons performing work under agency contracts as long as they are not employers.

The definition of employee is provided in Art. 2 of the Act of 26 June 1974 – Labour Code (an employee is a person employed under an employment contract, appointed, elected, nominated or under a cooperative employment contract).

Additionally:

- Persons performing contract work are entitled to join trade unions operating at the enterprise with which the have the contract for work (Art. 2.2 of the Act on Trade Unions);
- The right to establish and join trade unions at enterprises is also available to person delegated to those enterprises to perform substitute military service (Art. 2.5 of the Act on Trade Unions).

In accordance with the existing legislation, in Poland the persons who do not have the employee status in compliance with Art. 2 of the Labour Code and performing gainful employment, are not entitled to establish and join trade unions. Those are in particular:

1) persons performing services under commission contracts (including service contracts),
2) persons performing work under mandate contracts,
3) self-employed persons operating sole proprietorships.

The concept of the Polish trade union regulations is related to the former social and political conditions and the model of industrial relations in the state. The concept provided for locating trade unions in enterprises and combination of membership in the trade unions solely with employment under employment contracts.

The nature of commission contracts

Pursuant to Art. 734 of the Civil Code, under a commission contract, the person accepting the commission agrees to perform a specific legal operation for the principal. In the case of service contracts, pursuant to Art. 750 of the Civil Code, the regulations on commission

contracts apply accordingly. The essence of a commission contract consists in the fact that the person accepting the commission agrees to perform a specific legal operation for the principal. This is a category of contracts in the broad sphere of intermediation. The core elements specified in the definition of the contract are as follows: performance of a (specific) legal operation and acting for the principal. This is a structure providing for a possibility to perform legal operations using a substitute. The substitution consists in performing legal operations for another person (the principal) and thus it may be manifested both in acting on the principal's behalf with direct legal effects for the principal as well as acting on one's own behalf but for the account of the principal.

The parties to a commission contract are: the commissioning party (principal-client) and the accepting party (service provider). Any legal entity, being a natural person, legal person or an organisational entity without legal personality but without legal capacity, may be both the party commissioning and the party accepting the commission.

The commission covers the performance of a specific legal operation.

In practical business, frequently there are commission contracts not covering an obligation to perform a legal operation but to perform factual operations or a number of factual operations, including a regular or periodic performance of such operations. The services of the service provider may be one-off, continuous or periodic. The scope of the services may be determined in advance by the parties or it may remain undetermined – then it depends on the duration of the obligation. Such contracts are subject to the regulations applicable to commission contracts – pursuant to Art. 750 of the Civil Code. The occurrence of common features between employment contracts and service contracts sometimes results in problems with classifying such contracts. In accordance with the case law of the Supreme Court if a contract has features of an employment contract and a civil law contract with the same proportion, the type depends on the common intention of the parties and objective of the contract which may be expressed in the name of the contract; the legal classification of such contract shall take into account the circumstances prevailing at the time the contract was concluded (Supreme Court verdict of 18.6.1998, I PKN 191/98).

The nature of mandate contracts

Pursuant to Art. 627 of the Civil Code, under a mandate contract, the person accepting the order agrees to perform a work and the principal agrees to pay remuneration.

The parties to mandate contracts are: 1) the person who is to take efforts, endeavour and work to develop the work – the party accepting the order, and 2) the person for whom the work is to be performed – principal.

The elements that are material for a mandate contract is the identification of the work that the party accepting the order is obliged to perform, and the remuneration that the principal is obliged to pay.

A mandate contract is a "result contract". In the case of a mandate contract it is required that the efforts of the party accepting the order result in the future in a specific, individually identified result that is required to be achieved.

There is no relation of dependence or subordination between the parties to a mandate contract.

