Chapter V

The legal model of self-employment in Poland: the employment law perspective

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1. Opening comments

In Chapter III, I argued that the status quo in Poland is characterised by the absence of a comprehensive regulatory framework to articulate the key aspects of self-employed work, such as the principles to regulate the provision of services, the conditions of work, the social security and insurance safeguards,[1] and the specific legal status of self-employed workers. The Polish legislator's approach to the issue of self-employment lacks coherence, and the laws are fragmented and rather haphazard. This gives rise to a number of controversies and doubts, discussed both in the scholarship and in case law. In consequence, the status of self-employed workers remains unclear.

The reasoning laid out in Chapter III demonstrates that the Polish legislator must unequivocally step in and take action. No more time can be wasted on apathy and indolence. There is an immediate need for a comprehensive regulatory framework to articulate the key aspects of self-employed work, with particular emphasis on the social security and insurance safeguards. Here in Chapter V, I am going to attempt to articulate the outline of the optimal legal model of self-employment in Poland, taking into account the international and European Union law, the Polish Constitution, and the experiences of the European states studied in this research projects. This model, constructed from the ground up rather than by making adjustments to the status quo, will offer a fresh new perspective on the legal status of self-employed workers.

1 The status of self-employed workers in view of social insurance regulations is discussed in a separate chapter here in. See M. Krajewski, *The legal model of self-employment in Poland – the perspective of social insurance*.

There are certain important underlying principles and conditions that must be met by an optimal legal model of self-employment in Poland. Firstly, given the civil law-based nature of self-employment (rooted in a legal regime dominated by norms that gives parties ample flexibility and autonomy), the regulatory framework may not constitute excessive interference with Article 353[1] of the Civil Code[2] that articulates the principle of freedom of contract, including the freedom of choice of the basis on which a person performs work (as long as it is aligned with its social and economic objective); with the constitutional principle of freedom of economic activity (Article 22 of the Constitution of the Republic of Poland);[3] and with the principle of fair (free) competition (Article 9 of the act of 6 March 2018 – Law on Traders).[4] Secondly, the legal model of self-employment should fully take into account the specific nature and manner in which self-employed workers operate within the economy, and the differences between the conditions under which self-employed workers and employees provide work. Thirdly, the general concept underlying the model must reflect the social and economic requirements of the modern labour market,[5] balancing two factors: on the one hand, making sure that the regulations are not hindering economic growth, and on the other hand, ensuring that the position of workers is not precarious.[6] Fourthly, the legal model of self-employment in Poland proposed herein should allow for differentiation of forms of work provision, to allow for the kind of workforce flexibility that is necessary to meet labour market challenges[7] posed by technological developments, automation, digitisation, globalisation, professionalisation of work, growing importance and proportional size of the service sector, as well as the unfavourable demographic changes.[8] Having a variety of available forms of work provision diminishes the barriers to job

2 Act of 23 April 1964 – Civil Code, uniform text: Dziennik Ustaw of 2023, item 1610 as amended.

3 Constitution of the Republic of Poland of 2 April 1997, Dziennik Ustaw, no. 78, item 483 as amended.

4 Uniform text: Dziennik Ustaw of 2024, item 236.

5 See A. Musiała, *Zatrudnienie niepracownicze*, Warszawa 2011, p. 270.

6 According to Guy Standing, employment is precarious if the following seven guarantees are missing: labour market security, employment security, job security, work security, skill reproduction security, income security, and representation security. See G. Standing, *The Precariat: The New Dangerous Class*, Bloomsbury, London 2011, p. 18.

7 For more information see T. Duraj, *Przyszłość cywilnoprawnych stosunków zatrudnienia*, "Acta Universitatis Lodziensis. Folia Iuridica" 2019, vol. 88: *Stosowanie umów cywilnoprawnych w świetle przepisów prawa pracy i ubezpieczeń społecznych*, ed. T. Duraj, pp. 7 et seq.

8 According to the latest forecasts of Statistics Poland, the country's resident population in 2060 will be 32.9 million. Compared to 2022, it is a decrease by 4.8 million, i.e. by 12.7%. In addition to the negative growth rate, other further unfavourable changes in the population structure will also be observable in terms of ageing and the decrease in the number of women of childbearing age. Those aged 65 and over (i.e. those leaving the labour market) will account for approx. 30% of the population, with their number increasing by 2.5 million compared to 2022. See the forecast for Poland for 2023–2060: https://stat.gov.pl/obszary-tematyczne/ludnosc/prognoza-ludnosci/prognoza-ludnosci-rezydujacej-dla-polski-na-lata-2023-2060-poziom-powiaty,12,1.html (accessed: 24.05.2024).

creation, lowering the risk of increased unemployment rates, illegal employment, and unreported employment.[9] According to Zdzisław Kubot, "it is desirable to have a variety of different options available to work providers. Limiting this diversity would in effect amount to an unfortunate attempt to reverse a necessary and generally positive trend".[10] Fifthly, the regulations adopted by the Polish legislator must stop short of excessively interfering with the matter at hand, lest it should discourage both workers and their clients from self-employment. The model may not be designed so as to, in effect, eliminate self-employed work. This was pointed out by Gérard Lyon-Caen, who noted that the attraction of self-employment consists in the degree of liberty inherent in the notion – its charm, *charmes de la liberté* – and that an excess of regulation may well cause this element to perish.[11]

In presenting here my original proposal for a legal model of self-employment in Poland, I will being with a description of the key ideas behind my concept. I will then move on to discussing the method of regulation I am suggesting for this model, and the key terms I am going to use throughout. Further in the chapter, I will outline my proposals pertaining to legal protection of self-employed workers. I will articulate my comments in the following areas: protection of life and health, protection against discrimination and unequal treatment, protection against mobbing, protection of remuneration for work, protection of motherhood and parenthood, protection of the right to rest, protection of collective rights, and other protective regulations. I will then go on to propose regulations with regard to fundamental obligations of all parties involved in self-employed work, as well as the scope of liability for violations of statutory rights of self-employed workers. In the final sections of the chapter, I will lay out a proposal for a coherent, comprehensive model of preventing and eradicating bogus self-employment, and I will discuss my ideas for promoting self-employment. To conclude the analysis, some overarching comments will be made on the research project financed by the Polish National Science Centre (Narodowe Centrum Nauki) and completed under my direction.

Importantly, the proposed legal model of self-employment in Poland outlined in this chapter gives due importance to social security safeguards for self-employed workers, which lends it a universal dimension, rooted in the fundamental ideas behind labour law and its essential concepts. The solutions developed in the course of work on this model may serve as a starting point for the development of a broader concept of employment of all workers who provide work outside an employment relationship, on the basis of civil law contracts. The conclusions presented in this chapter therefore offer a springboard for a broader discussion about the future of labour law and about the scope of its applicability. Certain scholars in Poland have

9 See M. Gersdorf, *Nowe trendy gospodarcze a reguła domniemania zawarcia umowy o pracę*, "Acta Universitatis Lodziensis. Folia Iuridica" 2019, vol. 88, pp. 35 et seq.

10 Z. Kubot, *Szczególne formy zatrudnienia i samozatrudnienia*, [in:] Z. Kubot (ed.), *Szczególne formy zatrudnienia*, Wrocław 2000, pp. 35 et seq.

11 Quotation following A. Musiała, *Zatrudnienie niepracownicze*…

voiced their support for the expansion of labour law, so that its scope of regulation would extend to non-employee work (including self-employed work), effectively replacing labour law with so-called employment law (*prawo zatrudnienia*).[12]

The proposal for an original legal model of self-employment in Poland invokes, in the elements of its construction, certain ideas proposed by the Labour Law Codification Commissions that had produced two draft versions of a Labour Code – in April 2007[13] and in March 2018.[14] While these draft regulations never proceeded to become law, the concepts that shaped them in terms of regulating the legal status of self-employed workers are most certainly noteworthy.[15] In this part, I will also reference other legislative proposals that have just recently entered public debate following the political shift in power in Poland in late 2023, and the resulting new approach of the legislator to the labour market in general, and to the promotion of entrepreneurship in particular. This chapter includes excerpts from papers I authored throughout the duration of the above-mentioned research project, in which the partial results of my research on the legal model of self-employment in Poland were already previously published.

2. General foundations of the legal model of self-employment in Poland

Given the ideas outlined above that form the broad starting point for the legal model of self-employment in Poland, one must favour – following in the footsteps of Spain[16] – an approach that is centred around the notion of a single law that systematically and comprehensively regulates the legal status of self-employed workers, essentially without referencing other laws (relating to employees) and making them applicable

12 This view is expressed for instance in M. Gersdorf, *Prawo zatrudnienia*, Warszawa 2013.

13 Draft of the Individual Labour Code of April 2007, https://archiwum.mrips.gov.pl/gfx/mpips/userfiles/File/Departament%20Prawa%20Pracy/kodeksy%20pracy/KP_04.08..pdf (accessed: 12.05.2024).

14 Draft of the Individual Labour Code of March 2018, https://www.gov.pl/web/rodzina/bip-teksty-projektu-kodeksu-pracy-i-projektu-kodeksu-zbiorowego-prawa-pracy-opracowane-przez-komisje-kodyfikacyjna-prawa-pracy (accessed: 12.05.2024).

15 For more information see M. Gładoch, *Refleksje na temat koncepcji prawne regulacji pracy na własny rachunek w projektach kodeksu pracy*, "Acta Universitatis Lodziensis. Folia Iuridica" 2019, vol. 88, pp. 81 et seq.

16 Spain has a separate legal instrument that regulates the legal status of self-employed workers, namely the law 20/2007 of 11 July (Ley 20/2007, de 11 julio, del Estatuto del Trabajo Autónomo, Boletín Oficial del Estado of 12 July 2007, no. 166, hereinafter: LETA). For more information see A. Tyc, *Self-employment in Spanish law*, "Acta Universitatis Lodziensis. Folia Iuridica" 2023, vol. 103: *In Search of a Legal Model of Self-Employment in Poland: A Comparative Legal Analysis. Part I*, ed. T. Duraj, pp. 165 et seq. (a paper developed as a part of this research project).

mutatis mutandis.[17] This new law should fully take into account the specific nature of self-employed work, giving due regard to the principles discussed above, namely the principle of freedom of contract, the principle of economic freedom, and the principle of fair competition. The law on the legal status of self-employed workers must offer precise definitions of the terms necessary to apply it, and it must denote with precision to whom exactly it applies – and as for the latter, this should comprise primarily two groups: self-employed workers, and economically dependent self-employed workers. These workers must also be expressis verbis excluded (as it is done in the LETA law[18]) from the scope of regulation of labour law, with the possible exception of invoking selected specific labour law provisions. The Polish legislator may also decide to apply this law, either in its entirety or in parts, to other parties, such as for instance: members of the family of the self-employed worker or other persons sharing the same household as the self-employed worker, who cooperate with the worker in operating a business; agents; persons in top management and executive positions;[19] partners in general partnerships, limited partnerships, and professional partnerships; persons who only incidentally engage in economic activity that is not subject to mandatory registration. In terms of subject-matter scope, the law on the legal status of self-employed workers should offer comprehensive regulations in the following areas: essential requirements pertaining to civil law contracts between the client and the worker; most important rights and obligations of self-employed workers in relation to the work provided by them; protective guarantees for the workers in terms of individual and collective employment law, social safeguards and social insurance;[20] liability for violations of statutory norms pertaining to protection of self-employed workers; safeguards against bogus self-employment; promotion of self-employment.

The normative core of the proposed law on the legal status of self-employed workers consist in delimiting the scope of protection afforded to these workers; this where when the crux of the research was directed. Before contemplating the optimal model of legal protection of self-employed work de lege ferenda in Poland, four fundamental approaches must be recalled, as laid down by Adalberto Perulli

17 Naturally, I believe that some references to provisions governing the situation of employees, to a limited extent, may be made. However, this may only be the case when there is genuinely no need to duplicate the regulations, and only where such a reference will not open the avenue for arbitrary interpretations of the applicability (or the lack thereof) of the referenced provision to self-employed workers – as is the case currently.

18 Under Article 3(3) of LETA, according to the first of the final provisions of the Royal Decree 1/1995 (el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por Real Decreto Legislativo 1/1995, de 24 de marzo), self-employment is not subject to regulation by the provisions of labour law, with the exception of matters specifically indicated in the law.

19 I have been arguing for years in favour of a statutory ban on allowing the persons in top management positions to enter into employment relations. For more information, see T. Duraj, *Podporządkowanie pracowników zajmujących stanowiska kierownicze w organizacjach*, Warszawa 2013, pp. 380 et seq.

20 The matter is further discussed by M. Krajewski in the chapter IV.

in his report on self-employment prepared for the European Commission.[21] The first consists in upholding the status quo, so that self-employment is only regulated by the provisions of civil law and the parties are completely free to decide (under the principle of freedom of contract) what their relations will be, and what – if any – safeguards will be provided in the civil law contract. In this approach, the legislator makes absolutely no interreference into the relations between the person providing work and the client.[22] In the second approach, the category of economically dependent self-employed workers is conceptualised, articulated, and placed in the middle of the spectrum between employees and regular sole traders who run a proper business, and granting this middle category legal protection,[23] the general aim of which is to offer them some protection (but not as much protection as is vested in employees). The rationale is that economically dependent self-employed workers – who provide work under conditions similar to employees, where the client is dominant and there is full economic dependence on the client – should enjoy a degree of protection (though not as much as subordinated workers) but should not be categorised as subordinated workers.[24] The third approach boils down to the inclusion of economically dependent self-employed workers under the umbrella of an employment relationship, by means of expanding the understanding of subordination to also include economic dependence. In

21 A. Perulli, *Economically dependent/quasi subordinate (parasubordinate) employment: legal, social and economic aspects*, Committee on Employment and Social Affairs of the European Parliament and DG Employment and Social Affairs, 19th of June 2003, pp. 112 et seq.

22 The concept must be rejected a priori. While subordinated employees are by law covered by certain fundamental guarantees, self-employed workers fall under the civil law umbrella, where freedom of contract prevails (together with its attendant freedom to determine the rights and obligations of parties). In result, the economically more powerful party (the client) is a dominant negotiating position, with sometimes nearly-limitless ability to force the other party into contractual stipulations. This is why economically dependent self-employed workers should enjoy certain inherent vested protective guarantees – though naturally not as broad as subordinated employees.

23 This concept is favoured e.g. by A. Musiała, *Prawna problematyka świadczenia pracy przez samozatrudnionego ekonomicznie zależnego*, "Monitor Prawa Pracy" 2014, no. 2, pp. 69 et seq.; A. Ludera-Ruszel, *Samozatrudnienie ekonomicznie zależne a konstytucyjna zasada ochrony pracy*, "Roczniki Nauk Prawnych" 2017, no. 1, pp. 55 et seq.; K. Moras-Olaś, *Możliwe kierunki regulacji ochrony pracy samozatrudnionych ekonomicznie zależnych*, "Acta Universitatis Lodziensis. Folia Iuridica" 2022, vol. 101: *W poszukiwaniu prawnego modelu ochrony pracy na własny rachunek w Polsce*, ed. T. Duraj, pp. 114 et seq. See also U. Muehlberger, *Dependent Self-employment: Workers on the Border between Employment and Self-Employment*, Palgrave Macmillan, London 2007; H. Collins, K.D. Ewing, A. McColgan, *Labour Law: Text and Materials*, Portland, OR–Oxford 2005; S. Sciarra, *The Evolution of Labour Law (1992–2003)*, vol. I: *General Report*, Luxembourg 2005; C. Williams, F. Lapeyre, *Dependent self-employment: Trends, challenges and policy responses in the EU*, International Labour Office, Geneva 2017, pp. 5 et seq.

