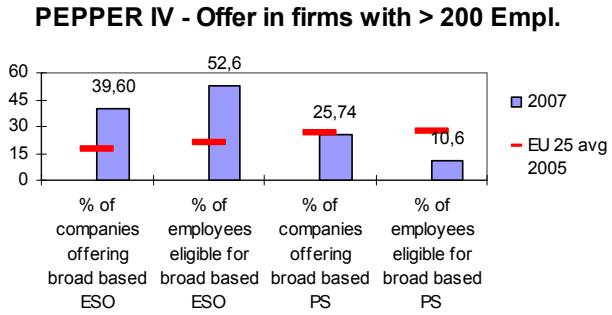
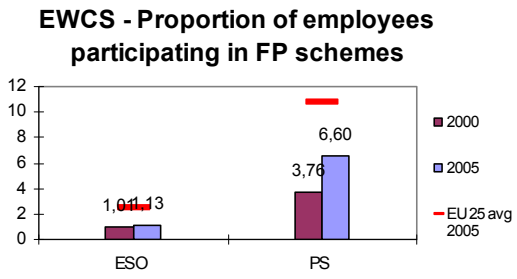
XXI. Poland

The most significant form of employee financial participation in Poland today is employee ownership. Poland's privatisation programme was characterised by significant incentives for employee participation, especially in firms privatised by leasing and transformed into so-called employee companies (*spółki pracownicze*). Ownership structures in these companies have, on the whole, been relatively stable, with non-managerial employees retaining, on average, a significant portion of enterprise shares. Research conducted in the late 1990s from a sample of 110 employee-leased companies privatised between 1990 and 1996 showed that on average the share of non-managerial employees in ownership decreased from 58.7 per cent immediately after privatisation to 31.5 per cent in 1999. Approximately 32 per cent of leasing-privatised firms were still majority-owned by non-managerial employees by mid-1999. Over time, more and more shares were also found in the hands of outsiders (probably due largely to retention of shares by people whose employment relationship with the company ceased for whatever reason), while the presence of strategic outside investors (including foreign investors) had begun to be felt in a minority of firms by the end of the last decade (see Lowitzsch, 2006, p. 237, Table 3). Less significant forms of minority employee share ownership emerged from privatisation methods other than leasing. Insiders possessed only 12.7 per cent of shares at the beginning of 1998, and this fell to 11.4 per cent two years later. Although, all current forms of financial participation may also be used in employee compensation schemes outside of privatisation, there are no tax incentives to encourage this.





1. General Attitude

No interest in further development of PEPPER schemes can be observed either in political or trade union circles. With regard to PEPPER schemes and other forms of workers' participation, the positions of trade unions like Solidarność were and still are inconsistent and often ambiguous. Institutions created to support employee-owned firms in Poland include the Union for Employee Ownership (*Unia Własności Pracowniczej*), the All-Poland

Chamber of Employee-Owned Companies (*Ogólnopolska Izba Gospodarcza Spółek Pracowniczych*) in Poznań, and the Gdańsk Employee Ownership Bank (*Bank Własności Pracowniczej SA w Gdańsku*); however, their role in employee-led privatisation in Poland was very limited. As of early 1996, the Union for Employee Ownership, founded in the autumn of 1990, had only 76 member firms, some of which were still state-owned.

Clearly, since the mid-1990s, the main, openly declared objective of privatisation policy has been to maximise revenues; therefore, all but the smallest state enterprises are to be privatised by commercial methods, despite the fact that employee-owned firms were often the most successful. Moreover, policy makers have encouraged enterprises being commercially privatised to seek outside investors; for this purpose, a clause was included in the 1996 Privatisation Law requiring at least 20 per cent of the shares of a leasing company to be purchased by persons not employed by the company. 100 per cent management-employee buyouts were thus made difficult. Policy makers provided no incentives for the extension of employee financial participation other than through privatisation schemes. However, most recently the topic has returned to the political debate.

2. Legal and Fiscal Framework

In Poland the legal framework provides various forms of PEPPER schemes, embracing on the one hand share ownership and profit-sharing, and on the other the private sector as well as enterprises undergoing privatisation. However, no incentives have been provided by policy makers for the extension of PEPPER schemes. All forms of participation are available for use in employee compensation schemes, although there are no tax incentives to do so.

a) Share Ownership

'Employee Companies' (1990, 1996) – So-called employee companies emerged from Leverage-Lease-Buyout (LLBO) privatisation. This is one form of so-called liquidation privatisation introduced in 1990 which according to Art. 39 of the Law on Commercialisation and Privatisation (PrivL[161]) since 1997 requires: relatively good financial and market conditions; no requirement for substantial investment to modernise, replace, develop equipment, etc; a yearly turnover of up to Euro 6 million; a maximum of Euro 2 million of equity consisting of two enterprise funds; willingness of management and employees to assume the financial risk involved in undertaking a common investment (including third parties). A newly established private company concludes an agreement with the State Treasury to lease the assets of the state enterprise for a maximum period of 15 years.[162]

161 Of 30 August 1996, Dz. U. No. 118, Pos. 561, re-published in Dz. U. 2002 No. 171, Pos. 1397, No. 240, Pos. 2055, with subsequent amendments.