The core obligation of the party accepting the order is to perform the identified work. The party accepting the order is responsible for the quality of the work. The methodology to perform the work is subject to the discretion of the party accepting the order; however, the work shall have features specified in the contract or inherent in the work. Performance of work usually requires certain qualifications, skills and resources. The party accepting the order basically is not required to perform the work personally unless otherwise specified in the mandate contract or the nature of the work (this applies e.g. to the performance of a work of art). However, the party accepting the order is obliged to personally direct the persons whom he/she uses to have the work performed and for whom he/she is responsible. The responsibility of the party accepting the order for performing the work not in compliance with the contract is the same irrespective of the fact if breached obligation to perform the personally resulted explicitly from the contract or was due to the nature of the work.

The core obligation of the principal is to pay the remuneration due to the party accepting the order. The remuneration may be in cash or it may be another service of economic value, being the equivalent of the value of the work.

Differences between mandate contracts and employment contracts

Mandate contracts differ from employment contracts in that there is no dependence relationship between the party commissioning and the party accepting the order as well as the need to generate a specific result of human work in the broad sense. In the case of employment contracts, the basic element is to perform the work and not the result of the work. The principal is entitled to provide guidelines as to the manner the work is to be performed. Contrary to the party accepting the order, an employee is not liable under contract when the work performed by him/her fails to meet the employer's expectations. The party accepting the

order is liable for failing to achieve the result. Thus, there is a different distribution f the risk of the performance and the quality of the service (comp. resolution of the Supreme Court of 2 September 2009, II UZP 6/09, OSNAP 2010, No. 3-4, item 46).

Differences between mandate contracts and commission contracts

The difference between commission contracts is that mandate contracts need to be finalised in each case with a specific and verifiable result. The obligation to perform the work personally by the party accepting the order was of lesser importance for mandate contracts if the final result is achieved. With respect to commission contracts, the result is not the required element while the principle of personal provision of the services by the service provider applies due to the personal trust between the parties. The commission in its core normative structure relates solely to performing a specific legal operation and does not have to be remunerated.

Differences between commission contracts and employment contracts

The difference between employment contracts and commission contracts is that the service provider may nominate a substitute. In the case of employment contracts, the work must be performed by the employee and the provisions of the Labour Code do not provide for nominating a substitute. Additionally, in the case of commission contracts, the service provider is not subordinated to the principal and additionally the service provider is not subject to any supervision by the principal. However, the service provider is obliged to follow the instructions provided by the principal.

Self-employed persons

Pursuant to Art. 4 of the Act of 2 July 2004 on freedom of economic activity (Journal of Laws of 2013, No. 672, as amended), a natural person is a category of enterprises provided such person is involved in business operations in their own name within the meaning used in Art. 2 of the Act: gainful production, construction, trading, service activities as well as prospecting, exploring and mining of minerals from deposits, as well as professional activity, each time provided the activity is performed in an orderly and continuous manner.

An entrepreneur may commence business activity once entered in the relevant register – for natural persons this is the Central Register and Information on Economic Activity.

The moment when business operations are started is also important with respect to other regulations and duties imposed on entrepreneurs. Apart from the entry to a register, the entrepreneur shall obtain the REGON number from the statistical office and notify its

business to ZUS and the tax office. In that respect, a *"one window" principle* has been introduced which materially facilitates the formalities of entrepreneurs beginning business operations.

Self-employed are primarily those persons who have decided instead of working under an employment contract and operate in the market on somebody else's behalf, on somebody else's account and risk, to take activities in their own name, their own account and risk.

The core attribute of self-employed persons is operation within their own economic calculus. On the one hand, this means a possibility to multiply profit, while on the other hand – a risk of bankruptcy, loss and insolvency.

The operation as self-employed persons does not necessarily mean the acting solely on one's own behalf. One may be self-employed and act in somebody else's name as a proxy, plenipotentiary. This form of operation is elected primarily by legal professionals of public trust performed independently on commission of clients. However, Acting in somebody else's name shall be without prejudice to the obligation of operating in one's own name – a plenipotentiary accepting such commission shall be liable for his/her actions and any damage caused to the principal.