24 For more information see T. Duraj, *Economic Dependence as a Criterion for the Protection of the Self-Employed under EU Law and in Selected Member States*, "Review of European and Comparative Law" 2024, vol. 56, no. 1, pp. 159 et seq.

this approach, the economically dependent self-employed workers would enjoy the status of employees and thus all the rights vested in employees.[25] The fourth approach rests on the notion of creating a charter of fundamental social rights, and making these rights applicable to all forms of work provision, regardless of the legal basis. This would transform labour law (*prawo pracy*) into employment law (*prawo zatrudnienia*), wherein all matters related to the employment relations would form one part of the employment code.[26]

In my opinion, when developing an optimal model of legal protection of self-employed work in Poland, a mixed approach should be taken into consideration, in which the elements of two approaches – namely of the second and the fourth one – would be combined. Given the standards of international and European Union law, where the legislator typically makes the protective guarantees applicable to all, broadly defined, 'workers' (*travailleurs*); given the requirements of the Polish Constitution (including the principle of social justice – Article 2 and the principle of equality before the law – Article 32) with its broadly conceived protective guarantees; and given the experiences of European countries studied in the research project, I believe a two-tier model of protection of self-employed workers is optimal. The first tier should cover all natural persons who provide work in person to at least one client (a trader,[27] an organizational unit that is not a trader, or an agricultural business), at their own responsibility and risk, without

25 This concept is favoured e.g. by A.M. Świątkowski, *Prawo pracy*, Kraków–Gdańsk 2001, p. 290. See also A. Chobot, *Nowe formy zatrudnienia: kierunki rozwoju i nowelizacji*, Warszawa 1997, p. 174. The concept however must be rejected on the grounds that it is structurally flawed. The economic dependence of the self-employed worker on the client may not be equated with the subordination characteristic of the employment relationship. Equating the two would lead to a blurring of the lines of subordination as the distinguishing feature of the employment relationship and, consequently, to a complete blurring of the already tenuous boundaries between employment relations and civil law relations. Adopting this concept would lead to the unacceptable situation that the same scope of protection (i.e., the scope guaranteed by the employment relationship) would be enjoyed both by employees, who are subject to the employer's strong authority and instructions, and self-employed workers, who provide work outside of the client's authority. For more information see T. Duraj, *Zależność ekonomiczna jako kryterium identyfikacji stosunku pracy – analiza krytyczna,* "Praca i Zabezpieczenie Społeczne" 2013, no. 6, pp. 8 et seq. One must agree with Zbigniew Hajn, who find this concept too radical and who argues that it constitutes an excessive expansion of labour law safeguards. See Z. Hajn, *Metody ochrony niepracowniczej pracy zależnej w prawie polskim*, "Studia Prawno-Ekonomiczne" 2019, vol. 113, p. 81.

26 This concept is favoured e.g. by A. Supiot, *Transformation of Labour and Future of Labour Law in Europe*. *Final report*, Luxembourg 1999, https://op.europa.eu/en/publication-detail/-/publication/b4ce8f90-2b1b-43ec-a1ac-f857b393906e (accessed: 11.12.2023); A. Perulli, *Economically…*, p. 116. This is the approach implemented in Germany, where the legislator created one single legislative instrument to cover all social rights, and gradually developed a social law code (*Sozialgesetzbuch*).

27 The requirement to provide work in person does not preclude the self-employed worker from having assistance from members of their immediate family or other persons with whom the workers shares the household.

management or supervision from the client, under conditions of registered economic activity, as understood by the Law on Traders, who hire neither employees nor civil-law contract workers for this purpose – i.e., self-employed workers. At this tier, there is a need to develop a charter of fundamental social rights (to form the core of the protective guarantees) that would be applicable to all natural persons who provide work in person, regardless of the legal basis (approach 4). Under this charter, the Polish legislator should ensure that self-employed workers have guarantees of: protection of life and health, protection against discrimination and unequal treatment, protection of dignity, protection of women in the period surrounding childbirth, the right to a maternity benefit, the right of association, the ensuing right to protection resulting from collective agreements, and the protection of against termination of a trade union officials' civil law contract. The second tier of protection must cover the self-employed workers who provide work in person to a client under conditions of economic dependence. A separate category of economically dependent self-employed workers must be established, located between employees (with an employment relationship) and sole traders (approach 2). These economically dependent self-employed workers should be granted, under the new separate law on the legal status of self-employed workers, the broadest protections and rights most resembling the status of employees. In particular, economically dependent self-employed workers should be granted the following rights: the right to a minimum wage and to the protection of this wage, the right to rest, the right to paid leave in connection with childbirth (8 weeks), the right to refuse working under hazardous conditions with a guarantee of remuneration, the right to have the period of being economically active count towards workplace seniority, the right to have notice periods, the right to have protection against immediate termination of the contract, the right to paid breaks in connection with holding a trade union office, the right to strike, and the right to bring an action to a labour court. In order to enshrine this two-tier model of protection self-employed workers in the relevant law, it is necessary first of all to create statutory definitions of the two essential terms: 'self-employed workers' and 'economically dependent self-employed workers.' All room for differences in interpretation must be eliminated, so that there is no shortage of clarity as to who is eligible for the statutorily guaranteed rights and protections.

Importantly, however, the protection of self-employed workers cannot be set at an identical level as the protection guaranteed to employees who provide work under conditions of subordination. This would constitute an excessive interference with the principles of freedom of contract, freedom of economic activity, and fair competition. It would also distort the relations between labour and capital. It is crucial not to lose sight of the fact that the most far-reaching rights must be vested in employees. The employment relationship must guarantee the broadest (fullest) scope of protection, because it must compensate the employee for the permanent subordination to the employer and for the obligation to remain under the employer's authority and direction. The protective function of labour law, which constitutes the

basis of the origin and development of this branch of law, must first and foremost concern employees. I fully agree with Barbara Wagner that the regulatory structure of the employment relationship is primarily oriented towards the protection of the employee who is considered to be most in need, i.e. the employee who is positioned low (or very low) in the organisational hierarchy of the workplace, who is the economically the weakest (earning income only by providing work to the employer), who is socially in a weak position as well, and who may find it most difficult to assert and pursue their rights.[28] With this model of the employment relationship at the centre (rooted in the notion of subordinated work), it is possible to envisage other forms of work, based in the civil law regime – including self-employed work – to which, to a limited extent, the protections developed under labour law should also have some applicability. The employment relationship, as a legal model, must serve as a reference point for any regulations of civil-law based forms of work (including self-employment), with fewer and lesser protective guarantees, tailor-made to reflect the specific nature of self-employed work.[29]

To complement the proposed model of protection of self-employed workers in Poland, it is also necessary to create effective mechanisms to discourage self-employment undertaken with the intent of circumventing labour law, and to develop regulations on liability for breaching the laws that protect self-employed workers. In effect, many workers who now operate as sole traders would be simply eligible for the employee status (rather than continuing with the fiction of self-employment). Towards this end, there is an urgent need for a precise definition of the term used in Article 22(1) of the Labour Code, namely "employer's direction", in order to give supervisory bodies (the Labour Inspection) and the labour courts effective tools to accurately classify relationship between workers and their clients, and thus gain an effective measure of tackling self-employment undertaken with the intent of circumventing labour law.

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28 See B. Wagner, *O swobodzie umowy o pracę raz jeszcze*, [in:] M. Matey-Tyrowicz, L. Nawacki, B. Wagner (eds.), *Prawo pracy a wyzwania XXI-go wieku. Księga jubileuszowa Profesora Tadeusza Zielińskiego*, Warszawa 2002, p. 378.

29 This is the argument put forward in T. Duraj, *Przyszłość cywilnoprawnych stosunków zatrudnienia*…, pp. 9 et seq.; idem, *The limits of expansion of labour law to non-labour forms of employment – Comments as the law stands and de lege ferenda*, [in:] J. Wratny, A. Ludera-Ruszel (eds.), *News Forms of Employment. Current Problems and Future Challenges*, Springer 2020, pp. 15 et seq.; idem, *Funkcja ochronna prawa pracy a praca na własny rachunek*, [in:] A. Napiórkowska, B. Rutkowska, M. Rylski (eds.), *Ochronna funkcja prawa pracy. Wyzwania współczesnego rynku pracy*, Toruń 2018, pp. 37 et seq.

3. Specific foundations of the legal model of self-employment in Poland

3.1. Method of legal implementation of the model of self-employment in Poland

Choosing the right method of implementation of the model of self-employment in Poland is crucial both in terms of technical legislative principles and – perhaps even more importantly – in terms of accuracy of interpretation of the new regulations, as well as their effectiveness. As the law stands, the norms applicable in the area of self-employment are spread across many different legal instruments in a number of different branches of law. The legal situation of self-employed workers is governed, at present, by constitutional law, business law, civil law, labour law (including laws other than the Labour Code), social security law, and tax law.[30] This has a negative impact on the uniformity, coherence, transparency, and effectiveness of the regulations. While it may seem reasonable with regard to social insurance and taxes, since the status of self-employed workers in those aspects is quite unique, in the other areas this is hardly an optimal situation.

Labour law scholars tend to fall into two camps in terms of the preferred method of legal implementation of the model of self-employment. The first camp favours the method of expansion, i.e. expanding the applicability of the labour law (including the Labour Code) to self-employed workers, together with its range of rights dedicated to subordinated workers.[31] This is not a good solution in terms of preserving the coherence of the system of law, because workers who provide work on the basis of civil law contracts fall under a different regime (with norms of a different nature), and thus these regulations fail to reflect the specifics of their situation. This is the method used in Germany, where 'persons with a status similar to that of an employee' (*arbeitnehmerähnliche Personen*) are covered by regulations originally designed to apply to employees and guaranteeing them certain rights. This is the case, for instance, with regard to the German law on collective agreements (*Tarifvertragsgesetz*) of 9 April 1949, which expands the employee's right to enter into collective agreements to cover not only employees but also *arbeitnehmerähnliche Personen*.[32] The flawed nature of this method of legal regulation of self-employment

30 See T. Duraj, *Prawna perspektywa pracy na własny rachunek*, [in:] E. Kryńska (ed.), *Praca na własny rachunek – determinanty i implikacje*, Warszawa 2007, pp. 19 et seq.

31 Proponents of this approach include Agata Ludera-Ruszel, *Samozatrudnienie ekonomicznie zależne*…, p. 56. Teresa Liszcz is also arguing in favour of expanding the applicability of labour law to cover civil law-based work relations. See T. Liszcz, *Niech prawo pracy pozostanie prawem pracy*, [in:] Z. Hajn, D. Skupień (eds.), *Przyszłość prawa pracy. Liber Amicorum. W pięćdziesięciolecie pracy naukowej Profesora Michała Seweryńskiego*, Łódź 2015, p. 283.

32 Furthermore, German antidiscrimination law also expands the protective regulations that pertain to subordinated workers to cover *arbeitnehmerähnliche Personen*. See R. Wank, *Self-employment in Germany and Austria*, "Acta Universitatis Lodziensis. Folia Iuridica" 2023,

is best seen on the example of the legislation currently in force in Poland. Unfortunately, in many cases the Polish legislator takes shortcuts and, in granting certain rights to self-employed workers, makes extensive use of references to the provisions of the labour law regulating the protection of employees, making them applicable mutatis mutandis. This is the case, for example, with regard to the protection of life and health, or with regard to collective rights (which I discussed in an earlier chapter of this book). These legal constructions must be viewed as inadequate and, in many cases, actually counterproductive to the cause of protection of self-employed workers. They give rise to a number of problems in terms of interpretation, and thus generate uncertainty about the legal position of self-employed workers in the context of the practical application of the rights that are guaranteed to them in theory. Furthermore, the mutatis mutandis referencing of provisions that pertain to employees often unnecessarily blurs the lines between the scope of protection guaranteed to self-employed workers and employees (for instance with regard to the protection of trade union officials, or with regard to the right to strike and to other forms of protest). This is problematic both axiologically and legally, and amounts to excessive interference of the Polish legislator with the civil law principle of freedom of contract, the constitutional principle of freedom of economic activity, and the principle of fair competition.

The second method of regulating self-employed work is by devising new, separate legal instruments which, using the provisions of labour law as a springboard, would create completely new regulations dedicated to self-employed workers, taking into account the specific, unique nature of work provided on the worker's own account and at their own risk.[33] This method has been applied in Spain, where a separate law – LETA – was adopted in 2007, not only defining in detail the category of self-employed workers (including economically dependent self-employed workers), but also comprehensively and systemically regulating the status of this group of workers, specifying their fundamental rights and obligations, as well as the form and duration of the contract on the basis of which they provide work.[34] Importantly,

vol. 103, pp. 121 et seq. A paper developed as a part of this research project. Most of the remaining European countries included in the study also rely on the method of expansion.

33 Proponents of this method include e.g. A. Musiała, *Prawna problematyka świadczenia pracy*…, p. 72; K. Moras-Olaś, *Możliwe kierunki regulacji*…, p. 116.

34 For more information see A. Tyc, *Self-employment in Spanish law…* See also A. Musiała, *Prawna regulacja pracy samozatrudnionego w świetle hiszpańskiej ustawy o pracy autonomicznej*, [in:] Z. Niedbała (ed.), *Księga pamiątkowa w piątą rocznicę śmierci Profesora Andrzeja Kijowskiego*, Lex 2010, pp. 145 et seq. Italy has a law – law no. 81 of 22 May 2017 on the work provided by self-employed workers – that was enacted to guarantee appropriate protection to self-employed workers (*Misure per la tutela del lavoro autonomo non imprenditoriale e misure volte afavorire l'articolazione flessibile nei tempi e nei luoghi del lavoro subordinato*, Gazzetta Ufficiale no. 135 dated 13 June 2017). However, this law does not regulate the entirety of the legal situation of self-employed workers; small business operators, as referred to in Article 2083 of the Italian Civil Code, are excluded from its scope. For a full picture of Italian regulations pertaining to self-employed workers, it is necessary to draw extensively on other statutory provisions.

by enacting LETA, the Spanish legislator created a completely separate legal regime, and within in, a list of individual and collective rights and privileges for this category of workers, taking into account the specific nature of self-employed work. A distinction was made between the rights guaranteed to all self-employed workers and those reserved exclusively for economically dependent self-employed workers who, given their status that is similar to employees, deserve a broader scope of protection. Crucially, the Spanish legislator has, in principle, excluded self-employment from the scope of labour legislation, as discussed above.

This latter method of regulating self-employment should be implemented in Poland.[35] The Polish legislator should enact a separate law on the legal status of self-employed workers, that would comprehensively regulate the legal situation of these workers,[36] in principle, without referencing provisions that pertain to employees and stipulating that they apply mutatis mutandis (beyond a handful of exceptions). This approach would fully meet the correct law-drafting requirements set out in the regulation issued by the President of the Council of Minsters dated 20 June 2002 on the principles of drafting the law.[37] As specified in its § 2, a law must exhaustively regulate a given matter, without leaving any of its significant aspects outside of its scope.

I disagree with Anna Musiała, who argues in favour of including the provisions that regulate the legal status of self-employed workers in the Labour Code.[38] Both of the Codification Commissions took that approach, proposing – in 2007 and 2018 respectively – that the status of self-employed, own-account workers should be delineated within the Labour Code.[39] In my opinion, this goes counter to the principles of legal drafting,[40] and would result in overloading the Labour Code with regulations, while – in order to preserve clarity of legal structures – it should remain limited

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For more information see A. Tyc, *Self-employment in French and Italian law*, "Acta Universitatis Lodziensis. Folia Iuridica" 2023, vol. 103, pp. 185 et seq. A paper developed as a part of this research project.

35 The following authors argue in favour of the separate regulation method: K. Klare, *The horizons of transformative labour and employment law*, [in:] J. Conaghan, R.M. Fischl, K. Klare (eds.), *Labour Law in an Era of* G*lobalization*: *Transformative Practices and Possibilities*, Oxford 2004, p. 29.

36 In point 2, I list the crucial matters that should be covered by the relevant statute, following the example of Spain.

37 Uniform text Dziennik Ustaw of 2016, item 283.

38 A. Musiała, *Prawna problematyka świadczenia pracy*…, p. 73. The following author also argues against regulating the status of self-employed workers in the Labour Code: K. Moras-Olaś, [in:] *Możliwe kierunki regulacji*…, p. 115–116.

39 The first Codification Commission (2002–2006), with Michał Seweryński serving as its head, did not use the term 'samozatrudnienie' (self-employment), instead using the terms 'zatrudnienie niepracownicze' (literally: non-employed work) and 'zatrudnienie niepracownicze ekonomicznie zależne' (literally: economically dependent non-employed work). For more information see M. Gładoch, *Refleksje na temat*…, pp. 81 et seq.