162 Until 2002 Art. 52 para. 1 PrivL foresaw a maximum of 10 years; the legal regulations for LLBOs are to be found in Art. 39 para. 1 No. 3 and 50 to 54 PrivL; it is reserved exclusively for Polish nationals and as an exception also legal persons (Art. 51, para. 1 No. 2 PrivL).

The interest payment was set at 30 per cent (75 per cent of 40 per cent) if the central bank refinance rate exceeded 40 per cent; in 1993 this was lowered to 50 per cent of the refinance rate.[163] Moreover, a leased company can apply to its founding organ for a reduction of interest payments owed as a result of postponements during the first two years of the leasing period if its investment expenditures out of profits amount to at least 50 per cent of its net profit. Finally, the corporate income tax law allows firms to include the interest portion of their lease payments as costs, thus reducing their tax liability. The new privatisation law in 1996 additionally leveraged the financial lease contracts in order to enhance the credit-worthiness of employee-leased firms applying for bank loans. Art. 52 PrivL makes it possible for full ownership to be acquired before the end of the contract if one-third of total leasing rates have been paid, provided that the balance sheet for the second business year of the company has been approved. If more than half of the total leasing rates have been paid, the blocking period is cut in half. Because of conditions on the Polish credit-market, this regulation has become very important in practice.[164]

Employee shares in Capital Privatisation (1990, 1997) – According to Art. 36 pp. of the new PrivL, which came into force in early 1997, employees can acquire 15 per cent of shares for free, with the restriction that these shares be exempt from free trade for two years, and for three years in the case of employees elected to the management board. Generally, they are required to enter their claim six months before the company is registering since the right expires otherwise; the right is also good for six months after sale of the first share. Shares are allocated in groups made up according to length of employment in the enterprise. The total value of allocated shares under these claims may not exceed the sum of the average salary in the public sector for 18 months, multiplied by the number of employees acquiring shares. This rule applies not only to commercialised companies undergoing capital privatisation and those included in the Mass Privatisation Programme, it was also extended to include 15 per cent employee participation in a 'direct privatisation' transaction involving sale of an enterprise as a going concern, as well as in kind contributions of an enterprise (Art. 48 para. 3, Art. 49 para. 4 PrivL). The only other exception is commercialisation via debt-to-equity-swaps.

Private Companies (2003) – In an exception from the general prohibition against acquiring its own stock, Art. 362 para. 1 of the Commercial Companies Code (CCC) permits a company to acquire its own shares in order to offer them to current employees, retired employees of the company, or employees of an affiliated company contingent upon a business relationship of at least three years.[165] In this case, Art. 393 No 6 CCC requires a decision by the general shareholders assembly and Art. 363 para. 3 CCC states that the shares shall be transferred to the employees within 12 of acquisition. Acquisition of the company's own shares in this case is subject to the provisions that the total nominal share

163 Ordinance of the Minister of Finance of 13 May 1993, M. P. 1993 No. 26, Pos. 274, altering that of 7 May 1991, M. P. 1991 No. 18, Pos. 123.

164 Furthermore Art. 54 PrivL foresees the possibility to regulate the specific conditions of such leverage by Ordinance of the Council of Ministers including the possibility to reduce the threshold of paying 20 per cent of the net value of the object of the lease stated in Art. 51 para. 1 No. 3 PrivL to 15 per cent. In this context Art. 64 PrivL granted existing Employees Companies the right to renegotiate their contracts within 3 months of the Ordinance coming into power.

165 This regulation had its origin in the harmonisation with the *acquis communautaire*, that is, the implementation of the Second Council Directive of 1976 (77/91/EEC; OJ L 26, 31.1.1977, p. 1).

value may not exceed the value of 10 per cent of the enterprise's equity capital, and that the purchase price, together with the transaction cost, may not be higher than the reserve set aside from the company's own profits (Art. 348 para. 1 CCC).[166] Additionally, under current legislation, joint-stock companies may issue new shares to be transferred to employees in the context of so-called conditional capital increases, with Art. 448 para. 2 No. 2 CCC expressly referring to the possibility of transferring shares to employees to satisfy previously acquired claims from profit-sharing. A prerequisite to this form of capital increase is that the employees are identified in the decision made by the general shareholders assembly on the capital increase.[167] A companion regulation is Art. 442 para. 1 CCC, which stipulates the possibility of capital increases financed by the company's own capital, referring to Art. 348 para. 1 CCC concerning reserves made from the company's own profits. In order to facilitate the acquisition of shares by employees, under Art. 345 para. 2 of the CCC, the legislature has made an exception to the general prohibition against leveraging acquisition of its own stock. Thus, conditional upon the creation of a corresponding reserve (Art. 348 para. 1 CCC), the company may advance funds, make loans, and provide security in order to expedite the acquisition of its stock by its on employees or those of an affiliated company.