Self-employed persons may operate on their own but may also hire other people – and then apart from employing themselves, they also act with the support of third persons. Such employment may have different form – this may be an employment contract, private individuals may be employed who do not operate a business (who are not self-employed) under mandate or commission contracts; also the services of other self-employed persons may be used or certain operations may be subcontracted.

However, it should be remembered that all forms of employment of third persons do not exclude the attribute of operating the business at their own risk. This means that if a self-employed person agrees to perform a specific task, then when third persons are involved, the self-employed person shall continue to be liable for the risk of errors, delayed performance or incompliance with law.

2. Regulations concerning the rights of trade unions, in particular protection mechanisms of persons employed otherwise than under employment contracts

As a result of extending the right of trade union coalition upon persons performing services under commission contracts, providing work under mandate contracts and self-

employed persons, it is necessary to consider the legal effects of such extension. Such consequences shall in particular relate to the following:

- potential release (or partial release) of trade union leaders, employed subject to any of the above contract, from the obligation to perform work for their term of office in the management of the company trade union organisation – a solution being similar to the one specified in Art. 31.1 and Art. 31.2 of the Act on Trade Unions. ;
- potential release of such trade union leaders from performing professional work while maintaining their right to remuneration, to perform occasional activities related to their trade union function if such operation may not be performed after working house - a solution being similar to the one specified in Art. 31.3 of the Act on Trade Unions.;
- the right to protect such trade union leaders against termination of the collaboration agreement by the employer or unilateral change of the contractual terms and conditions to the detriment of the provider – a solution being similar to the one specified in Art. 32 of the Act on Trade Unions.;
- a potential duty to provide the company trade union organisation composed of persons employed under the contracts specified above with premises and technical facilities as may be required to perform trade union operations at the enterprise – a solution being similar to the one specified in Art. 33 of the Act on Trade Unions.;
- a potential obligation to collect contributions for the trade unions from the remuneration due to the service provider, author of the work or collaborating businessperson operating their own business, and subsequently transfer such contributions to the bank account designated by the company trade union organisation - a solution being similar to the one specified in Art. 33^1 of the Act on Trade Unions;
- a possibility to establish basic trade union organisations outside enterprises which may be of particular importance for persons operating their own businesses and is related to their professional mobility.

3. Protection against anti-trade union discrimination

Pursuant to Art. 3 of the Act on Trade Unions, no one may suffer negative effects due to their membership in trade unions or not being a member or due to performing a function in trade unions. In particular, this may not be a condition to enter into an

employment contract with an employee or their remaining employed or being promoted.

Employees who fell victim to discrimination due to their trade union status shall be entitled to damages pursuant to Art. 18^{3d} of the Labour Code. The amount of such damages is each time determined by a labour code, subject to the applicable circumstances. However, such damages may not be lower than the minimum remuneration as set forth in the Act of 10 October 2002 on minimum remuneration for work (Journal of Laws No. 200, item 1679, as amended). Additionally, a guarantee mechanism applies in this matter as set forth in Art. 18^{3e} of the Labour Code (use by employees of rights due to them as a result of breach of the equal treatment principles in employment may not constitute the basis for an unfavourable treatment of employees and may not generate any negative consequences for such employees; in particular, it may not constitute the reason underlying the termination of the employment contract by the employer or termination of such contract with immediate effect).

From the legislative viewpoint, membership in a trade union or non-membership, is indifferent in relation to individual employment relationships. Persons who in connection with the occupied position or performed function, discriminate against employees due to their membership in a trade union organisation, not being a trade union member or performing a trade union function, are subject to penal liability pursuant to Art. 35.1.3 of the Act on Trade Unions.

In connection with numerous instances reviewed by the Trade Union Freedom Committee, related to acts of anti-trade union discrimination, including dismissal, protracted court proceedings, dismissal of proceedings due to insignificant social noxiousness of an act and failure to enforce court verdicts, it seems justified to analyse the possibility of introducing solutions that could ensure adequate protection in that respect.

4. Verification of the number of trade union members.

The rights to company trade union organisations are available to organisations grouping minimum 10 members who are employees or persons performing contract work for a given employer or who are executives in the enterprise (Art. 25^{1}.1 of the Act on Trade Unions).