40 For a different view see L. Florek, *Czterdziestolecie kodeksu pracy*, "Państwo i Prawo" 2015, no. 3, pp. 21 et seq.

in scope, focusing only on the employment relationship.[41] Broadening the scope of regulation of the Labour Code, both in terms of subject matter and in terms of applicability to another category of workers, would further diminish the clarity of its previsions, and in effect would render it even less effective. It would undermine its position as a stable uniform law that enshrines the regulations pertaining to a specific domain governed by cohesive principles.[42] For similar reasons, it would also not be appropriate to regulate the status of self-employed workers in the Civil Code.[43] Due to the unique status of this category of workers, which is in many aspects similar to the status of employees (in particular when the work is provided under conditions of economic dependence on the client) precludes this regulatory option.

For the sake of completeness of the argument, it is also relevant to note that there is precedent for regulation the legal situation of self-employed workers by means of a regulation (*rozporządzenie*, a lower-level act of law) issued on the basis of Article 303 of the Labour Code. The option must, however, be assessed negatively. Under Article 303, the Council of Ministers may determine, by means of a regulation (*rozporządzenie*), the scope of application of the provisions of labour law to persons providing work on a long-term basis outside the employment relationship, with changes resulting from different conditions under which this work is provided. This is how, since the 1970s, piece work carried out at home has been regulated in Poland (regulation of the Council of Ministers of 31 December 1975 on the rights of workers who carry out piece work[44]). Under this regulation of the Council of Ministers, piece workers have, in particular: the right to a minimum wage; the right to remuneration for a period of being incapable of working; the right to paid uninterrupted annual leave of the length specified in the Labour Code; protection in terms of occupational health and safety; protection against termination; protection of remuneration for work; protection in terms of parenthood; procedural protection before labour courts.[45] This approach, again, is rooted in the method of expansion of labour law, which I critically engaged with above. It results in a large

41 According to Article 1 of the Labour Code, the Code determines the rights and obligations of employees and employers.

42 I disagree with Z. Hajn, who argues that the issue classification of legal regulations pertaining to work provided by non-employees into the relevant branches of law is of secondary importance; Z. Hajn, *Metody ochrony niepracowniczej*…, p. 83.

43 As the law stands, the Civil Code regulates the agency contract, i.e. the contract that serves as a basis for the work provided by agents (Article 758 et seq.). According to these provisions, an agent must be registered as a sole trader, and the Civil Code contains provisions that guarantee certain protections to these workers, e.g. in terms of payment of their commission or the permissibility of termination of the agency contract. For more information see Z. Hajn, *Regulacja prawna zatrudnienia agentów*, [in:] Z. Kubot (ed.), *Szczególne formy zatrudnienia*, Wrocław 2000, pp. 137 et seq. I believe that the status of agents as workers should instead fall under the scope of regulation of the law on the status of self-employed workers.

44 Dziennik Ustaw of 1976, no. 3, item 19 as amended.

45 For more information about the piece-meal work contract see T. Wyka, *Sytuacja prawna osób wykonujących pracę nakładczą*, Łódź 1986.

number of references to the provisions of the Labour Code, to be applied mutatis mutandis[46]. It is however rather unfathomable that matters of grave importance, classified as second generation human rights, such as the right to protection of life and health, protection against discrimination and unequal treatment, protection of dignity, protection of remuneration, or protection of the right to rest, should be regulated by means of a legal instrument of a rank below the statute.

3.2. Conceptual matrix of fundamental terms of the legal model of self-employment in Poland

3.2.1. Opening comments

As a vital element of the legal model of self-employment, it is necessary to delimit the applicability of the law to clearly defined categories of persons. This in turn requires precise definitions of the two main categories of persons to whom the provisions of this act will apply in the two-tier model of protection. The legislator must define the terms: 'self-employed worker' and 'economically dependent self-employed worker'. These categories of workers – following the example of Article 3(3) of LETA – must

46 The method of expansion of labour law has also been applied to persons who belong to agricultural production cooperatives. The legal situation of these persons is currently regulated by the act of 16 September 1982 – Law on Cooperatives (uniform text: Dziennik Ustaw of 2024, item 593, Article 138 et seq.). Members of cooperatives are not considered employees. They provide work for the benefit of the cooperative on the legal basis consisting simply in the fact of their membership in the cooperative, which is civil law based and which explicitly provides that they are obliged to provide work to the cooperative, in person. However, due to the economic dependence of these persons on the agricultural production cooperative, the legislator allowed for the possibility of mutatis mutandis application of specific labour law provisions (granting protection to employees) to these persons as well. In particular, these persons are eligible for the protection in the following scope: the right to monetary payments (benefits) related to pregnancy, birth, and raising a young child, as specified in the labour law (Article 161 of the Law on Cooperatives); the right to wage protection (Article 165 of the Law on Cooperatives); the right to paid annual leave according to the rules set out in the bylaws of a given agricultural production cooperative (Article 160 of the Law on Cooperatives); freedom of association and the collective rights derived therefrom. There is also no legal obstacle that would prevent agricultural production cooperatives from bestowing more rights on their members, within the civil law based relationship of membership in the cooperative. This can be accomplished either by means of enshrining, in the bylaws of the cooperation, of a provision mandating the mutatis mutandis application of specific provisions of the labour law (as long as it is not in contravention of the Law on Cooperatives), or by means of granting the rights modelled on employee rights directly in the bylaws. For more information see M. Gersdorf, *Regulacja prawna zatrudnienia osób pracujących w rolniczych spółdzielniach produkcyjnych. Rozważania de lege ferenda*, Studia i Materiały IPiSS, Warszawa 1990; T. Duraj, *Podstawa prawna świadczenia pracy członków rolniczych spółdzielni produkcyjnych*, [in:] M. Szabłowska-Juckiewicz, B. Rutkowska, A. Napiórkowska (eds.), *Tendencje rozwojowe indywidualnego i zbiorowego prawa pracy. Księga jubileuszowa Profesora Grzegorza Goździewicza*, Toruń 2017, pp. 141 et seq.

be excluded from the scope of regulation of labour law, except for a handful of references to specific (selected) norms of this law arising expressis verbis from the law on the legal status of self-employed workers. As pointed out in chapter III, absence of these definitions generates a number of problems, rendering the legal status of self-employed workers unclear. The objective here is to eliminate room for interpretative doubts as to the subjective scope of the rights and safeguards enshrined in the law.

3.2.2. 'Self-employed worker' (*samozatrudniony*)

The conclusion from our study is that neither international, nor European Union, nor domestic legislation in the European countries we investigated actually contains a uniformly applied definition of the term 'self-employed worker,' with the sole exception of Spain. According to Article 1(1) of LETA, the act is applicable to natural persons who habitually, in person, directly, on their own behalf, without management or supervision from another person, engage in business or professional activity in order to generate a profit, whether or not these persons hire other workers. Furthermore, LETA applies to work performed habitually by relatives of self-employed workers, if these relatives do not have the status of employees. In a similar vein, the 2018 draft of the Labour Code proposed the following wording: "a self-employed worker is a person who provides work either within the scope of operating a business or outside of that scope. A self-employed worker provides work as a registered sole trader if the law so requires" (Article 7(4)).

On the basis of the considerations outlined in chapter III of this book, as well as other research carried out as part of this project, I believe that the best overall conclusion is as follows: a self-employed worker is a natural person who provides work (services) in person for at least one trader, an organisational unit that is not a trader, or an agricultural business (client), at their own responsibility, at their own risk, and outside the scope of the management (direction) of that client, under conditions of registered economic activity, as understood by the Law on Traders, who hires neither employees nor civil-law contract workers for this purpose. The personal provision of work (services) does not preclude unpaid assistance from family members recognised as cooperating persons as understood by Article 8(11)[47] of the act of 13 October 1998 on the social security insurance system,[48] as well as unpaid

47 Pursuant to this provision, the category of persons cooperating with persons running a non-agricultural business includes: a spouse, the children, children of the spouse, adopted children, parents, stepmother and stepfather, and adoptive parents, if they live in the same household and cooperate with the said person in running the business in question. The term does not pertain to persons with whom an employment agreement was concluded for vocational training purposes.

48 Uniform text: Dziennik Ustaw of 2024, item 497 as amended.

assistance from persons how are not family member according to that definition but who share the same household as the self-employed worker.[49]

While arguing in favour of the adoption of this definition of the term 'self-employed worker,' the following caveats must be made:

1. This definition applies only to natural persons registered as sole traders (operating a business on their own account) as understood by the Law on Traders. In effect, persons conducting unregistered activity as referenced in Article 5(1) of the Law on Traders do not fall into this category (under Article 5(1), activity performed by a natural person whose income due from this activity does not exceed in any month 75% of the amount of the minimum remuneration referred to in the act of 10 October 2002 on minimum wage, and who within the last 60 months did not engage in economic activity, does not constitute economic activity[50]). Thus, persons who are not registered sole traders as defined in the Law on Traders, and who only engage in independent for-profit work incidentally, are not to be considered 'self-employed workers'.[51]
2. A self-employed workers as understood by the law on the legal status of self-employed workers must be a natural person who provides work in relations with other traders (B2B). This excludes natural persons who provide work (services) solely to individual customers (B2C).
3. The term 'work' used in the above definition also includes 'services' as understood by the Civil Code. Naturally, the work is typically provided – as discussed in chapter III of this book – on the basis of the contract for services similar to a contract of mandate, as defined in Article 750 of the Civil Code (which is a B2B contract). I propose a broad, functional approach to work, interpreted as a person's intentional, purposeful, mental or physical effort. This is the accurate understanding of 'work' in the context of Article 24 of the Polish constitution, as discussed in more detail in chapter III of this book.[52] Another argument in support of this understanding of 'work' is that the legislator, in the act of 23 May 1991 on

49 Similar views in: M. Barwaśny, *Ochrona osób pracujących na własny rachunek – koncepcja regulacji prawnej*, a PhD thesis written under the supervision of T. Duraj, Łódź 2023, pp. 277 et seq.

50 Act of 10 October 2002 on the minimum wage, uniform text: Dziennik Ustaw of 2020, item 2207 as amended.

51 Certain provisions in the act on the legal status of self-employed workers (that explicitly make this stipulation) may apply to these workers.

52 According to Z. Hajn: "it is therefore irrelevant whether the object of the obligation towards the other person is the work itself, as in an employment relationship, or whether, as in a civil law relationship, it is provided by the worker for themselves or their own undertaking, and the principal or client benefits from it indirectly in the form of its effect embodied in the purchased service or work" (see Z. Hajn, *Metody ochrony niepracowniczej*…, p. 72). Contrary opinion in: A. Sobczyk, *Podmiotowość pracy i towarowość usług*, Kraków 2018, pp. 18 et seq. Compare also J. Stelina, *Praca czy usługa na własny rachunek*, "Acta Universitatis Lodziensis. Folia Iuridica" 2022, vol. 101, pp. 35 et seq.

trade unions[53] uses the wording "a person who performs work for money", which should be understood as an employee or a person providing work for remuneration on a basis other than an employment contract, if no other persons are hired to provide that work, regardless of the legal basis therefor (Article 1^1(1)). Both in scholarship and in case law, there is a consensus that this includes in particular self-employed workers.[54]

4. The concept of 'self-employment' should be restricted only to natural persons who operate a business in person, without employees or other hired workers, because the essence of self-employment is independent provision of work for a client by individual economic operators (using their own knowledge, qualifications, skills, and experience). This is what distinguishes self-employment from operating a business as such. Importantly, this requirement should only apply to those services (tasks) that are central to scope of the self-employed person's business (e.g. the IT industry or medical services). In contrast, the self-employed person may outsource the non-essential elements of their business, such as e.g. bookkeeping, to an external entity.
5. There is one essential element of the definition of 'self-employment' that follows directly from LETA but that can also be derived from the legislation of other European countries analysed in our project: namely, the sine qua non condition that the natural person, when they provide work on their own account, must do so – at the very minimum with regard to one client – without being directed by that client. Direction, for the purposes of this discussion, is to be understood as the defining feature of the employment relationship (Article 22(1) of the Labour Code), which identifies this relationship and serves to distinguish it from civil law-based forms of work provision. Own-account work carried out with direction from the client (as interpreted in light of the Labour Code) must always be understood as bogus self-employment, i.e. an attempt to circumvent labour law in order to reduce business overheads. The problem is that currently in Poland, as discussed in Chapter III of this book, this 'direction' is not precisely defined, with various interpretations of the term cropping up across labour law scholarship and the case law.[55] Therefore, in order to draw clearer boundaries between the definition of self-employment proposed above, and the employment relationship, it is necessary to introduce more clarity and greater precision into Article 22(1) of the Labour Code in terms of what constitutes 'direction' by the employer. Specifically, the provision of the Labour Code should contain the information that the 'direction' consists in the right of the employer to issue binding instructions to the employees, giving a more detailed description of what the employee is expected to do as part of their job. Drawing

53 Uniform text: Dziennik Ustaw of 2022, item 854.

54 This was, for instance, the opinion of the Constitutional Court, expressed in its judgment of 2 June 2015 (K 1/13, OTK-A 2015, no. 6, item 80, Dziennik Ustaw of 2015, item 791). See a detailed discussion in Chapter III of this monograph.

55 See an extensive analysis of the views of legal scholarship and case law, [in:] T. Duraj, *Podporządkowanie pracowników*…, pp. 45 et seq.

on international and European Union documents, the legislations of the countries examined in this research project, as well as labour law scholarship and case law, a need may also arise to introduce additional criteria that would allow, in practice, to effectively distinguish between self-employment (as specified in the proposed definition) and the employment relationship as defined in Article 22(1) of the Labour Code. I will discuss these issues in more detail further herein, when addressing the legal mechanisms for counteracting bogus self-employment in Poland, because improving the effectiveness of these mechanisms requires the implementation of the same proposals I outlined above.

6. Adopting the above-proposed definition of the term 'self-employed worker' does not by any means preclude the expansions of the provisions of the proposed law on the legal status of self-employed workers (whether in its entirety or in part) to other persons, such as: members of the self-employed worker's family, other persons sharing the self-employed worker's household who cooperate with the worker in carrying out the relevant activities, agents, workers in top managerial and executive positions,[56] partners in general partnerships, limited partnerships and professional partnerships, or persons who only incidentally engage in carrying out unregistered business activity. Relevant solutions already exists in Spain, where Article 1(2) of LETA allows for extending of the scope of its regulations to other persons.

3.2.3. 'Economically dependent self-employed worker' (*samozatrudniony ekonomicznie zależny*)

A precise definition of the term 'economically dependent self-employed worker' is vitally important for the proper operation of the proposed two-tier model. The legal definition of this term in the law on the legal status of self-employed workers should employ criteria that are as clear (and as easy to understand) as possible, in order to facilitate quick and uncomplicated determination of a worker's status, to decide whether the given worker who provides work in person on their own account is eligible for the broader scope of rights. In the words of Zbigniew Hajn, a typological method must be applicable here: if work is provided under certain conditions listed by the law, the person providing this work is to be considered an economically dependent self-employed worker, regardless of the nature of the legal relationship.[57]

The reason why economically dependent self-employed workers should be conceptualised as a distinct separate category of workers, located between employees (with an employment relationship) and full-fledged business operators, is that this group of self-employed workers must be offered certain safeguards (in a lesser scope

56 I have been arguing for years in favour of a statutory ban on allowing the persons in top management positions to enter into employment relations. For more information see T. Duraj, *Podporządkowanie pracowników*…, pp. 380 et seq.

57 Z. Hajn, *Metody ochrony niepracowniczej*…, p. 82.

than the safeguards available to employees), while not being conflated with employees. These workers provide work under conditions of economic dependence on the client. The dominant position of the client translates into the client's clear negotiating advantage, and in result the ability to unilaterally impose disadvantageous contractual stipulations. In result, economically dependent self-employed workers (similarly to employees) must be covered by more extensive protective guarantees than other own-account workers who enjoy full autonomy and financial independence.[58] Economic dependence is, of course, much different than the subordination of the employee to the employer[59]. It usually boils down to a situation where the self-employed worker provides work in person to only one (or mostly one) client, and the income generated in that manner is the sole (or main) source of livelihood of the worker and their immediate family.

