European Integration Studies, Volume 17, Number 2 (2021), pp. 83–91.
https://doi.org/10.46941/2021.e2.83-91

LABOUR LAW PROTECTION OF EXECUTIVE EMPLOYEES IN HUNGARY AND WESTERN EUROPE

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Abstract: This article examines a specific chapter of the Hungarian Labour Code, the regulation on executive employees. The study is comparative in nature and aims to reveal the difference between the old and the new legislation. It compares changes in past and current legislation and presents the solutions used in Western European labour law to achieve the most optimal regulation of the executive status. The study also looks at what solutions should be adopted in the field of management regulation and what would be the tasks of the legislation that would bring about the updating of labour law provisions. Such a problem does not arise in the Western European legal literature, as in countries following the unique works council system this is prevented by the legal disclosure of the hierarchical chain of executive employees, and in dual systems the dual composition of works councils, where one side is occupied by members elected by subordinate employees from among their own circle, while the other side is provided by the upper level of executive employees by delegation from the employer.

Keywords: *labour law, executive employees, Labour Code, management, collective agreement, regulation*

1. INTRODUCTION

This article examines a specific chapter of the Hungarian Labour Code, the regulation on executive employees. The study is comparative in nature and aims to reveal the difference between the old and the new legislation. It compares changes in past and current legislation and presents the solutions used in Western European labour law to achieve the most optimal regulation of the executive status. The study also looks at what solutions should be adopted in the field of management regulation and what would be the tasks of the legislation that would bring about the updating of labour law provisions. The final chapter presents the forms of Western European settlements that include rules for the protection of the interests of executive employees.

The narrowed "de iure" notion of executive employees in Hungary also allows for abuse. That is because, in the absence of an 'ex lege' chain hierarchy of executive employees that exists in Western Europe and the United States, executive employees may be entitled to exercise 'de facto' management and control rights at lower levels on the basis of instructions and work organization from the employer. This, in turn, may lead to a background situation. According to Section 235 of the Hungarian Labour Code (Kardkovács, 2014, p. 389), the Hungarian works council belonging to the German-type unique works council systems, may only have subordinate employees as members and such a works council shall negotiate with the works owner and the management. However, due to the fact that the Hungarian Labour Code does not broadly define the concept of a manager and the hierarchical ranking of managers, it is possible to nominate formally non-managers to the works council as subordinate employees and direct the works council through them. So far, no one has addressed this problem in the Hungarian legal literature. Such a problem does not arise in the Western European legal literature, as in countries following the unique works council system it is prevented by the legal disclosure of the hierarchical chain of executive employees – Similarly – in dual systems, in the dual composition of works councils, one side is occupied by members elected by subordinate employees from among their own circle, while the other side is provided by the upper level of executive employees by delegation from the employer. Regarding the conceptual scope of executive employees, the Hungarian legal literature only distinguishes executive officers from other executive employees with a particular emphasis on managers.

2. HUNGARIAN LABOUR LAW PROVISIONS

According to the current Hungarian provisions, an executive employee' shall mean the employer's director, and any other person under his direct supervision and authorized – in part or in whole – to act as the director's deputy. Thus, in the case of the second-line leader, the new law no longer refers to an employer requirement. The employment contract – with the exception set out in Subsection (2) of Section 209 of the new Labour Code, which excludes the application of the collective agreement to executive employees – may invoke the provisions on executive employees if the employee is in a position considered to be of considerable importance from the point of view of the employer's operations, or fills a post of trust, and his salary reaches seven times the mandatory minimum wage. (Berke and Kiss, 2012, p. 214)

With regard to the establishment of a legal relationship, the Labour Code does not establish special rules for executive employees, nor did the previous Labour Code. It is not illegal to have a provision in the executive employment contract that is contrary to the content of the collective agreement concerning the employer. Regarding the employment relationship of an executive employee, a uniform practice has developed according to which he or she is employed by the employer with which he or she operates. As for executive employees in companies, it is conside-

red typical in practice that no separate employment contract is concluded for them, only the decision of the supreme body contains the election. (Pál, 2016, p. 399) This is recorded either in the memorandum of association or, in the course of amending it, in the minutes of the meeting of the supreme body, the part of which includes the instrument of incorporation which is transferred to the memorandum of association and a consolidated version is prepared. (Kenderes, 2007, p. 78) It is accompanied by a declaration of acceptance, and this practice is considered lawful and meets the requirements of concluding an employment contract.