A representative company trade union organisation is an organisation which is organisational unit or a member organisation of a inter-company trade union organisation within the meaning of the Act on the Tripartite Commission for Social and Economic Affairs, if it groups minimum 7% of the employees of the specific employer, and an organisation grouping minimum 10% of such employees, or the largest organisation if no single organisation meets the above requirements (Art. 241^{25a} of the Labour Code).

Pursuant to Art. 25^{1}.2 of the Act on Trade Unions, the company trade union organisation shall submit quarterly reports as at the last day of the preceding quarter with the total number of members of their organisation. Such information may not be unreliable, therefore it would be justified to introduce a mechanism to verify the information, e.g. on the basis of data from a specified public register.

The issue of ensuring impartial and independent methods of verifying the membership of trade unions was reviewed by the Trade Union Freedom Committee in a case relating to infringing upon the freedom of association at Frito Lay Polska sp. z o.o.

5. **Right to strike by civil servants and employees of public administration without positions of power**

Pursuant to Art. 17 of the Act on Resolving Collective Disputes, a strike consists in collective refraining by employees from performing work in order to resolve a dispute related to the rights and interests specified in Art. 1 of the Act (*a collective dispute of employees with an employer or employers may relate to working conditions, salaries or social benefits as well as trade union rights and freedoms of employees or other groups that are entitled to associate in trade unions*). The Act explicitly states that a strike is a final means and may not be declared without previously exhausting all the possibilities to resolve the dispute in compliance with the Act (submission of claims, negotiations, mediation). The right to strike is an individual employee right that may be exercised solely collectively. A trade union organisation may not declare a strike action before the completion of the direct negotiation stage or the mediation stage. For a strike to be deemed as legal, the earlier stages must end with the drafting and executing protocols of dispute while the protocol of dispute ending the mediation process must be signed in the presence of the mediator. At each stage, the parties may sign an agreement and end the dispute.

Strikes may be organised without adhering to the above principles if unlawful actions by the employer prevented the holding of negotiations or mediation, or when the employer terminated the employment relationship with the trade union leaders leading the dispute.

Another major element making a strike lawful is the consent of the employees of the enterprise to hold a strike (strike referendum). A strike may be declared when minimum 50% of the employees of the enterprise participated in the referendum and a majority of whom voted for the strike. In the case of a multi-enterprise strike, a strike may be proclaimed subject to consent of a majority voters in each enterprise that are to participate in the strike if minimum 50% of employees participated in the voting at each enterprise. However, the Act does not stipulate the voting which is subject to the decision of the trade union.

In accordance with the Act (Art. 19.2) it is not permitted to organise a strike at The Internal Security Agency, Intelligence Agencies and the Central Anti-Corruption Bureau, at Police units or military forces of the Republic of Poland, penitentiary service, border service, customs service and fire protection organisational units.

The right to strike is also prohibited for employees of state authorities, central or local government administration, courts and prosecutors' offices (Art. 19.3). Employees who are not entitled to strike may – subject to exhaustion of the conciliation procedures – apply other forms of protest actions that pose no hazard to human life or health, without interrupting work subject to complying with the applicable regulations (Art. 25).

With respect to the right to strike of public administration employees (in particular civil servants), the Expert Commission on the application of ILO conventions and recommendations since 2006 has been expressing a position that the refusal of the right to strike in the public sector should be limited solely to officials exercising power on behalf of the state. However, the Committee reminds that such employees lose a major defence of their interests and therefore they should be entitled to an adequate measure compensating the restriction, e.g. mediation and conciliation procedures that in the case of a stalemate would lead to an arbitration procedure acceptable to the interested parties. It is of major importance that employees are involved in the drafting and implementing the procedure which in turn should ensure an appropriate guarantee of impartiality and fastness of the proceedings; arbitration awards should be binding upon both parties and when issues they should be implemented in full and fast (see

General Overview of 1994, paragraphs 158 and 164). In that connection, the Committee has approached the Government many times to take the necessary steps to amend the Act on Civil Service in order to guarantee that the right to strike is limited solely to official exercising power on behalf of the state and to provide the required information. However, in the opinion of the Committee, members of the civil service corps whose right to strike is to be restricted in accordance with the convention, should be provided with measures compensating such right.