The need to conceptualise economically dependent self-employed workers as a separate distinct category of workers was noted both at European Union level and in several member states. The national legislation in Spain, Germany, and Italy grants a broader scope of protection to economically dependent self-employed workers, as confirmed in our research project. At the European Union level, the first indications of the emerging need to designate a separate category of economically dependent self-employed workers, who require protection due to the similarity between their working conditions and those of employees, can be traced back to as early as 1999. At that time, a group of academics led by Alain Supiot submitted a report to the European Commission, drawing attention to the existence of a new group of workers who could not be classified as employees, but who were in a situation of economic dependence on the entity contracting them to work. The authors of the report recommended that these workers should be able to benefit from social rights since, in result of the economic dependency, they remain in a grey area between dependent employment and self-employment, deprived of protection extended to employees under the regulations of labour law.[60] The necessity of conceptualizing the category of economically dependent self-employed workers was also noted by the European Commission in the 2006 green paper *Modernising labour law to meet the challenges of the 21st century*.[61] A similar view can be found in the opinion of the European Economic and Social Committee (EESC), dated 26 February 2009, *New trends in self-employed work: the specific case of economically dependent self-employed work*.[62] In the opinion, the EESC

58 Compare, e.g.: T. Duraj, *Funkcja ochronna*…, pp. 37 et seq.; T. Duraj, *Protection of the self-employed – justification and scope*, "Právní Rozpravy" 2018, vol. VIII, pp. 199–206.

59 The economic dependence of the self-employed worker on the client is not to be equated with the subordination characteristic of the employment relationship. For more information see T. Duraj, *Zależność ekonomiczna jako kryterium*…, pp. 8 et seq.

60 A. Supiot, *Transformation of Labour…*

61 COM(2006) 708 final, 11–12.

62 OJ L, 19.1.2011, 2011/C 18/08. See also the opinion of EESC of 30.5.2007 on the Green Paper – Modernising labour law to meet the challenges of the 21st century, OJ L, 27.7.2007, 2007/C 175/17.

notes that economically dependent self-employed work is an issue of current concern in the European Union, and that a number of member states specifically recognise in their legislation the concept of economically dependent self-employed workers, locating this category of workers as an intermediate category between subordinated employment and truly independent self-employment. The objective being pursued is not to turn self-employed but economically dependent workers into employees, but rather to give them a specific status, entitling them to specific protection on the basis of their economic dependency. The EESC observes that in the states which recognize it, the status of economically dependent self-employed worker has been a means of extending greater legal protection to workers who are not employees but genuinely self-employed, albeit in a situation where they cannot take advantage of the economic protection they would be afforded were they able to work for a number of different clients. The EESC suggests that with the development of cross-border services, there is a need for harmonisation of employment statuses, starting with a European definition of economically dependent self-employed work. The EESC realizes that the diversity of national regulations and practices is likely to make the process difficult. However, failure of the European bodies to act is liable to generate large disproportions between member states. In countries where no separate category of economically dependent self-employed workers is specified and granted certain rights, a growing sector of European workers risk being left without protection. On the other hand, the EESC notes that there is reason to fear that recognition of economically dependent self-employed work, followed by increased legal protection for workers who provide such work, might lead to people hitherto defined as employees being transferred to the category of economically dependent self-employed work, for example in connection with companies' outsourcing strategies. This, in turn, could increase so-called bogus self-employment, which merely serves to hide and mask what is, in fact, subordinated employment.

The problem is that, so far, no regulation at the European Union level has established the category of economically dependent self-employed workers with a specific vested standard of protection. In light of the considerations in Chapter III of this monograph, the findings presented in other sections of this research project, and the arguments put forward in labour law scholarship in general, I believe that the definition of the term 'economically dependent self-employed worker' must incorporate four fundamental elements, namely: 1) providing work in person under conditions of autonomy; 2) limited or non-existent access to the market; 3) economic dependence on the client – the crucial component of the definition; 4) continuity, regularity, and recurrence of providing work.[63]

As for the first element, I have discussed it at length hereinabove. A. Perulli argues, in the above-cited report on self-employment prepared for the European

63 See e.g. A. Musiała, *Prawna problematyka świadczenia pracy*…, pp. 69 et seq.; Z. Hajn, *Metody ochrony niepracowniczej*…, p. 82; K. Moras-Olaś, *Możliwe kierunki regulacji*…, pp. 108 et seq.

Commission, that another crucial element of economically dependent self-employment consists in the obligation to render services without help of dependent workers.[64] The requirement to provide work in person in order to be eligible for certain protective guarantees is also present in the Spanish definition of economically dependent self-employment; under Article 11(1) of LETA, an economically dependent self-employed worker is a person who carries out for-profit economic or professional activity directly and in person. Additionally, a person must also meet the requirements listed in Article 11(2) of LETA, i.e. may not hire workers or outsource the entirety or part of their work to third parties, both with regard to the client on whom the worker is economically dependent and with regard to other activities. In Great Britain, for instance, the category of 'workers' is distinct and separate form the category of 'employees'. It includes persons who provide work for remuneration without the direction of the client, in person, not within a limited liability company where the entity commissioning the work is the client.

As for the second element, A. Perulli in the same above-cited report also makes an important argument. He favours the concept of establishing a separate category of economically dependent self-employed workers, and proposes that the economic dependence should be defined on the basis of whether the person provides services only to one client (or a small number of clients) without coming into direct contact with the market, and the results of the work are not placed on the market directly, but rather via the client. This would suggest the absence of economic independence (autonomy) of the self-employed worker, who under these conditions would be unable to spread the risk across a larger number of clients.

The third element – economic dependence on the client – is the most problematic and controversial, both in scholarship and in practice. This requirement should be specified with sufficient precision to enable the (potential) client to easily verify whether or not a worker is economically dependent, on the basis of clear, objective criteria. This is a crucial issue for the effectiveness of the relevant regulations, and for the ability to effectively determine eligibility for the relevant tiers of the system of safeguards and protections. Yet creating a precise specification of what constitutes economic dependence on the client is hardly a simple endeavour. Most typically, economic dependence on the client is defined as a situation where the self-employed worker provides work in person to only or mainly one client and the income thus generated, as a proportion of the worker's overall income, is the sole (main) source of livelihood for the worker and members of their immediate family. This approach to economic dependence is noted in European Union documents. The opinion of the European Economic and Social Committee *Abuse of the status of self-employed* of 19 January 2012[65] lists the criteria that facilitate the distinction between bona fide self-employed own-account workers and those in bogus self-employment. According

64 See A. Perulli, *Economically…*, pp. 105–106.

65 Opinion of the European Economic and Social Committee on 'Abuse of the status of self-employed' (own-initiative opinion), OJ L C of 2013, no. 161, item 14.

to the opinion, when considering the status of a nominally self-employed person the presumption should be that an employment exists, and the servicer are rendered to an employer, if at least rive out of eight requirements are met. The key requirement for the purposes of this discussion is that the worker depends on one single person for whom the service is provided for at least 75% of his income over a period of one year.[66] A direct reference to economic dependence at the European Union level is also made expressis verbis in the European Commission's guidelines on the application of European Union competition law to collective agreements regarding the working conditions of solo self-employed persons of 9 December 2021.[67] According to these guidelines, such persons are in a situation similar to employees, and the applicability of collective agreements to these person is not a violation of Article 101 of the Treaty on the Functioning of the European Union of 30 April 2004[68] with regard to solo self-employed workers who provide their services exclusively or predominantly to one counterparty and are likely to be in a situation of economic dependence vis-à-vis that counterparty. The Commission considers that a solo self-employed person is in a situation of economic dependence where that person earns, on average, at least 50% of total work-related income from a single counterparty, over a period of either one or two years; in general, such solo self-employed workers do not determine their conduct independently on the market and are largely dependent on their counterparty, forming an integral part of its business and thus an economic unit with that counterparty.[69]

The legislation in several countries studied in the research project is similarly oriented on the matter. Separate chapters of this project discuss the issues in detail, but I would like to reference LETA here again, and its definition of economically dependent self-employment. Under Article 11(1) of LETA, economically dependent self-employed worker is a person who carries out for-profit economic or professional activity habitually, directly and in person, primarily for the benefit of a natural or legal person (client) on whom they are economically dependent, because they derive

66 The same requirement of work being provided in person, whereby the self-employed worker cannot subcontract their work to others, is also listed in the opinion of the European Economic and Social Committee. Both of these requirements clearly point to a similarity with the situation of employees.

67 Guidelines on the application of European Union competition law to collective agreements regarding the working conditions of solo self-employed workers (2022/C 374/02, OJ L C of 2022, no. 374, p. 2).

68 Dziennik Ustaw of 2004, no. 90, item 864/2 as amended. Pursuant to Article 101 TFEU, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are prohibited as incompatible with the internal market.

69 See also judgment issued by CJEU of 4.12.2014, C-413/13, FNV Kunsten Informatie En Media v. Staat Der Nederlanden, collection of judgments of the Court of Justice and the General Court, 2014, no. 12, item. I-2411.

a minimum of 75% of their work-related income from that legal relationship.[70] This refers to the entirety of income (whether of monetary or in-kind nature), including income that may have been earned for work as an employee for another client or employer, or for the principal client. Verification of a self-employed person's economic dependence is accomplished by means of a declaration to this effect made to the State Treasury. A party challenging the accuracy of the declaration must prove its claims. Furthermore, the court may conduct its own proceedings to collect evidence in this respect.[71] Beside the crucial requirement of 75% of income derived from a single client, the Spanish legislator set several other requirements of eligibility for the economically dependent self-employed worker status (Article 11(2) of LETA).[72] Yet this has not worked out well in practice. In particular, the method of objective verification of whether the 75% requirement is met has been problematic. The Spanish experience demonstrates that the (potential) clients find it difficult to determine the true proportion of the work's income generated from specific work streams.[73] Furthermore, the worrying practice of circumventing the income criterion has emerged, by artificially multiplying capital-linked clients to avoid exceeding the 75% income threshold from a single client. Due to the low effectiveness of the approach based on the proportion of income, and to the restrictive nature of the other prerequisites for eligibility for the economically dependent self-employed worker status, the number of self-employed workers who enjoy the protective guarantees provided by LETA is negligible in Spain. Statistics show that of all those who are in fact economically dependent in Spain (a number of over 1 200 000), only a small percentage (approx. 10 000 persons) have the TRADE status (*trabajadores autónomos económicamente dependientes*), which means that economically dependent self-employed workers make up less than 0.33% of all self-employed workers, and less than 0.05% of those in employment in Spain as a whole. These figures clearly demonstrate the marginal

70 See a detailed discussion in: A. Tyc, *Self-employment in Spanish law*…, published as part of this research project.

71 In the event of a dispute, the court will be able to take into account other circumstances, e.g. the number of hours of work provided by the self-employed worker, which precludes the undertaking of any other professional activity in a substantial manner.

72 A. Tyc, *Samozatrudnienie*… See also E. Sánchez Torres, *The Spanish Law on Dependent Self--Employed Workers: A New Evolution in Labor Law*, "Comparative Labor Law and Policy Journal" 2010, vol. 31, no. 2, pp. 231 et seq.

73 These difficulties arise for a number of different reasons. Firstly, the client has no right to request the self-employed worker's tax documents for inspection. There is also no option to change the self-employed worker's status during the tax year. Secondly, the status vis-à-vis the income threshold may fluctuate, as the self-employed worker may acquire new contracts, and the client has no ability to verify this on an ongoing basis. Thirdly, the possibility of objectively verifying the income criterion is hindered by tax regulations that allow for the application of different taxation methods. For instance, in Poland, there are four different forms of income tax settlement available to sole traders (settlement according to the tax scale, flat tax, fixed amount of tax (so-called "tax card"), and lump sum taxation on the registered income).

importance of the legal regulation of this subcategory of self-employed workers, and the ineffectiveness of the income criterion adopted in LETA.[74]

The German legislator has also created a separate category of economically dependent self-employed workers, by creating a category of 'persons with a status similar to that of an employee' or, more literally, 'employee-resembling persons' (*arbeitnehmerähnliche Personen*), in order to extend protection to the workers.[75] Yet there is no legal definition of this term in German law.[76] Yet, in order to offer to these 'employee-resembling persons' the right to enter into collective agreement, it is assumed they are economically dependent if the work primarily for one client generates, on average, more than 50% of their income (Tarifvertragsgesetz of 9 April 1949, § 12a[77]).[78] It is sometimes argued in this context that economic dependence should be set against a background of relationship with one client, defined either by time or by income.[79] The law itself makes no reference refer to specific numbers, but case law suggests that a self-employed worker does not qualify for this status if the income generated outside of the relationship with the primary client allows the self-employed worker to be independent.[80]

The Italian legislator has addressed the issue of protection for self-employed workers differently: instead of an income threshold, it invokes the criterion of coordinated and permanent cooperation. Article 3(4) of the act (no. 81) on the work of self-employed workers stipulates that Article 9 of the act of 18 June 1998 (no. 192) on the abuse of economic dependence applies mutatis mutandis to the relationships governed by that act.[81] According to this Article 9, economic dependence occurs when an undertaking is able to establish, in its commercial relations with another undertaking, an excessive imbalance of rights and obligations. Economic dependence is assessed by taking into account the extent of genuine capacity of the abused party to find satisfactory alternatives on the market.[82]

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74 A. Tyc, *Samozatrudnienie…*

75 See a detailed discussion in: R. Wank, *Self-employment in Germany and Austria*…, published as part of this research project.

76 N. Neuvians, *Die arbeitnehmerähnliche Person*, Berlin 2002, pp. 49 et seq.

77 Uniform text of 25 August 1969, BGB I, 1323.

78 In addition, there are other acts that not only apply to employees, but also to persons with a status similar to that of an employee. These acts are mentioned by F. Bayreuther, *Sicherung der Leistungsbedingungen von (Solo) Selbständigen, Crowdworkern und anderen Plattformbeschäftigte,* Frankfurt am Main 2018, p. 18, 25.

79 M. Franzen, *Kommentar zu § 12a Tarifvertragsgesetz*, [in:] R. Müller-Glöge, U. Preis, I. Schmidt (eds.), *Erfurter Kommentar zum Arbeitsrecht*, München 2021.

80 K. Moras-Olaś, *Możliwe kierunki regulacji*…, p. 109.

81 *Disciplina della subfornitura nelle attività produttive*. Gazzetta Ufficiale of 22 June 1998, no. 143.

82 See a detailed discussion in: A. Tyc, *Self-employment in French and Italian law*, "Acta Universitatis Lodziensis. Folia Iuridica" 2023, vol. 103, pp. 185–201. A paper developed as a part of this research project.

As discussed in chapter III of the monograph, at present there is no criterion of economic dependence in Polish law. However, the proposals of the Codification Commissions have advocated for the adoption of this criterion in the past, as a prerequisite for extending additional protective guarantees to workers who provide work outside the employment relationship. Most notably, the 2007 draft Labour Code in its Article 462(1), referred to persons providing work under a contract other than an employment contract, performing in person, for the benefit of a single client, work of a continuous or recurring nature, for remuneration exceeding half of the minimum remuneration established on the basis of separate regulations.[83] It is an interesting proposal, to which I would like to offer three objections. Firstly, the threshold of half of the minimum wage seems too low; it would result in an excessive number of economically dependent self-employed workers enjoying the protection. Secondly, it is unclear how the amount of the minimum wage should be calculated in relation to workers with civil law-based contract, given that outside of employment relationships, the standard is the hourly (rather than monthly) minimum wage and, moreover, at present, not all civil law contracts are covered by the provisions of the act of 10 October 2002 on minimum wage.[84] Thirdly, the "continuous or recurring nature" is liable to cause widely varying interpretations in practice.

The 2018 draft of the Labour Code uses the exact term 'economically dependent self-employed worker' (*samozatrudniony ekonomicznie zależny*). It defines the term as denoting a person who provides service in person to a specific client (a trader, an organizational unit that is not a trader, or an agricultural business), directly, on average for 21 hours or more a week, for a period of 182 days or more (Article 177(1)).[85] No income threshold was proposed, which is likely sensible, given Spain's negative experiences in this respect. Instead, the 2018 draft of the Labour Code defines economic dependence by invoking the number of hours (or the length of the period) when work was being provided. This fits well with the general concept of economic dependence, because it must be presumed, when the time involvement is this big, the worker must be economically dependent on the client. An advantage of this approach is also that it is relatively easy to verify the number of hours (days) objectively, even though it would necessitate the implementation of a statutory obligation to formally log working time.[86]

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83 In the event of the provision of work for several clients, it refers to the provision of work to the client who pays the biggest proportional part of remuneration to the worker, if it exceeds half of the minimum wage for work established pursuant to separate provisions.