The employment contract with the executive employee shall be drawn up in writing. Given that there are no special requirements for the conclusion of an employment contract in the aspect of executive employees, there is also no difference in the regulation of probation. The Hungarian labour law makes no distinction when establishing a legal relationship in the field of probationary regulation, whether it provides legal regulation for an executive employee, including a manager or any other leader, or for an employee. The duration of the probationary period was uniformly regulated. This solution is increasingly questionable to what extent it is designed to meet economic needs. (Kiss, 2001a, p. 201) The regulation of the probationary period has changed in the new Labour Code as it is also possible to extend it within the legal framework, however, according to the current Section 50 (4) of the Labour Code, the probationary period can be 6 months on the basis of a collective agreement, which does not apply to an executive employee pursuant to Section 209 (2) of the new Labour Code, so a derogation from Section 45 of the new Labour Code is not possible for an executive employee pursuant to Section 50 (4).

In connection with the conclusion of an employment contract, and thus the establishment of an employment relationship, it can be stated that in Hungarian labour law the employment relationship of an executive employee, an employee of mental or physical occupation is usually regulated by uniform rules. There is nothing to prevent a collective agreement or employment contract from laying down different rules for employees and workers, or part of them, which are based on employment-related circumstances and do not constitute discrimination. (Kiss, 2014, p. 150)

However, an employment contract with executive employees is most similar to a civil law agency contract because a personal relationship of trust is established between the parties, which lacks the employee subordination and self-employment that characterizes the employment relationship. (Törő, 2003, p. 37) The manager performs the management of the employer with a high degree of independence, with unlimited civil law liability, and practically the employer's right of instruction does not apply to him. However, the employee does not appear "under his own name" in the economic turnover, in this capacity he is "not marketable".

Pursuant to Section 74 of the former Labour Code, if the employer's authority was not exercised by the authorized body or person, the procedure was invalid, unless the employee could reasonably infer from the circumstances the entitlement of the acting person or body. (Kiss, 2001b) In connection with an executive offi-

cial, it is not considered irrelevant who should be considered entitled during the exercise of the right, which is defined by the regulations of the Civil Code.

When establishing an employment relationship, the employer is obliged to inform the employee which body or person exercises or fulfills the employer's rights and obligations arising from the employment relationship. The new Labour Code does not change this provision either. (Keserű, 2016, p. 533)

The fact that the delegation is not mentioned in the memorandum of association or in the deed of foundation of a particular form of enterprise does not mean that the employee does not know who exercises the employer's authority over him or her, so the mere fact that the provisions written in the Civil Code have been omitted, does not mean that the employee cannot reasonably conclude who exercises the employer's rights or who fulfills the employer's obligations. Nevertheless, the court has ruled in several cases that the exercise of the employer's power is invalid even if the given body or person exercised it in violation of the rules of the Civil Code, regardless of the extent to which this omission affects the provisions of the Labour Code.

According to the provisions of the current Labour Code, the designation of job is a conclusive element of the employment contract, and this also applies to the contract concluded with the executive employee. As such, it must be determined by the parties that they establish an employment relationship for the operational management of the given company. It is not obligatory to include a job description in the executive employee's employment contract either, so it is up to the parties to determine the level of details of the executive employee's duties and responsibilities.

As far as the Hungarian executive employee contracting practice was concerned, the problematic formulation of the concept of an executive employee, especially in the first period, provided an opportunity for abuse. According to the original wording of Section 188 of the 1992 Labour Code, not only the employer, that is to say, the manager of the company and his or her deputy counted as an executive employee, but also the person who was classified as such by the employer. (Sárközy, 2015, p. 3) As mentioned above, this has allowed for serious abuses and subjective decisions. It has already been pointed out that a very common phenomenon among the auxiliary staff, that those employees who perform administrative and descriptive working tasks, have been formally placed in executive positions in a way that is not justified by their scope of activities, with the establishment of a fictitious executive position. (Nádas, 2017, p. 83) Most of the time with the formal new title, they continued to hold their previous jobs because they did not have the skills and qualifications to fill a higher position. It has also been mentioned above that the employers were happy to broaden nominally the scope of executive employees, because this way they tried to enforce the negligent damage of their employees in the hope of full compensation and not based on the reduced extent established by the Labour Code. Such and similar abuses of the unlimited conversion of executive positions were eliminated by the amendment of the 1992 Labour Code by Act LVI of 1999, providing that only employees holding an important and confidential position may be qualified as executive employees. The Labour Code currently in effect has also adopted this. (Pál, 2007, p. 43)