The Convention of the International Labour Organisation No. 87 on Freedom of Association and Protection of the Rights to Organise of 1948, ratified by Poland, entitles employee organisations *inter alia* to freely elect their representatives and to nominate their management. The Expert Commission on the application of ILO conventions and recommendations has been submitting its comments to the Polish Government on the various restrictions imposed on civil service employees and officials by the Act on Civil Service (1998), and specifically by Art. 69.3 – the ban on public manifestation of political views and participating in protest actions; Art. 69.4 – the ban of performing functions in trade unions. Equivalent provisions are included in the Act on Civil Service of 2006 that is in force now. The comments have been provided to the Chancellery of the Prime Minister as the office responsible for civil service.

Taking those comments into account, the Council of Ministers submitted to the Parliament a bill *of the Act amending the Act on Civil Service and amending certain other Acts*. As a result, the Act of 21 November 2008, in its Art. 78.6 provides as follows: *"A member of the civil service corps occupying a senior position in civil service may not perform a function in trade unions."*.

The restriction of the right to hold functions in trade unions applies solely to those members of the civil service corps (civil service officials and employees) who occupy senior positions in civil service. Considering the fact that in Poland the civil service corps includes about 121,400 persons (including civil service officials of about 7,600), and the number of senior civil service positions is 1574 (as at the end of 2013, data on the basis of: www.dsc.gov.pl), the proposed statutory amendment meets the expectations of the Expert Committee since it materially restricts the application of the regulation.

However, the Act on Civil Service of 2008 retained the provisions stating that *"Members of the civil service corps may not participate in strikes or protest actions*

interrupting the normal functioning of the office.". The civil service corps is a specific form of public service. Contrary to other countries where the civil service corps covers almost the entire public sector, including e.g. teachers, health services or local government employees, in Poland it is relatively small and applies to persons employed in government administration (about 2300 offices).

Performance of power functions by members of the civil service corps on behalf of the state is to be reviewed in the context of Art. 5.2 of the Act on Civil Service where the legislator used a similar term "participation in exercising public power". In the opinion of the Civil Service Department in the Chancellery of the Prime Minister, the provision of a specific answer to a question requesting the identification of members of the civil service corps (e.g. by identifying a group of positions in civil service) who perform functions of power in the state is not possible. An answer to such question is possible only after an analysis of tasks performed by a member of the civil service corps in a specific position in civil service and will apply solely to the specific position. Pursuant to Art. 5.2 of the Act on Civil Service, a person without Polish citizenship may be employed in a position where the work performed does not consist in direct or indirect participation in exercising public power and functions that are aimed at protecting general interests of the state if such persons has the knowledge of the Polish language confirmed with a document specified in the relevant regulation of the Prime Minister. Consent of the head of the Civil Service pursuant to Art. 5.1 of the Act on Civil Service granting a possibility to apply for employment in civil service by person who do not hold Polish citizenship is each time preceded with an analysis of the tasks performed in the position with the potential participation of the person employed in the position in performing public power or functions aimed at protecting general interests of the state.

Additionally, it should be noted that the literal wording of Art. 78.3 of the Act states that members of the civil service corps are entitled to organise protest actions that would not disturb normal functioning of offices. This has been practised in Poland in the form of placing national flags on buildings, public presentation of opinions or submission of petitions with postulates by the officials.