84 Uniform text: Dziennik Ustaw of 2020, item 2207 as amended.

85 According to Article 177(3) of the 2018 draft of the Labour Code, the self-employed worker loses the status of an economically dependent self-employed worker after each period of 91 days in which the number of hours for which work is provided is lower than the number specified in Article 177(1).

86 The concept is not new. Under the act on minimum wage, there already is an obligation to keep records (logs) of working hours. Pursuant to Article 8c thereof, a trader or another organizational unit for which the mandate is performed or services are rendered must keep

The fourth element of the definition of economically dependent self-employment is the continuity, regularity, and recurrence of providing work for a specific client. This element appears in the Spanish legislation (where the worker must "regularly" engage in professional or business activity), in the Italian legislation (where there is the requirement of "coordinated and permanent cooperation"), in the 2007 draft of the Labour Code ("work of continued or recurring nature"), and in the 2018 draft of the Labour Code (work on average for 21 hours or more a week, for a period of 182 days or more). While this alone does not automatically generate economic dependence, it does make it more likely. A legal relationship of six months between the worker and the client is also enshrined in Polish collective labour law provisions. When determining the size of trade union organisation in a facility for the purposes of counting the membership of self-employed workers, there is a requirement of the length of the relationship with the client. Pursuant to Article $25^1(1)(2)$ of the act on trade unions, the rights of a facility-based trade union organisation are vested in an organisation with at least 10 members who perform paid work but are not employees, and who have been performing this work for at least 6 months for a client where the trade union organisation is active.[87] A similar view his favoured by Małgorzata Gersdorf, who argues in her monograph that the socially protective regulations should only extend to the civil-law based relationships (that centre around work) if they last for more than 6 months.[88] Other scholars propose that the requirement of continuity of the legal relationship should be considered met when the relationship last for longer than 15 days.[89] Mateusz Barwaśny argues that a person should qualify as an economically dependent self-employed worker if they provide work in person to a specific client for at least 31 hours per week on average, for a period of at least three months; the threshold of 75% of the average weekly working time (40 hours) precludes a predominant engagement in other work at the same time, and the proposed 3-month (quarterly) duration is a reference to labour law that often invoke this period for employees.[90]

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documents specifying the method of confirming the number of hours of performing the mandate or rendering services, as well as documents confirming the number of hours of performing the mandate or rendering services for a period of three years from the date on which the remuneration became due.

87 The idea is to ensure the stable size of the trade union organization under conditions of unstable staffing with civil law contracts. According to K.W. Baran (*Z problematyki liczebności zakładowej organizacji związkowej*, "Monitor Prawa Pracy" 2019, no. 5, p. 9) previous periods of performing work may not be counted towards the period in question, unless they are consecutive periods. See also: J. Żołyński, *Sądowa kontrola liczebności członków związku zawodowego*, "Monitor Prawa Pracy" 2019, no. 5, pp. 12 et seq.; J. Witkowski, *Proceduralne aspekty ustalenia liczby członków organizacji związkowej*, "Monitor Prawa Pracy" 2019, no. 8, pp. 6 et seq.

88 See M. Gersdorf, *Prawo zatrudnienia*, Warszawa 2013, p. 172.

89 The argument is made in e.g.: W. Sanetra, *Uwagi w kwestii zakresu podmiotowego Kodeksu pracy*, [in:] M. Matey-Tyrowicz, L. Nawacki, B. Wagner (eds.), *Prawo pracy a wyzwania XXI wieku. Księga jubileuszowa Profesora Tadeusza Zielińskiego*, Warszawa 2002, p. 315.

90 M. Barwaśny, *Ochrona osób pracujących*…, pp. 291 et seq.

Given the arguments for and against the various approaches to defining the term 'economically dependent self-employed worker,' and using primarily the requirement of effective determination of economic dependence, which should be easy to verify on the basis of objective parameters both for the client and for the authorities (in particular for the Labour Inspection) and the courts, the best approach uses both a reference to hours worker and to the period over which these hours were distributed. In effect, an economically dependent self-employed worker is a natural person referenced in 3.2.2 above, if this person provides work (services) continuously for a specific trader, an organizational unit that is not a trader, or an agricultural business (client), on average for 21 hours or more a week, for a period of 182 days or more.[91] The adoption in the law on the legal status of self-employed workers of the above-proposed definition that relies on clear and transparent criteria will facilitate quick and precise determination of whether an own-account worker who provides work in person is eligible for the broader range of rights guaranteed by the legislator.

3.3. Legal protection of self-employment in Poland: comments on proposed regulations

3.3.1. Opening remarks

The review of legislation of the selected European countries carried out as part of the research project demonstrates that, against the background of other countries, Poland is actually at the forefront when it comes to the level of protection guaranteed to self-employed workers. The top ranking in this respect goes to Spain, although – given the low effectiveness of the income requirement, and the restrictive nature of the other statutory eligibility requirements to qualify for the status of an economically dependent self-employed worker – the number of self-employed workers who enjoy the protective guarantees under LETA is low. A relatively high level of statutory protection is provided for the intermediate category of workers in the United Kingdom. In contrast, in Germany, Austria, Hungary, and in the Baltic states, the extent of statutory protective guarantees is negligible, and there are clear differences (to the detriment of self-employed workers) compared to the protections available to employees. In most of the European countries studied in the project, there are safeguards in the area of health and safety ant work, protection against discrimination and unequal treatment, protection of dignity and other personal rights, as well as insurance and unemployment protection.

In light of this comparative review, the extent of protection guaranteed to the self-employed workers by the Polish legislator must be assessed positively.

91 Of course, other different options may be considered here. The option of 'on average, at least 31 hours per week, for a period of at least 3 months for a specific contracting entity' also has its advantages (greater intensity of the legal relationship in a shorter period).

As the law stands, these workers enjoy: legal protection in terms of life and health, the prohibition of discrimination and the requirement of equal treatment in employment, a guaranteed minimum wage and protection of remuneration for work, protection of motherhood and parenthood, as well as the freedom of association in trade unions, which consequently gives them extensive collective rights. However, the considerations in Chapter III of the book demonstrate that it would be difficult to speak of the existence of a legal model for the protection of self-employed workers in Poland at the moment. On the contrary, even a cursory analysis reveals a complete absence of a systematic and comprehensive approach to this issue. Instead, the legal solutions are fragmented and inconsistent. Changes in this area are often made *ad hoc*, without any coherent underlying concept, including under the influence of political factors. Legal regulations on the protection own-account workers are not properly correlated with international and European Union regulations and the Polish Constitution. The rights guaranteed to self-employed workers are scattered across numerous legal instruments that use inconsistent terminology and that rely on unsubstantiated criteria to determine the scope of the protection vested in self-employed workers. The Polish legislator fully disregards the criterion of economic dependence on the client. In light of the critical analysis presented in Chapter III of the book, in this section I will attempt to devise an optimal model of legal protection of self-employed workers that would comprehensively and systematically address the key aspects of self-employment, taking into account the standards of international law and European Union law, the requirements of the Constitution of the Republic of Poland, as well as the experience of the European countries analysed in the research project.

3.3.2. Protection of life and health

The review presented in Chapter III of the book has demonstrated that the Polish regulations with regard to the protection of the life and health of self-employed workers in the workplace are generally in line with the standards of international law and European Union law, in principle ensuring that these workers enjoy a level of protection that is similar to that of employees. However, there are fundamental issues surrounding the manner in which this matter is regulated within the legal system. The Polish legislator, in specifying the scope of the obligations of the client and the worker in the area of occupational health and safety, has relied on the highly problematic method of referencing mutatis mutandis the relevant provisions concerning the situation of employees. This raises a number of problems of interpretation, creating uncertainty as to the legal position of self-employed workers in terms of protection of their life and health at work. It also hinders effective enforcement of occupational health and safety regulations by the relevant authorities. I therefore propose the following solutions in order to guarantee adequate protection of life and health of self-employed workers:

1. The proposed law on the legal status of self-employed workers should regulate the legal situation of these workers with regard to the protection of life and health, separately and specifically, taking into account the specific nature of self-employed work, and limiting to the necessary minimum (if not altogether avoiding) the use of references to the relevant provisions regulating the situation of employees in this area.
2. Unlike the law at present, these new regulations must introduce a minimum standard of protection in terms of life and health at the workplace (lower than the relevant standard for employees) for all self-employed workers whose work is organised by the client. The obligation to make the workplace meet the health and safety standards should extend to any entity that organises the work of self-employed workers, regardless of where this work is carried out. The status of the client cannot be seen as a relevant aspect in determining the scope of this obligation. The obligations in the area of health and safety with regard to self-employed workers should be the same for all clients (i.e. for all contracting entities that organise the work of self-employed workers), regardless of whether they are employers within the meaning of Article 3 of the Labour Code, traders operating a business, or entities that are neither employers nor traders.
3. The law on the legal status of self-employed workers should include detailed lists of health and safety obligations, both for the client (the contracting entity organising the work) and the self-employed worker. The aim is to avoid, as far as possible, references to the relevant provisions defining the situation of employees.[92] There is a clear need for a separate statutory regulation setting out the minimum obligations in the area of occupational health and safety (modelled on the provisions concerning employees) both for the client (the contracting entity organising the work) and the self-employed worker. This matter cannot be left within the realm of contractual freedom of the parties, as is the case at present.
4. The minimum standard for any entity organising the work of self-employed workers must include, in particular, the following obligations: 1) ensuring an appropriate level of occupational health and safety at the workplace, with appropriate use of the relevant scientific and technological achievements; 2) organising the work in a manner that ensures safe and hygienic working conditions; 3) ensuring observance of the provisions and principles of occupational health and safety at the workplace or at any other place of work; 4) providing information on the relevant occupational risks and risks to health and life occurring at the workplace, at individual workstations, and in the locations where work is actually performed, including the instructions on how to proceed in the event of accidents and emergencies; 5) eliminating conditions that are harmful and burdensome to the health of self-employed workers, and striving to create

92 In exceptional cases, a reference should be allowed if the regulation pertaining to the self-employed workers in a particular aspect related to occupational health and safety rules is to be the same as the regulations applicable to employees.

a working environment that is free of risks to the life and health of the workers; 6) eliminating risks to the life and health of the workers at the workplace; 7) preventing the emergence of workplace accidents and occupational diseases; 8) providing preventive health examinations and access to training related to the observance of regulations affecting the safety of work; 9) providing first aid at the workplace; 10) cooperating with other entities responsible for the state of health and safety at the workplace; 11) ensuring the proper condition of premises and facilities; 12) ensuring the proper condition of machinery and other tools and equipment; 13) ensuring the availability of appropriate collective and individual protection measures and equipment; 14) ensuring the availability of measures and facilities necessary to maintain health and safety, including the relevant alimentary options.[93]

5. The obligations in the area of health and safety should also extend (at least to a degree) to the entities contracting work out to self-employed workers who have no control over where the work is carried out, and where, consequently, the own-account workers are dependent on the client when it comes to the means necessary to carry out the work, despite operating on fairly loose terms of when it comes to subordination to the client. M. Barwaśny argues that an appropriate standard of life and health protection should apply to those self-employed workers who use, outside the client's workplace, machinery or equipment owned by the client.[94] In those cases, the client should be obliged to ensure that the equipment in question meets the requirements set out in Chapter IV of Division X of the Labour Code. The client would then also have the right to inspect the condition of machinery or equipment used by the own-account worker outside the workplace.[95]
6. The minimum standard for the self-employed worker whose work is organised by the client must include, in particular, the following obligations: 1) respecting the manner of organisation and order of work established at the place where work is to be carried out; 2) being familiar with the regulations and principles of occupational health and safety and fire safety; 3) participating in occupational health and safety and fire safety training and instruction; 4) taking the tests and exams required in the field of occupational health and safety and fire safety; 5)

93 Of course, in the case where the entity organizing the work of the self-employed worker is an entity with the employer status as defined in Article 3 of the Labour Code, then it is obliged to provide the self-employed workers with safe and hygienic working conditions at the same level that it guarantees to the employees at its facility. In this regard, provisions prohibiting discrimination and unequal treatment in the workplace should apply.

94 The issue in question is subject to similar provisions laid down in the LETA law applicable in Spain: occupational health and safety protections have been extended to both self-employed workers who perform work at the registered office of the client and those who carry out work outside that registered office, but use the client's machines, equipment, products, and resources.

95 M. Barwaśny, *Ochrona osób pracujących*…, p. 296.

taking proper care of machines, devices, tools, and equipment, as well as maintaining proper order and tidiness in the place where work is to be carried out; 6) using appropriate collective and individual protection measures and equipment; 7) undergoing preliminary, periodic, and routine medical examinations and other medical examinations as instructed, and complying with medical instructions; 8) cooperating with the client in the performance of duties relating to health and safety at the workplace and fire safety.

7. With regard to self-employed workers who are economically dependent on the contracting entity (client) that organises their work, the law on the legal status of self-employed workers should pass on to that client the costs of the necessary health, safety, and fire protection measures. In my opinion, these costs should not be charged to the State Treasury.[96]
8. The provisions of the law on the legal status of self-employed workers in the area of health, safety, and fire safety must be extended to also cover persons cooperating with self-employed workers in a shared household (see section 3.2.2). These persons should enjoy the same protective guarantees insofar as they assist the self-employed worker, without payment, in the process of providing work, and have similar responsibilities. As a condition for their eligibility for these protective guarantees in the area of health, safety, and fire safety, self-employed workers must notify the client that other persons will cooperate in the process of providing work.
9. The law on the legal status of self-employed workers must guarantee self-employed workers whose work is organised by the client (and the persons who assist them without pay) the right to refrain from work and to step aside from the place where work is carried out if the conditions fail to meet the requirements set out in the relevant health and safety regulations and pose an immediate danger to their health or life, or if the work causes danger to other persons.[97] Naturally, the exercise of this right may not result in any negative consequences. Furthermore, self-employed workers who are economically dependent on the client should retain the right to remuneration for the time spent refraining from hazardous work (as is the case in the relevant legislation that pertains to employees).
10. The matter of the liability of self-employed workers (and the persons who assist them without pay) for breaches of health and safety obligations must also be clarified; this is important from the point of view of the effectiveness of these proposed regulations. The rules on employee liability will not apply, and the specific nature of this type of breaches, inherently associated with labour law, requires a separate regulation on liability in these cases. As the law stands, in

96 Compare: M. Mędrala, *Obowiązki ze sfery bhp w zatrudnieniu niepracowniczym*, "Annales Universitatis Mariae Curie-Skłodowska" 2015, vol. LXII, no. 2, p. 151.

97 Self-employed workers in Spain enjoy similar rights. Pursuant to Article 8(7) of the LETA, these contractors have the right to stop their professional activities and leave the workplace without any legal consequences when there is a serious and imminent threat to their life and health.

the event of non-compliance with health and safety regulations, a self-employed worker (and the persons who assist them without pay) may only be held liable for breach of contract, or under the rules of tort liability, as regulated by the Civil Code. This is not adequate. Consideration should be given to the idea of implementing a separate regime of financial penalties set out in the law on the legal status of self-employed workers for breaches of health and safety obligations by the self-employed workers (and the persons who assist them without pay).[98] This would appropriately safeguard the interests of both parties to a B2B contract. While it would undoubtedly constitute interference with the civil law principle of freedom of contract (Article 353^1 of the Civil Code) and the principle of freedom to conduct business, it would nonetheless be fully justified by the gravity of the matter, which involves the protection human life and health, i.e. unquestionably something of unique value.

11. The law on the legal status of self-employed workers should include solutions that account for the proportion of economically dependent self-employed workers in the total number of employees, which obliges the employer, as defined in Article 3 of the Labour Code, to establish a health and safety service (Article 237^{11} of the Labour Code) and a health and safety committee, i.e. an advisory and consultative body to employers with more than 250 employees (Article 237^{12} of the Labour Code). The new regulations should also guarantee the economically dependent self-employed workers the right to participate in health and safety consultations that are relevant to the determination of measures related to ensuring an adequate level of protection of the life and health of persons working for the given employer (Article 237^{11a} of the Labour Code).