3. THE PROTECTION OF EMPLOYEES' INTERESTS IN EUROPE

In the developed continental states of Western Europe, as well as in the countries of the European and transatlantic Anglo-Saxon legal systems, each company enters into an employment contract with the executive employee, usually called as an installation contract, rather than a long-term contract to produce a work or an agency contract, in which they determine which unit the executive employee should manage, which organizational unit is above him or her and what relationship he or she is obliged to maintain with the leader and how should he or she co-operate with his or her leader and unit. At the same time, the installation contract lists the organizational units that are subject to its supervision and defines the professional, economic and organizational direction of the exercise of supervision. It shall also specify the manner in which the executive employee is to maintain professional, economic and organizational contact with the superior head of unit and how to execute his or her instructions and transmit them to the lower units subordinate to him or her, and how to inform the superior unit about the results of the control of their implementation. Although neither the general collective agreement for employees nor the sectoral collective agreement covers executive employees, trade unions representing the interests of executive employees enter into collective agreements to protect their interests, the content clauses of such collective agreements apply to and affect the content of installation contracts. Currently, there is no such thing in Hungary, although it would be good to introduce one. Therefore the Hungarian legal literature could only confine itself to the basis of the provisions of the Labour Code, and as the collective agreement does not cover the executive employee, the employment contract with the executive employee may be in conflict with the corporate collective agreement. The representatives of this position, including Emese Törő (Törő, 2002, pp. 479–480), are absolutely right, but it would be right if sectoral trade unions protecting the interests of executive employees were formed in Hungary at the sectoral level, which could form a national association and conclude collective agreements with employers and their associations in the interests of executive employees, and of which the employer would be obliged to take into account when concluding employment contracts for executive employees. (Pál, 2015, p. 334)

The general expectations of executive employees in the developed Western European and transatlantic states were (Pázmándi, 2014, p. 232), and still are, loyalty towards the employer, and a ban on all activities that could harm or reduce their competitive position in the market. For this reason, in Western European states as well as in Hungary, conflict of interest regulations are strongly emphasized, as are the legal disadvantages that burden executive employees during bankruptcy proceedings. However, the new Hungarian labour law does not address the prohibition of engaging in an economic activity or conduct that may worsen the economic competitive position of the company or organizational unit it represents on the market. The executive employee may not engage in counter-advertising activities against his or her employer. To a large extent, it is obliged to keep the confidential information of the company and/or of its internal organizational unit and to negoti-

ate with customers politely but purposefully, keeping the interests of the company in mind. In addition, with necessary critical remarks, the executive employee is obliged to implement the wishes and decisions of the company upon written request, even if he or she has reservations about them. Nor can he or she pursue a lifestyle or engage in conduct that could potentially remove customers from entering into an economic contract with the company. To prevent this from happening, an executive employee can be expected to lead a scandal-free and fair, as well as a passion-free and corruption-free lifestyle. In short, in conducting his or her public and private activities, an executive employee, regardless of the level of the executive employee hierarchy, must always keep in mind what his or her company has an interest in and how he or she should behave in different situations. These are general expectations for which it is not necessary to make separate normative legal regulations. The established jurisprudence takes these aspects into account on the basis of customary law and imposes legal consequences even if all this is not regulated by law. Conduct contrary to that set out here, irrespective of the damage involved, justifies the immediate termination of the post of the executive employee in case of an intentional or a deliberate serious breach. However, this happens in the rarest of cases, as the executive employee usually knows a lot about the internal and external relations of the company. Therefore, in most cases, they are released from work with immediate effect and even before the installation contract, the concluding of a non-competition agreement sets out that they are not allowed to jeopardize the competitive position of their former job, either as a contractor or by entering into a new employment relationship. (Birk, 1990, p. 216)

4. SOLUTIONS

The Hungarian labour law makes no mention of the protection of the interests of executive employees, unlike the labour law of Western European and transatlantic countries. Moreover, Section 209 (3) of the Labour Code of 2012 states “expressis verbis” that the scope of the collective agreement does not extend to the executive employee. In contrast, in all developed western states, as already indicated in this study, executive employees also have trade unions, which are grouped into territorial and national general and intersectoral associations and, with the exception of Germany, enter into collective agreements with employers’ associations. Two solutions have emerged in continental Western European states. One is where sectoral and intersectoral unions and their associations have executive employee sections, and the other is where executive officials and employees have independent unions. The former is characteristic of Francophone-Latin systems, while the latter is characteristic of Germanic legal systems. With the exception of Germany, these unions or sections usually protect the interests of executive employees and officials by concluding national sectoral collective agreements. Thus, in France, the ‘Convention collective nationale des ingenieurs et des cadres’, ie. the collective agreement for engineers and executives, and in Italy, ‘Contratto collettino per i dirigenti industriali’ ie. the collective agreement for industrial directors, were concluded. In the

BENELUX states, a comprehensive collective contract network is concluded in national professional committees and affects the protection of the interests of economic leaders, while in Denmark, a national cross-sectoral collective agreement for executive employees and subordinates plays a significant role, which was signed into law by the state.