Additionally, it should be noted that in accordance with the Act on solving collective disputes, a trade union operating in another enterprise may organise a solidarity strike for maximum one half of a working day to defend the rights and interest of employees who are not entitled to strike (Art. 22). Arbitration is another alternative to a voluntary

strike (Art. 16). Trade unions involved in collective disputes may – without resorting to the right to strike – try to have the dispute resolved by submitting it to social arbitration. If the dispute relates to one enterprise, such dispute is reviewed by a social arbitration college at the provincial court in which the court of labour and social insurance has been established (now provincial courts no longer exist and their competences have been taken over by district courts). A dispute concerning multiple enterprises is reviewed by the Social Arbitration College at the Supreme Court.

APPENDIX II

Draft programme of the ILO experts mission in Poland
14 – 16 May 2014

13 May 2014 (Tuesday)

19:10 arrival from Zurich (flight no. LX1352)
Welcomed by Ms. Magdalena Wysocka Madej, Social Dialogue and Social Partnership Department, Ministry of Labour and Social Policy (mobile +48 604 12 85 24)
Accommodation in the Hotel Dom Chłopa

14 May 2014 (Wednesday) Centre of Social Partnership "Dialogue", Limanowskiego str. 23 room B

9:30 departure from the hotel to the meeting place

10:00 – 12:00 meeting with representatives of the Ministry of Labour and Social Policy

Participants:

1. Ms Karen Curtis, Chief, Freedom of Association Branch, International Labour Standards Department, ILO
2. Ms Christa Bader, expert International Labour Standards Department, ILO
3. Mr Jacek Męcina, Secretary of State In the Ministry of Labour and Social Policy
4. Mr Marek Waleśkiewicz, Director, Social Dialogue and Social Partnership Department, MoLaSP
5. Ms Agata Oklińska, Deputy Director, Social Dialogue and Social Partnership Department, MoLaSP
6. Representatives of Social Dialogue and Social Partnership Department, MoLaSP

12:00 – 13:00 lunch

13:30 – 16:00 meeting with representatives of trade unions

16:30 return to the hotel

17:30 – 20:00 sightseeing walk with an English guide

Participants:

1. ILO experts
2. Representatives of Independent and Self-Governing Trade Union „Solidarność"
3. Representatives of All-Poland Alliance of Trade Unions
4. Representatives of Trade Unions' Forum

15 May 2014. (Thursday)

10:30 meeting at the hotel lobby with Ms. Wysocka-Madej in order to walk to the Ministry

11:00 – 13:00 meeting with representatives of National Labour Inspection and Chancellery of the Prime Minister (venue building of MoLaSP, Nowogrodzka str. 1/3/5, room 613)

Participants:

1. ILO experts
2. Representative of National Labour Inspection (Chief Labour Inspectorate, Legal Office)
3. Representatives of Chancellery of thePrime Minister (Civil Service Department)
4. Representatives of Social Dialogue and Social Partnership Department, MoLaSP

13:00 – 14:00 lunch

14:30 – 17:00 meeting with representatives of employers' organizations (venue: Centre of Social Partnership "Dialogue", Limanowskiego str. 23 room B)

Participants:

1. ILO experts
2. Representatives of Employers of Poland
3. Representatives of Confederation LEWIATAN
4. Representatives of Business Centre Club – Employers Union
5. Representatives of Polish Craft Association

17:30 return to the hotel, free time

16 May 2014. (Friday) Centre of Social Partnership "Dialogue", Limanowskiego str. 23 room B

12:00 – 14:00 Tripartite meeting summing-up the visit

Participants:

1. Ms Karen Curtis, Chief, Freedom of Association Branch, International Labour Standards Department, ILO
2. Ms Christa Bader, expert International Labour Standards Department, ILO
3. Mr Jacek Męcina, Secretary of State In the Ministry of Labour and Social Policy
4. Mr Marek Waleśkiewicz, Director, Social Dialogue and Social Partnership Department, MoLaSP
5. Ms Agata Oklińska, Deputy Director, Social Dialogue and Social Partnership Department, MoLaSP
6. Representatives of trade unions
7. Representatives of employers organizations
8. Representatives of Social Dialogue and Social Partnership Department, MoLaSP

14:30 – 16:00 lunch

16:30 departure to the airport

19:50 departure from Warsaw to Zurich (flight no. LX2818)