3.3.3. Protection against discrimination and unequal treatment

The discussion in Chapter III of the book demonstrates that the Polish regulations in terms of protection of self-employed workers against discrimination and unequal treatment at the workplace are generally in line with the standards of international law and European Union law, in that they ensure that these workers enjoy, in principle, a level of protection similar to that of employees. Unfortunately, however, the act of 3 December 2010 on the implementation of certain provisions of the European Union on equal treatment[99] fails to sufficiently take into account the specific nature of work provided by self-employed workers. Consequently, it is ineffective in practice, and fails to ensure effective protection of this category of workers against

98 M. Barwaśny proposes that the law on the legal status of self-employed workers should contain a list of fines for self-employed workers who violate occupational health and safety rules and provisions, or that it should specify an explicit obligation of the parties to a civil law contract to regulate these matters in the contract with an indication of the maximum limits of sanctions. See, e.g. M. Barwaśny, *Ochrona osób pracujących*…, pp. 302–303.

99 Uniform text: Dziennik Ustaw of 2023, item 970 as amended.

discrimination and unequal treatment. I therefore propose the following solutions in this area:

1. The law on the legal status of self-employed workers, as postulated in the research project, should separately and comprehensively, taking into account the specific nature of self-employment, regulate the legal situation of self-employed workers in terms of protection against discrimination and unequal treatment, limiting to the necessary minimum (and if possible, completely avoiding) references to the provisions of labour law. The law on the legal status of self-employed workers must also include the solutions currently located in the act on trade unions that pertain to the prevention of discrimination on grounds of membership in a trade union or of the decision not to join a trade union or on grounds of holding a trade union office. As a consequence of the implementation of this separate regulation protecting self-employed workers against discrimination and unequal treatment, these workers should be expressly excluded from the scope of the Equality Act of 3 December 2010.
2. The law on the legal status of self-employed workers should build on the regulations adopted in the current Equality Act. However, it should also adopt its own mechanisms to protect all self-employed workers against direct discrimination, indirect discrimination, harassment or sexual harassment, by prohibiting such practices in places where work is carried out. The obligation to respect the principle of non-discrimination and equal treatment must be addressed first and foremost to those who hire self-employed workers.[100] Yet it should also apply to the own-account workers, who are also prohibited from engaging in discriminatory actions in the course of doing business.
3. In the law on the legal status of self-employed workers, the Polish legislator must provide a non-exhaustive list of grounds for legal protection against discrimination and unequal treatment of self-employed workers, following the example of the provisions regulating the situation of employees.[101] Any discrimination regarding in terms and conditions that govern the taking up and engaging in business or professional activity on the basis of self-employment with a civil law contract, whether direct or indirect, in particular on grounds of sex, age, disability, race, religion, nationality, political opinion, trade union membership

100 The LETA law stipulates that both public authorities and private sector clients must the respect prohibition of discrimination against self-employed workers (Article 6(2)).

101 The Spanish legislator developed a non-exhaustive list of criteria for legal protection against discrimination. Under Article 4(3) of LETA, self-employed workers have the right not to be discriminated against, either directly or indirectly, on the grounds of birth, racial or ethnic origin, sex, marital status, religion, belief, disability, age, sexual orientation, using any of the official languages in Spain, or any other personal or social characteristics. LETA also establishes guarantees for self-employed workers with regard to respect for their privacy and dignity, as well as protection against harassment, including sexual harassment, on the basis of sex or on the grounds of other personal or social characteristic (Article 4(3)(c) of LETA).

(or the decision not to join a trade union), ethnic origin, confession, sexual orientation, and employment for a fixed or unlimited duration is forbidden.

4. The law on the legal status of self-employed workers should also extend its scope of protection to cover self-employed own-account workers who are seeking a B2B civil law-based contract with a specific client (as is the case with job applicants seeking to become employees). Furthermore, the protection against discrimination and unequal treatment must also extend to persons cooperating with self-employed workers with whom they share a household (see section 3.2.2). These persons should enjoy the same protective guarantees in terms of non-discrimination and equal treatment, in relation to their unpaid assistance in the process of providing work.
5. The law on the legal status of self-employed workers should specify, with coherence and clarity, the range of claims that self-employed workers are entitled to bring for violation of the principle of non-discrimination and equal treatment. The legislator must expressly guarantee these workers both the right to seek an end to discriminatory practices and the option of seeking recompense both for their financial losses and for the suffering they experience. Self-employed workers who are refused B2B contracts, or whose B2B contracts are terminated on discriminatory grounds, should also be eligible for this protection.
6. The Polish legislator must develop a standardised procedure for claims related to violations of the principle of non-discrimination and equal treatment against self-employed workers (and the persons who assist them without pay). I propose a two-pronged solution in this respect. Disputes arising from breaches of anti-discrimination law in relation to self-employed workers (and the persons who assist them without pay) should be brought to the civil courts. In contrast, the labour courts should have jurisdiction in relation to claims related to violations of the principle of non-discrimination and equal treatment in respect of economically dependent self-employed workers. In these latter cases, due to the similarity to the situation of employees, the provisions of the act of 17 November 1964 – Code of Civil Procedure[102] on proceedings in labour law cases should apply accordingly.
7. The law on the legal status of self-employed workers should extend the limitation period for claims to 10 years from the occurrence of the event constituting a breach of the principle of non-discrimination and equal treatment (currently the limitation period is set at only five years). This will bring the regulation fully in line with the limitation period for tort claims set out in Article 442^1 of the Civil Code, which stipulates that these claims are time-barred 10 years from the date on which the event that caused the harm occurred.
8. The law on the legal status of self-employed workers should uphold the mechanisms currently in place to protect self-employed workers from unfavourable treatment and any negative consequences in relation to their exercise of the

102 Uniform text: Dziennik Ustaw of 2023, item 1550 as amended.

rights for which they are eligible in the event of breach of the principle of equal treatment. These mechanisms should also be extended to the persons who assist them without pay, referred to above. Furthermore, this protection should also be afforded to those who have provided any form of support to a self-employed worker (and the persons who assist them without pay) exercising their rights in the event of a breach of the principle of equal treatment. The law on the legal status of self- employed workers should uphold the principle (currently in force) of reversed burden of proof in cases involving violations of anti-discrimination law.

9. In the law on the legal status of self-employed workers, additional protection for self-employed workers should be introduced against the use of contractual clauses that violate the principles of non-discrimination and equal treatment. This has been successfully implemented into the law in Spain: pursuant to Article 6(4) of LETA, an abusive clause in a contract made with a self-employed worker is invalid and inapplicable by operation of law. Furthermore, in this situation, the affected self-employed worker may seek compensation.
10. An option that is worth considering is whether to grant associations and trade unions of which self employed workers are members the right to represent them (and the persons who assist them without pay) before the courts in cases related to discrimination. Typically, these organisations have access to legal professionals who can offer support in pursuing claims for violations of the principle of non-discrimination and equal treatment against self-employed workers. This regulation has also been in force in Spain, pursuant to Article 6 of LETA.
11. In order make the regulations designed to prevent violations of the principle of non-discrimination and equal treatment with regard to the self-employed workers (and the persons who assist them without pay) more effective, I propose that the Labour Inspection should be equipped with powers to inspect and supervise with regard to compliance with these regulations. Conduct that leads to discrimination and unequal treatment in the workplace, irrespective of the legal basis on which workers provide work there, should be considered an offence against the rights of workers. At present, the Labour Inspection does not have any powers to inspect with regard to compliance, even in relation to employees, and violations of laws protecting against discrimination and unequal treatment do not qualify as an offence against the rights of workers. Adopting the approach proposed herein would undoubtedly contribute to strengthening the effectiveness of the efforts to prevent and counteract violations of anti-discrimination law at the workplace.

3.3.4. Protection against mobbing

As demonstrated in Chapter III of the book, the Polish legislator has so far failed to ensure efficient protection against mobbing to self-employed workers, even though typically, mobbing is a violation of the dignity of the self-employed worker, has

a damaging impact on health, and causes a dramatic decrease in the worker's general well-being. This is in clear contradiction to the norms of international law, European Union law, and the provisions of the Polish Constitution, which protects the dignity, health, and other personal rights of every person, regardless of the legal basis on which this person provides work. It therefore seems necessary to put forward the following proposals on the matter:

1. The law on the legal status of self-employed workers should separately and comprehensively, taking into account the specific nature of self-employment, regulate the legal situation of these workers with regard to protection against mobbing. These provisions must cover all self-employed workers as well as the persons who assist them and with whom they share a household (see section 3.2.2).
2. The Polish legislator should extend the legal obligation to prevent and counteract mobbing to entities that hire self-employed workers. In my opinion, the law on the legal status of self-employed workers should specify the minimum scope of obligations that the entity must fulfil in order to comply with this obligation.[103]
3. The law on the legal status of self-employed workers should define the concept of mobbing in a manner that is fully identical to its legal definition in the Labour Code. Without going into a detailed discussion of the flawed construction of this definition,[104] the Polish legislator must modify it significantly, both in relation to employees and in relation to other workers.[105] I believe that the legal definition of mobbing in employment should be simplified. As the law stands, the definition invokes complex and elaborate concepts and its wording is vague and ambiguous. In consequence, it is difficult to achieve an accurate understanding of the legal obligation to prevent and counteract mobbing at the workplace, and thus hinders the effectiveness of efforts to eradicate it.[106]
4. The Polish legislator must guarantee self-employed workers who have suffered mobbing inflicted on them by the client who organised their work, or from others at the workplace, both the right to demand the cessation of the mobbing and the right to financial compensation, as well as to damages for the harm suffered (in the form of an adverse health impact). These claims should be modelled on the relevant regulations concerning employees, with the proviso, however, that no lower limit should be set for the amount of compensation or damages. It must be up to the court to decide on these amount, on the basis of the provisions of the Civil Code. The rules developed in the case law should be taken into

103 Looking to the future, this proposal also applies to the provisions of the Labour Code that lay down the legal obligation to prevent and counteract mobbing with regard to employees (Article $94^3(1)$).

104 An analysis of the legal definition of mobbing is far beyond the scope of this monograph.

105 See also G. Jędrejek, *Rozdział IX Postulaty de lege ferenda*, [in:] *Mobbing. Środki ochrony prawnej*, Warszawa 2011, LEX.

106 See for instance: W. Cieślak, J. Stelina, *Definicja mobbingu oraz obowiązek pracodawcy przeciwdziałania temu zjawisku*, "Państwo i Prawo" 2004, no. 12, p. 68; P. Prusinowski, *Normatywna konstrukcja mobbingu*, "Monitor Prawa Pracy" 2018, no. 9, p. 7.

account when determining the amounts of compensation and damages due to a self-employed worker who suffered mobbing. Compensation and damages must be effective, proportionate, and dissuasive (i.e. have a deterrent effect), and should adequately compensate for the losses suffered by the self-employed worker injury and the harm inflected upon them. With regard to compensation, there must be a fair balance between its amount and the breach of the client's duty to prevent mobbing. The compensation should have serve to prevent and deter mobbing.

5. The law on the legal status of self-employed workers should provide expressis verbis for the right of a self-employed worker who has been a victim of mobbing to pursue additional supplementary claims for damages and for compensation in the event that the damages or compensation awarded under this law prove insufficient. Furthermore, the worker must be also allowed to pursue claims on the basis of provisions for the protection of personal rights under the general rules of civil law (Article 24 of the Civil Code).
6. In addition, a self-employed worker who is economically dependent on the client should have a statutorily guaranteed right to immediately terminate the B2B contract with the client, on grounds of the client's fault, if mobbing against that worker should occur. Exercising this right may not give rise to any negative legal consequences for the self-employed worker, in particular in the form of a liquidated damages (or contractually set monetary penalties) for contract termination.
7. The Polish legislator must ensure that the procedure for pursuing claims of mobbing directed at the self-employed workers (the persons who assist them without pay) is consistent and standardised. Just as I did with regard to claims on the basis of breaches in the area of discrimination and unequal treatment, here too I propose a two-pronged solution. Disputes arising from mobbing against self-employed workers (the persons who assist them without pay) should fall within the jurisdiction of the civil courts. In contrast, the labour courts should have jurisdiction to examine claims of mobbing in respect of economically dependent self-employed workers. Due to the similarity of the situation of economically dependent self-employed workers to employees, the provisions of the Code of Civil Procedure on proceedings in labour law cases should apply accordingly. Due to the nature of the matters in question, labour courts are best equipped to resolve conflicts arising in result of mobbing.
8. Just as is the case for employees, the law on the legal status of self-employed workers should introduce mechanisms to protect the self-employed workers (the persons who assist them without pay) who experience mobbing from any negative consequences in connection with the fact that they are exercising their rights under the anti-mobbing regulations. This protection should also be afforded to those who have provided any form of support to a self-employed worker (the persons who assist them without pay) exercising these rights.

9. In terms of effectiveness of the legal protections of self-employed workers against mobbing, consideration should be given to introducing – in line with the regulation already present in anti-discrimination law – the principle of a reversed burden of proof.[107] Currently, not even employees enjoy this benefit, which has a significant adverse impact on the effectiveness of anti-mobbing legislation.[108]
10. The law on the legal status of self-employed workers should introduce two time limits with regard to claims of harassment against self-employed workers (the persons who assist them without pay). The period in which claims are allowed should be calculated as follows: three years, counting from the date the victim of the mobbing became aware of the violation, but no longer than ten years from the date of the last event that constitutes mobbing. This is fully in line with the limitation periods for claims arising out of torts, regulated in Article 442^1 of the Civil Code.
11. In the law on the legal status of self-employed workers, an option that is worth considering is whether to grant associations and trade unions of which self employed workers are members the right to represent them (and the persons who assist them without pay) before the courts in cases related to mobbing. Typically, these organisations have access to legal professionals who can offer support in the relevant claims.
12. In order to increase the effectiveness of the anti-mobbing regulations, I propose the introduction of two new solutions. Firstly, the Labour Inspection should be equipped with powers to inspect and supervise with regard to compliance with these regulations. Conduct that leads to mobbing at the workplace, irrespective of the legal basis on which workers provide work there, should be considered an offence against the rights of workers. At present, the Labour Inspection does not have any powers to inspect with regard to compliance, even in relation to employees, and violations of anti-mobbing laws do not qualify as an offence against the rights of workers. Secondly, I propose that new provisions should be added into the Act of 6 June 1997 – Criminal Code,[109] creating a new criminal offence consisting in conduct that meets the definition of mobbing.[110] Adopting the approach proposed herein would contribute to strengthening the effectiveness of the efforts to prevent and counteract mobbing, which is a workplace pathology that is dangerous to human life and health.

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107 The same problem arises under the current Labour Code regulations, under which it is the employee – in accordance with the general provisions of civil law (Article 6 of the Civil Code) – who has the burden of proving all the defining prerequisites for the occurrence of mobbing.

108 A broader analysis of the matter is beyond the scope of this monograph.

109 Uniform text Dziennik Ustaw of 2024, item 17 as amended.

110 See also E. Szynwelska, *W kwestii kryminalizacji mobbingu*, "Praca i Zabezpieczenie Społeczne" 2017, no. 6, pp. 27 et seq.

3.3.5. Protection of remuneration for work

As demonstrated in Chapter III of the book, where I outlined the regulations on the broadly understood protection of the remuneration of self-employed workers, there is a need for a thorough revision of laws in this area, both in terms of what they apply to and who falls within the scope of their regulation. As the law stands, the provisions regulating the matter fail to sufficiently take into account international and constitutional standards as well as the experience of other developed countries in Europe. I fully agree with Z. Hajn, who argues that the protection of remuneration for work, despite its broad applicability in terms of persons eligible for the protection, is nonetheless inappropriately structured. The Polish legislator has extended this protection to an overly large group of workers, irrespective of the duration of their contract (performance of work), the number of clients, and the proportion of the worker's overall income generated from a single client. I believe this constitutes excessive interference with the freedom of contract and the freedom of competition.[111] In view of the negative assessment of the current regulations, I propose the following solutions in this respect:

1. The issue of payment for self-employed work should be regulated in the new, separate law on the legal status of self-employed workers. First of all, I believe there is a need for a significant change in the scope of applicability of the guarantees of the minimum hourly rate[112] and other wage protection mechanisms. Given the axiological considerations which underpin the idea of a minimum wage – namely, that it is supposed to guarantee workers a life with dignity and the ability to meet their basic needs (i.e. its function is to provide a source of livelihood), a natural consequence of this should be the statutory restriction of the application of the minimum hourly rate for each hour of work (service) only to economically dependent self-employed workers (see section 3.2.3).[113] There is, in contrast, no valid reason why minimum wage protection should cover those self-employed workers who provide services to many different clients and operate under conditions of economic interdependence, often using short-term or even one-off (incidental) contracts.