In Germany, the trade union organization of executive employees has not yet developed. As a result, there are no collective agreements protecting the rights of executive employees. (Kaiser, 1996, p. 40) However, the fact that the individual employment status of German executives is not worse than in Western European states, where executives have the protection of interests embodied in collective agreements, is due to the fact that executive employees in all companies have an elected organ, the so-called "Sprecheausschuss[1]" which has co-decision rights "(Mitbestimmungesprecht)". Based on its content, this can be considered as a conciliation committee for executive employees. Just as the status of works councils in

[1] SprAuG: § 12 Sitzungen des Sprecherausschusses
(1) Vor Ablauf einer Woche nach dem Wahltag hat der Wahlvorstand die Mitglieder des Sprecherausschusses zu der nach § 11 Abs. 1 vorgeschriebenen Wahl einzuberufen. Der Vorsitzende des Wahlvorstands leitet die Sitzung, bis der Sprecherausschuß aus seiner Mitte einen Wahlleiter zur Wahl des Vorsitzenden und seines Stellvertreters bestellt hat.
(2) Die weiteren Sitzungen beruft der Vorsitzende des Sprecherausschusses ein. Er setzt die Tagesordnung fest und leitet die Verhandlung. Der Vorsitzende hat die Mitglieder des Sprecherausschusses zu den Sitzungen rechtzeitig unter Mitteilung der Tagesordnung zu laden.
(3) Der Vorsitzende hat eine Sitzung einzuberufen und den Gegenstand, dessen Beratung beantragt ist, auf die Tagesordnung zu setzen, wenn dies ein Drittel der Mitglieder des Sprecherausschusses oder der Arbeitgeber beantragen.
(4) Der Arbeitgeber nimmt an den Sitzungen, die auf sein Verlangen anberaumt sind, und an den Sitzungen, zu denen er ausdrücklich eingeladen ist, teil.
(5) Die Sitzungen des Sprecherausschusses finden in der Regel während der Arbeitszeit statt. Der Sprecherausschuß hat bei der Anberaumung von Sitzungen auf die betrieblichen Notwendigkeiten Rücksicht zu nehmen. Der Arbeitgeber ist über den Zeitpunkt der Sitzung vorher zu verständigen. Die Sitzungen des Sprecherausschusses sind nicht öffentlich; § 2 Abs. 2 bleibt unberührt.Die Sitzungen des Sprecherausschusses finden als Präsenzsitzung statt.
(6) Abweichend von Absatz 5 Satz 5 kann die Teilnahme an einer Sitzung des Sprecherausschusses mittels Video- und Telefonkonferenz erfolgen, wenn
1. die Voraussetzungen für eine solche Teilnahme in der Geschäftsordnung unter Sicherung des Vorrangs der Präsenzsitzung festgelegt sind,
2. nicht mindestens ein Viertel der Mitglieder des Sprecherausschusses binnen einer von dem Vorsitzenden zu bestimmenden Frist diesem gegenüber widerspricht und
3. sichergestellt ist, dass Dritte vom Inhalt der Sitzung keine Kenntnis nehmen können.
Eine Aufzeichnung der Sitzung ist unzulässig.
(7) Erfolgt die Sitzung des Sprecherausschusses mit der zusätzlichen Möglichkeit der Teilnahme mittels Video- und Telefonkonferenz, gilt auch eine Teilnahme vor Ort als erforderlich.

Germany is governed by the Betriebsverfassungsgesetz, these committees are also governed by a separate law, the Sprecheausschutsgesets[2]. The protection of the interests of the works council of executive employees has also been resolved in those states where the works council operates in a dual form and where such a special committee of executive employees is unknown. Although, within the Belgian works council system, its organization is made up of two sections, one of which consists of elected subordinated employees and the other of the plant owner, that is to say, the executive employees delegated by the owner. The latter department, ie. the executive employee department, similarly to the "Sprecheausschuss", negotiates separately with the employer company owner to represent the interests of executive employees. The situation is similar in Luxembourg and the Scandinavian states, where the works council means the committee of subordinate workers elected from among the union's candidates and the committee of executive employees negotiating jointly, but the interests of executive employees are protected by the committee of executives.

In this way, at least in the majority of continental Western European states, the collective labour law representation of executive employees is ensured through the participation of both trade unions and works councils. This is important because if either a minor or a major economic or financial crisis unfolds and the company's economic performance declines or stagnates as a result, business owners immediately begin to blame the executive staff. This justifies the organizational development of their legitimate interests, which should be established in Hungary as well.

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