Stock Options – Employees may receive stock options, regular or on a privileged basis (at below-par prices or free of charge) although there is no specific regulation to this effect.

Pre-emptive Right of Purchase of an Enterprise under Insolvency Law (2003) – The Insolvency and Reorganisation Law (IRL) of 2003, a completely new version of Polish insolvency law[168] provides a contingent possibility for setting up 'employee companies' in the context of a liquidation procedure. If the sale of the debtor's business as one or several functioning units is impossible, then each asset is to be publicly auctioned by the administrator, under supervision of the judge-commissioner. If assets are not sold at a public auction or the judge-commissioner does not accept the offer, he can order a second auction, or can determine the minimum price and conditions of sale and allow the administrator to find a purchaser or to sell assets free of procedural restrictions (to be approved by the creditors' committee). In this case, a commercial company founded by at least half of the debtor enterprise's employees and with the participation of the Treasury has a pre-emptive right of purchase of the enterprise or functioning enterprise units (Art. 324 IRL).

166 Art. 347 para. 3 and 348 para. 1 CCC provide the possibility to allocate enterprise profits to special funds while not paying them out as dividends to shareholders, thus allow share based profit-sharing.

167 The issuance of shares to be acquired by employees in this case shall not be considered as a public offering but as a 'private subscription' (Art. 431 para. 2 No. 1 CCC).

168 Dz. U. 2003 No. 60, Pos. 535. For a detailed analysis of the new law see Zedler (2003).

b) Profit-Sharing

The possibility of implementing profit-sharing as a form of remuneration in addition to wage systems and directly linked to enterprise profits is stipulated in Art. 347 para. 3 and 348 para. 1 CCC for joint-stock companies (*tantiema)*.[169] Furthermore, as already mentioned, share-based profit-sharing is regulated in the context of conditional capital increases under Art. 448 CCC, which mentions the possibility of transferring shares to employees, especially in cases where they have acquired claims from profit-sharing. The general type of scheme linked to enterprise results is referred to in Polish as a '*bonus*' but has no legal foundations. Other practices presently sanctioned by law are compensation forms linked to an employee's individual results (gain-sharing); these are not generally linked to enterprise results and thus do not constitute a PEPPER scheme.[170]

c) Participation in Decision-Making

Codetermination at the strategic level takes the form of obligatory representation of employees on the supervisory boards of commercialised companies of, initially, two-fifths of the members and, from the moment the state ceases to own 100 per cent of the shares, one-third (Art. 14 PrivL). Furthermore Art. 11, 12, 60 PrivL provide a detailed procedure for the election and qualification of representatives, while Art. 15 PrivL protects their employment contract for the duration of their term and the year following. A new feature in the context of 'social compensation' is the participation of an employee representative on the executive boards of privatised enterprises employing more than 500 employees (Art. 16 PrivL). Outside privatisation, development of participation in decision-making has been very limited, even in companies where employees have significant share accounts. Poland is still dominated by an elitist and managerial corporate culture which minimises opportunities for participation. Almost all progress made in the area of participation in decision-making in Poland may be attributed to the European Union.

Although the development of both direct and indirect (representational) employee participation in decision-making in employee-owned companies seems rather low, there are signs that some potential for genuine employee involvement could be latent in these firms. In many Polish employee-owned companies, for example, no dividends have been paid out, even after two or three years as a private company, because of decisions to plough back profits into investment or to not pay dividends until the lease is paid off. That employee shareholders can be convinced to vote in favour of such 'austerity' plans is evidence that the entrepreneurial attitudes characteristic of genuine ownership and participation may be present amongst the work forces of certain employee-owned companies.

169 See decision of the Supreme Court of 5 May 1992, I PZP 23/92, Bibl. Prac. No. 25, p. 96.

170 Such as other forms of remuneration, for example, gratifications (gratyfikacja, nagrody, nagrody jubileuszowy), thirteenth salary, commissions (prowizja; used frequently, if not universally, in the case of sales force employees) and various types of bonus schemes. For details, see Ciupa (2001); 'Premie I nagrody dla pracowników', Rzeczpospolita of 3 Oct. 2005.