111 Z. Hajn, *Metody ochrony niepracowniczej*…, p. 80.

112 The 2018 draft of the Labour Code proposes a slightly different method for calculating the minimum wage for economically dependent self-employed workers. Under its Article 178(2), an economically dependent self-employed worker is eligible for pay (for services rendered) which, calculated into hours, may not be lower than 1/100 of the minimal wage established by separate provisions, free of VAT. Consequently, the minimum wage for economically dependent self-employed workers would be higher than the minimum wage guaranteed to employees and the hourly rate now in force – PLN 28.10. Given that the current minimum wage for employees is PLN 4300 gross, the minimum hourly rate would be PLN 43.00 gross.

113 A similar view is expressed by A. Tomanek, *Status osoby samozatrudnionej w świetle znowelizowanych przepisów o minimalnym wynagrodzeniu za pracę*, "Praca i Zabezpieczenie Społeczne" 2017, no. 1, p. 19.

2. When the notion of economic dependence of the self-employed worker is introduced into the Polish legal system, the legislator should abandon the restrictions (currently enshrined in the law) that limit the applicability of the minimum hourly wage only to self-employed workers who provide services on the basis of a contract of mandate (Article 734 et seq. of the Civil Code) or a contract for the provision of services similar to a mandate (Article 750 of the Civil Code). The minimum wage must cover all civil law-based relationships, insofar as they are carried out under conditions of economic dependence on the client. There is also no reason why the minimum hourly wage should only apply to those self-employed workers who do not get to decide where and when to carry out a contract or provide a service, and who receive remuneration that is not exclusively commission-based. The new law on the legal status of self-employed workers must grant minimum wage protection also to own-account workers who are economically dependent on the client, yet who get to decide where and when to carry out a contract or provide a service, or receive remuneration that is exclusively commission- or result-based, and have signed any civil law contract with the client (including a contract to perform a work, an agency contract, or any other civil law contract). The Polish legislator cannot a priori deprive these self-employed workers of the statutorily guaranteed minimum hourly wage, as is the case under the current law.
3. As for other wage protection mechanisms, the law on the legal status of self-employed workers should extend them only to the economically dependent self-employed workers, as defined by that same law (see section 3.2.3). Only those self-employed workers – rather than all self-employed workers – should enjoy the following statutory protections: (1) the prohibition on waiving the right to be paid the minimum hourly wage; (2) the prohibition on transferring that right to another person at the minimum hourly rate; (3) the requirement of monetary form of payment of the minimum hourly wage; (4) the minimum frequency of payment of the accumulated amount of the minimum hourly wage (at least once a month).[114] In addition, the client should have the statutory obligation to keep records specifying the number of working hours and confirming the number of hours of work only in relation to economically dependent self-employed workers. This will require keeping these records for a period of three years from the date the payment of the remuneration became due. Furthermore, economically dependent self-employed workers should enjoy the right to receive information about their pay. In this regard, the 2018 draft of the Labour Code proposed that, at the request of an economically dependent self-employed worker, the client

114 The 2018 draft of the Labour Code proposes the following solution. According to its Article 178(2), a self-employed worker who is economically dependent is entitled to remuneration paid at least once a month within a period of no more than 14 days from the date of delivery of the document giving rise to the payment. The 2007 draft of the Labour Code, on the other hand, stipulates that, unless otherwise agreed by the parties, payment of wages to an the workers is to be made in cash at least once a month (Article 470(1)).

should be obliged to provide the information needed to determine whether the amount of remuneration has been correctly calculated, and in particular to make available for inspection the documents on the basis of which that amount has been calculated (Article 178(2)).[115]

4. Self-employed workers who are not economically dependent on client (see section 3.2.2) should be covered neither by the minimum hourly wage guarantees nor by other statutory mechanisms to protect their remuneration. The arrangements regarding payment for their work must be left to the discretion of the parties to the contract; matters not regulated in the B2B contract are governed by the Civil Code, and particularly by its auxiliary provisions. With regard to contracts of mandate and contracts for the provision of services similar to mandate, the relevant auxiliary provisions include in particular Article 744 of the Civil Code, according to which, when the mandate (service) is to be rendered in exchange for pay, the payment is due to only after the mandate (service) has been performed, unless the contract provides otherwise. With regard to self-employed workers who are not economically dependent on the client, the legislator should not interfere with these rules regarding the payment of remuneration, in order to respect the principles of freedom of contract, freedom of business activity, and fair competition.
5. In order to increase the effectiveness of the legal safeguards in the area of wage protection with regard to the economically dependent self-employed workers, I propose that the Labour Inspection should be equipped with powers to inspect and supervise with regard to compliance with these regulations, to a much greater extent than is the case today. Firstly, the Labour Inspection should not only have the right to inspect the payment of wages based on the minimum hourly wage, but should also be given wide-ranging powers to verify the client's compliance with all the mechanisms for protecting the wages of economically dependent self-employed workers set out in point 3 above. Secondly, the Labour Inspection should not stop at verifying the formal aspects of the client's documentation of working hours on the basis of which the payment of wages to economically dependent self-employed workers is made. Rather, the Labour Inspection should be granted by the law the appropriate instruments necessary to verify the accuracy of the records of working hours, in order to eliminate cases of self-evident underreporting of the number of hours in the records (in relation to the number of hours actually worked). Thirdly, the Labour Inspection should be granted the powers (which it already has, in relation to employees) to issue orders for the payment of the remuneration due for work already provided, as well as any other benefits to which the economically dependent self-employed workers are entitled. The orders in these cases should be immediately enforceable. As the law stands, these orders may only be issued in the context of the

115 Of course, the implementation of this obligation by the client would not involve any additional charges for the economically dependent self-employed worker.

employment relationship, i.e. only in relation to the remuneration for work or any other benefit resulting from the employment relationship (Article 11(7) of the act on the Labour Inspection). It is generally accepted that a labour inspector may issue such an order only if the amount of wages or other benefits, and the basis for their payment, are undisputable, the amounts are due and payable at the time of the inspection, and the fact that the payment has not been made is not in question.[116]

6. With regard to economically dependent self-employed workers, and taking into account the specific nature of their situation, the law on the legal status of self-employed workers should provide separate regulations on the safeguards concerning the limits on deductions from the remuneration for work and the threshold below which deductions cannot be made.[117] The concept of remuneration should be understood broadly in this case. It should include all recurring payments the purpose of which is providing livelihood, if they constitute the main source of income for the economically dependent self-employed worker. In this respect, the Polish legislator should follow the example of the provisions of Articles 87 and 87[1] of the Labour Code relating to employment.
7. In order to increase the effectiveness of the legal protection of the remuneration of economically dependent self-employed workers, the range of actions for which a person can held liable as petty offences (*wykroczenia*) should be expanded. Currently, only a trader or a person acting on a trader's behalf, or on behalf of another organisational unit, may be subject to a fine of between PLN 1,000 and PLN 30,000 if they pay a self-employed worker remuneration for each hour of work (services) in an amount lower than the applicable minimum hourly wage (Article 8e of the minimum wage act). However, the fine should be applicable to any breach of the provisions governing the protection of the wages of economically dependent self-employed workers. Following the example of the regulations concerning employees (Article 282(1)(1) of the Labour Code), the client should be subject to a fine in the event of failure to pay the remuneration or other amounts due to the self-employed worker within the agreed deadline, or in the event the client makes an undue reduction of the amount of these payments, or in the event the client makes any unjustified deductions from that amount. This is what the 2007 draft of the Labour Code proposes in its Article 383(3).
8. The law on the legal status of self-employed workers should grant economically dependent self-employed workers the right to seek redress for violations of the provisions protecting their wages before the labour courts. In these cases, due

116 See the judgment of the Supreme Administrative Court of 18 May 2023 r., III OSK 6743/21, unpublished.

117 The basis for determining the amount free of deductions should be the minimum hourly rate reserved for the economically dependent self-employed worker, not the minimum wage set for employees. This mechanism for specifying the free amount would be based on the principle of proportionality and would take into account the fact that a self-employed worker often provides work over varying lengths of time.

to the similarity of their situation to that of employees, the provisions of the Code of Civil Procedure on proceedings in labour law cases should be applied accordingly.[118]

9. The Polish legislator should guarantee the economically dependent self-employed workers legal protection against the insolvency of the client.[119] There are two options as to how this can be accomplished: either the law on the legal status of self-employed workers may regulate this issue, or new separate provisions should be added to the act of 13 July 2006 on the protection of employees' claims in the event of the employer's insolvency.[120]
10. I also believe that economically dependent self-employed workers should be legally guaranteed the option of benefiting from the social protection provided for in the act of 4 March 1994 on the employer's welfare and wellbeing benefits fund.[121] Most definitely, this protection should be available to economically dependent self-employed workers whose client has the status of an employer as defined in Article 3 of the Labour Code, and is (by virtue of that act) obliged to establish a welfare and wellbeing benefits fund. If that is the case, self-employed workers who are economically dependent on that client have to be included in the headcount on which the obligation to set up the fund is based. As for other economically dependent self-employed workers, the law on the legal status of self-employed workers should specify the obligations of the client to provide them with at least some of the social benefits provided for by the act on the employer's welfare and wellbeing benefits fund.[122]

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118 Krzysztof W. Baran and Izabela Florczak go even further. They propose to give jurisdiction in all matters concerning non-employee work to the labour courts as a judicial bodies with the relevant specialization. They argue that it would contribute to a fuller realisation of the right to court and prevent any doubts as to the jurisdiction of the courts in cases concerning the work performed on the basis other than the employment relationship, [in:] K.W. Baran, I. Florczak, *Kognicja sądów w sprawach zatrudnienia osób wykonujących pracę zarobkową na innej podstawie niż stosunek pracy*, "Przegląd Prawa i Administracji" 2021, vol. 124, p. 33.

119 M. Latos-Miłkowska, *Ochrona osób zatrudnionych na podstawie umów cywilnoprawnych w razie niewypłacalności pracodawcy*, "Praca i Zabezpieczenie Społeczne" 2019, no. 1, pp. 39 et seq.

120 Uniform text Dziennik Ustaw of 2023, item 1087 as amended.

121 Uniform text Dziennik Ustaw of 2024, item 288.

122 Pursuant to Article 2(1) of this act, social services are understood as services provided for various forms of leisure, cultural and educational activities, sports and recreational activities, care of children in crèches, children's clubs, provided by a day-care provider or nanny, in kindergartens and other forms of pre-school education, provision of material assistance in cash or in kin, as well as repayable or non-repayable assistance for housing purposes under the conditions specified in the agreement.

3.3.6. Protection of motherhood and parenthood

The review of Polish legislation with regard to rights of self-employed workers in the area of motherhood and parenthood presented in Chapter III hardly inspires optimism. The scope of protection guaranteed to self-employed workers who regularly pay contributions to the voluntary sickness insurance fund is insufficient and much different than the level of protection that the Polish legislator provides for employees. The existing regulations raise serious doubts as to their compliance with the standards of international law and European Union law, as well as with the provisions of the Polish Constitution. As the law stands today, Polish legislation fails to ensure effective and efficient care for the child immediately after birth and the full scope of sharing ability of parental rights between parents (with the support of immediate family members), and to create optimal material and financial conditions for this care. Furthermore, the legislation does not sufficiently protect the life and health of self-employed mothers, and their children, before and immediately after childbirth. The Polish state fails to guarantee a comparable standard of care and livelihood in the early years to children of employees and children of self-employed workers. Consequently, the Polish regulations on motherhood and parenthood protection fails to meet the key requirements that formed the rationale for the implementation of these regulations. It therefore seems necessary to implement the following *de lege ferenda* proposals on the matter:

1. The law on the legal status of self-employed workers should separately and comprehensively regulate the legal situation with regard to the protection of motherhood and parenthood in a way that takes into account the specific nature of self-employment (and the differences between employment and self-employment). The level of this protection should be differentiated based on the criterion of economic dependence of the self-employed worker (see section 3.2.3). In consequence of implementing these separate regulations, the provisions of the Labour Code currently applicable to the matter at hand should be repealed.
2. There should be a statutory requirement for an insured self-employed mother to cease working while receiving a maternity benefit for the first 8 weeks after childbirth (*urlop połogowy*, post-natal leave).[123] If the self-employed mother is economically dependent on the client, she should, for that period, be protected against the termination of the B2B contract between herself and the client. This is the suggestion made in the 2007 draft of the Labour Code. Pursuant to its Article 467, a civil law contract with a woman who is economically dependent on the client within 8 weeks after childbirth may only be terminated on grounds of non-performance or improper performance of duties, or if circumstances arise that prevent the continuation of the legal relationship. The 2018 draft Labour

123 The 2007 draft of the Labour Code goes much further in its proposals. Under its Article 472(1), the client is obliged to grant a woman who is an economically dependent self-employed worker a 16-week period as maternity leave, without pay.

Code provides for an even broader scope of protection: according to its Article 185(1), the inability of an economically dependent self-employed worker to provide services during the 8 weeks following childbirth may not result in any negative legal consequences for the worker in terms of liability for non-performance or improper performance of the contract. This approach must be assessed positively, especially as the 2018 draft provides for the jurisdiction of the labour courts to resolve disputes between the economically dependent self-employed worker and the client (Article 186(2)).

3. The law on the legal status of self-employed workers should give parents more freedom to decide who will use the maternity allowance to provide childcare in person at any given time (making the exercise of the right to draw that allowance more flexible). The insured mother, after the mandatory break in providing work during the postpartum period (the first eight weeks of the child's life), must be able to transfer the allowance not only the insured self-employed father, but also to another member of the immediate family, and option currently not offered by the Polish legislator.
4. The legislator should allow for the option for an insured father or an insured other member of the immediate family to immediately acquire the right to maternity leave in the event of special circumstances preventing the insured mother from directly caring for the newborn child. This refers in particular to the following situations: 1) the insured mother is a person holding a certificate of incapacity for independent living; 2) the insured mother is in a hospital or another treatment facility due to a medical condition that prevents her from taking care of the child in person; 3) the mother has abandoned the child. In these cases, the insured father or another insured member of the immediate family should be guaranteed a right to draw the maternity benefit independent of the mother's waiver of this benefit.
5. There is a need for the legislator to introduce legislation to determine the order of priority of persons competing for the right to draw the maternity benefit in place of the mother. In my opinion, the insured father should have priority before other insured members of the immediate family of the mother, possibly with certain specifically listed exceptions.
6. The law on the legal status of self-employed workers should provide for the option for the insured father (or another insured member of the immediate family) to immediately acquire the right to maternity leave in any case when a child is born – and not, as the case now, only under special circumstances – if the child's mother has not been paying into the sickness insurance fund or does not have a title to such insurance during this period. Thus, the insured father (or another insured other member of the immediate family) must be granted an independent right to acquire the maternity benefit. Since these persons, i.e. the father or another member of the immediate family, have made regular contributions to the sickness insurance fund (as sole traders), there is no reason

why their right to draw the maternity benefit should be dependent on the rights of the child's mother in this respect.

7. There is an urgent need for the Polish legislator to clarify the definition of 'another insured member of the immediate family,' proposing a broad formulation of the term, allowing not only for biological relationships but also for other close relationship, based on both personal and economic factors. It should include unrelated persons who share a household, who live together, or who are in informal relationships (in particular on the basis of cohabitation). The current state of regulation on the matter, where the legislator fails to offer precise criteria for eligibility for the to maternity benefit, is unacceptable.
8. The law on the legal status of self-employed workers should expressly dispense with the current requirement of stopping work in order to provide care for the child in person, which is now a sine qua non condition for the acquisition of the right to maternity benefit by the insured father or another insured member of the immediate family. Instead, new solutions should be adopted (along the lines of the current regulations concerning employees) to allow for combining paid work with childcare, provided that the work (within or outside one's own business) does not preclude the option of providing caring for the child in person.
9. The Polish legislator should also consider introducing a statutory safeguard for self-employed workers against negative legal consequences in terms of liability for non-performance or improper performance of services, if the worker chooses to suspend offering services for the period of drawing maternity benefit in order to take care of a child in person. This safeguard should only apply to economically dependent self-employed workers, as defined by the law on the legal status of self-employed workers (see section 3.2.3).
10. There is an interesting concept: namely, that an economically dependent self-employed worker who is providing care in person to a child should have the right to hire an employee or another person under a civil law contract, without automatically losing the status of an economically dependent self-employed worker. The law on the legal status of self-employed workers should – if this option were to be included therein – specify the maximum period during which this rights can be exercised, and the age of the child (e.g. up to the age of 4[124]). This is a right vested in economically dependent self-employed workers in Spain; LETA guarantees it to workers who provide care in person to a child up to the age of 7. Having this option would be very convenient for sole traders who are economically dependent on the client. It would allow them to continue providing services to the client, i.e. continue to derive the main source of income from providing these services, while caring for a newborn child. This solution is conducive to

124 The restriction of this right only to children under the age of 4 corresponds to the provisions of the Labour Code, which grants employees certain rights related to childcare with regard to children in this age range (for instance Article 67^{19}(6), Article 148 (3)).

achieving a good work-life balance, which as a concept is currently being heavily promoted, including at the level of the European Union.

11. Contemporary literature on the subject posits that a broad understanding of protection of motherhood begins with the conception of the child and not with that child's birth.[125] In consequence, the law on the legal status of self-employed workers should introduce separate regulations for self-employed women during pregnancy. These regulations should only apply to economically dependent self-employed workers (see section 3.2.3). At present, the Polish legislator offers no protective guarantees to pregnant women who are self-employed, even if they provide work to a client which has the status of an employer within the meaning of Article 3 of the Labour Code and which also employs pregnant women on the basis of an employment relationship. In this area, the following legal regulations should be introduced into the law on the legal status of self-employed workers, with regard to pregnant women who are economically dependent self-employed workers:
    a. An absolute prohibition of working in prohibited types of work as defined in the Regulation of the Council of Ministers of 3 April 2017 on the list of types of work that are arduous, hazardous, and harmful to the health of pregnant and breastfeeding women.[126] This prohibition should actually be extended to all self-employed women who are pregnant or breastfeeding, including those who are not economically dependent on a client.
    b. The obligation to move a pregnant woman to a different position or, if impossible, to release her for the necessary time from the obligation to provide work, with pay.
    c. An absolute prohibition of working at night and of working more than 8 hours in a 24-hour period.
    d. Paid time off for medical examinations related to the pregnancy. This option was proposed in Article 472(2) read in conjunction with Article 304 of the 2007 draft of the Labour Code. According to this proposal, the client would be obliged to grant a pregnant woman time off work for doctor-recommended medical examinations to be carried out in connection with the pregnancy, if these examinations cannot be carried out outside working hours. The woman would retain her right to receive pay for the time she was absent from work for this reason.
    e. A prohibition of termination of a civil law contract during pregnancy, except as a result of non-performance or improper performance of duties, or where circumstances arise which make it impossible to continue the legal relationship. This option was proposed in Article 467 of the 2007 draft of the Labour Code. The 2018 draft envisaged an even stronger protection against the termination of contract with regard to economically dependent self-employed workers

125 For more information see E. Lichtenberg-Kokoszka, *Ojcostwo i macierzyństwo od poczęcia*, "Teologia i Moralność" 2023, vol. 18, no. 1 (33), pp. 21 et seq.

126 Dziennik Ustaw of 2017, item 796.

who are pregnant. Pursuant to its Article 185(1), the inability to provide services due to pregnancy may not cause any negative legal consequences for the economically dependent self-employed worker in terms of liability for non-performance or improper performance of services. Furthermore, according to the 2018 draft, during the period between the beginning of the pregnancy and the date on which the self-employed pregnant worker becomes eligible for the payment of the maternity benefit, termination of the contract for the provision of services by the client is invalid, unless it is objectively impossible for the services to be provided during this period (Article 185(4)).

12. In order to increase the effectiveness of the legal protection of motherhood and parenthood of self-employed workers, I propose that two new solutions should be introduced. Firstly, the Labour Inspection should be equipped with powers to inspect and supervise with regard to compliance with these regulations. Secondly, violation on the part of the client of the provisions specifying the rights of self-employed workers related to motherhood and parenthood should be considered an offence against the rights of workers and punishable by a fine from PLN 1,000 to PLN 30,000. This was already proposed in Article 383(2) of the 2007 draft of the Labour Code.
13. The resolution of disputes arising from the legal safeguards for economically dependent self-employed workers with regard to motherhood and parenthood should be subject to the jurisdiction of the labour courts, which are best equipped to examine these matters. In these cases, due to the similarity to the situation of employees, the provisions of the Code of Civil Procedure on proceedings in labour law cases should be applied accordingly. Both the 2007 draft of the Labour Code (in its Article 475) and the 2018 draft (in its Article 186(2)) suggested that similar solutions should be implemented.

The introduction of the above-discussed new regulations would reduce the significant disparities between the level of protection of currently offered to employees and self-employed workers with regard to maternity and parenthood. As the law stands, there is neither axiological or legal reason for the existence of these disparities. The proposed solutions would be more effective in ensuring that care is provided to a child immediately after birth, and that the life and health of mothers and newborn children are more effectively protected, regardless of the legal relationship on the basis of which the parents of the child provide work. The above-discussed regulations would not unduly interfere with the principles of freedom of contract, freedom of business activity, and fair competition.

3.3.7. Protection in terms of the right to rest

As demonstrated in Chapter III of the book, the Polish legislator at present offers no guarantees to self-employed workers with regard to the right to rest, neither in the strict sense (as the right to paid annual leave) nor in the broader sense, i.e. including

also the right to days off, maximum working time norms, and daily and weekly rest periods. Apart from specific regulations pertaining to the right to rest that only apply to selected categories of self-employed workers, and that were implemented for the sake of public safety (e.g. with regard to self-employed drivers[127]), this issue has been left entirely to the parties to the B2B contract, exercising their freedom of contract. In result, a self-employed worker may only achieve a guarantee of the right to rest by means of a civil law contract – that is, of course, if that worker has the appropriate bargaining position vis-à-vis the client to be successful in the contract negotiations. This situation is problematic, primarily from the point of view of international standards, under which the right to rest is guaranteed to every person performing work, regardless of the legal basis on which this work is provided.[128] This is a decidedly disadvantageous situation especially for economically dependent self-employed workers, who as a rule provide services to a single client, which is able to leverage its unquestionable negotiating advantage to unilaterally impose provisions that are not in the best interest of the workers. Typically, this deprives economically dependent workers of opportunities to rest, which in extreme cases can endanger their health and lives. Taking the above into account, and taking into account the broad interpretation of the constitutional principle of labour protection (Article 24 of the Constitution of the Republic of Poland) and the legal solutions in force in some of the countries included in the research project, the following solutions should be proposed regarding the right to rest of self-employed workers:

1. The law on the legal status of self-employed workers should separately and comprehensively regulate the right to rest of self-employed workers, taking into account the specific nature of self-employment, without relying on references to the provisions of the Labour Code. The solutions adopted in this regard must, on the one hand, provide a minimum standard of protection (much lower than for employees), while on the other hand not interfering to an excessive extent with the principles of freedom of contract, freedom of business activity, and fair competition.
2. In my opinion, the right to rest should only be guaranteed to economically dependent self-employed workers (see section 3.2.3).[129] Given their unfavourable bargaining position and the similarity of their situation to that of employees, the Polish legislator should guarantee to economically dependent self-employed workers the right to a rest break of the duration of at least 12 working days per calendar year, with the proviso that the collective bargaining agreement, other collective agreements with the client, or the provisions of the B2B contract may provide for

127 Act of 16 April 2004 on the working time of drivers, uniform text: Dziennik Ustaw of 2024, item 220.

128 Compare M. Barwaśny, *Right to rest of the self-employed under international and EU law*, "Acta Universitatis Lodziensis. Folia Iuridica" 2022, vol. 101, pp. 183 et seq.

129 Similar opinion M. Barwaśny, *Prawo do wypoczynku osób pracujących na własny rachunek – uwagi de lege ferenda*, "Acta Universitatis Lodziensis. Folia Iuridica" 2019, vol. 88, pp. 97 et seq.

more favourable solutions in this regard. The Spanish law is similar; according to Article 14(1) of LETA, an economically dependent self-employed worker has the right to interrupt work for 18 working days per year, again with the proviso that the worker's contract with the client, or a type of collective agreement, may put more favourable rules in place. Proposals to guarantee self-employed workers the right to a rest break have also been included in drafts of the Labour Code. The 2007 draft proposes making it obligatory for the client to grant, at the request of an economically dependent self-employed worker, a leave of absence of at least 14 calendar days in each calendar year of work (Article 471(2)). The 2018 draft, on the other hand, provided in Article 181(1) for the right of an economically dependent self-employed worker, after each period of work of 182 days, to take a break of a minimum length of 10 working days.

3. While the right of economically dependent self-employed workers to a period of leave is not, in principle, in question, the biggest problem concerns the payment for this period. On the one hand, making the time of the leave payable would result in a far-reaching interference by the legislator with the principles of freedom of contract, freedom of business activity, and fair competition, because it would generate on the part of the client an inflexible costs associated with self-employed labour (which would make the situation of the client similar to that of an employer). On the other hand, however, the lack of pay for the period of the leave undermines the entire ratio legis of the right to the leave. This is because self-employed workers are not likely to rest, and to recuperate their mental and physical strength, if they are liable to suffer the loss of income during the period of not providing work. The 2018 draft of the Labour Code proposed that a paid period of leave should be introduced, specifying that an economically dependent self-employed worker is entitled to vacation pay in the amount of $1/10^{th}$ of the pay due for the period of work payable after the end of each calendar quarter. If no leave was used by the worker, due to termination of the service contract or loss of the status of an economically dependent self-employed worker, the worker would be entitled to a one-time payment in the amount specified above. The 2007 draft of the Labour Code, in contrast, envisaged a period of leave, but with no pay due for that period (Article 471(2)). However, in the event of the client's failure to grant the annual leave, for reasons attributable to the client, in the calendar year in which the request was made, the worker would be entitled to compensation in the amount of half of the minimum wage established under separate regulations. Despite the shortcomings of this option, I am in favour of granting payable guaranteed annual leave to the economically dependent self-employed workers. I support the position of M. Barwaśny, who argues in favour of the adoption of remuneration, calculated by using the amount of the minimum hourly rate established under separate regulations multiplied by the number of hours of work that would be provided by the self-employed worker during the period of leave. This option, I believe, ensures that the self-employed worker is

guaranteed a minimum level of income during this time, without placing an undue burden on the client.[130]

4. In terms of the procedure for granting leave to an economically dependent self-employed, I do not support the mechanism (envisaged in the 2007 draft of the Labour Code) of mutatis mutandis application of the relevant regulations on employees. The law on the legal status of self-employed workers should separately and comprehensively regulate the procedures for the use of this leave by self-employed workers, taking into account the specific nature of self-employment. According to Article 181(1) of the 2018 draft, after each 182-day-long period of work, a break of a minimum of 10 working days should follow, to be used within the next 360 days, either on dates agreed by the parties to the service contract, or on the date selected by the economically dependent self-employed worker with a minimum of 30 days' notice. For certain selected categories of workers,[131] the break could not be shorter than 2 days for every 30 days of the contract. In contrast, M. Barwaśny proposes that a self-employed economically dependent worker should acquire the right to apply for a paid leave after 3 full months of work for the client, regardless of the duration of the contract.[132] In my opinion, the same mechanism as is used in the act of 9 July 2003 on the employment of temporary workers[133] may also be used here. It provides for the right to a leave for each month of work, granted on days that would have be working days for the self-employed worker if the worker were not on leave. Consequently, an economically dependent self-employed worker would earn the right to paid leave in the amount of 1 working day for each month of work for a specific client, for a total of 12 days per calendar year. For work periods of 6 months or more, the client would be obliged to allow the self-employed worker to take the leave no later than 30 days from the date of the relevant request, after agreeing on specific dates, which would take into account legitimate interests of both parties to the B2B contract. Should it prove impossible for the worker to take the leave, for reasons attributable to the client, within a period of 3 months from the date of the relevant request, the self-employed worker would have to be guaranteed by law the right to compensation equal to twice the amount the worker was due to receive for the time of the leave.
5. To ensure that the economically dependent self-employed worker is able to use the leave for its intended purpose without unease, the Polish legislator should disallow the termination of a civil law contract during the leave, except under circumstances that make it impossible to continue the legal relationship.
6. The law on the legal status of self-employed workers should guarantee the economically dependent self-employed workers the right to one day off in each calendar

130 M. Barwaśny, *Ochrona osób pracujących*…, p. 326–327.

131 The reference was made to employees using expert knowledge at work, managers, and workers employed in governing bodies of a legal person.

132 *Ibidem.*

133 Uniform text: Dziennik Ustaw of 2023, item 1110.

week. This was also suggested in the 2018 draft of the Labour Code: according to its Article 180, an economically dependent self-employed worker is to have at least one day each week on which no work is to be provided. However, I am not in favour of imposing maximum working time caps (as is the case in Spain under LETA[134]). I believe that doing so would undermine the flexibility and thus the attractiveness of this form of hiring labour, and would constitute excessive interference with the principles of freedom of contract, freedom of business activity, and fair competition.

7. There is an interesting concept: namely, that the economically dependent workers should have the right to cease working and take an unpaid break in the event of urgent, sudden, and unpredictable events arising from family obligations. This is a right vested in economically dependent self-employed workers in Spain under Article 16 of LETA.[135] The law on the legal status of self-employed workers should guarantee the economically dependent self-employed workers the option of an unpaid break, in the amount of 5 days per calendar year, along the lines of the right to caregiving leave that, in the current state of the law, is vested in employees (Article173[1] of the Labour Code).[136]
8. To conclude this part of the argument, one more option is worth noting. It was proposed in the 2007 draft of the Labour Code: under its Article 471(1), the client must exempt the worker (without pay) from the obligation to provide work in the event when providing work is impossible. The law on the legal status of self-employed workers should guarantee the economically dependent self-employed workers such an exemption in particularly justified situations, under the terms and conditions set out separately in that act.

3.3.8. Protection of collective rights

In a seminal decision that represents a positive breakthrough in collective employment relations in Poland, the Polish legislator has already granted the self-employed workers the freedom to associate in trade union organizations and, consequently, a number of collective rights inherent to that freedom. Consequently, the following rights are vested in self-employed workers: protection against discrimination on the grounds of union membership or lack thereof (Article 3 of the act on trade unions), the right to engage in collective bargaining in order to conclude a collective

134 For more information see A. Tyc, *Self-employment in Spanish law*…, published as part of this research project.

135 *Ibidem.*

136 On the other hand, Article 148[1] of the Labour Code provides that an employee is entitled to a separate right to time off work. The Polish legislator stipulated such time off in each calendar year of 2 days or 16 hours including for reasons including force majeure, i.e. urgent family matters caused by illness or accident, where the immediate arrival of the employee is necessary. During the time off work, the employee is entitled to half their usual remuneration.

agreement (Article 21 of the act on trade unions), the right engage in collective bargaining in order to settle collective disputes, the right to strike and to engage in other forms of protest within the limits set forth in the act of 23 May 1991 on the resolution of collective disputes, or the protection arising from the holding a trade union office (Articles 25, 31 and 32 of the act on trade unions). The amendment that vested these freedoms and rights in self-employed workers was very important, because it gave self-employed workers much greater protection on both individual and collective level.

A reviews of the laws of the selected European countries, completed as part of this research project, clearly demonstrates that Poland provides the self-employed workers – theoretically at least – the broadest guarantees in terms of collective rights. In England, Austria, Italy, and Hungary, self-employed workers enjoy virtually no collective protection. In Lithuania, the situation is much better, in that the law guarantees the self-employed workers the freedom of association in trade unions, as well as most of the collective rights. In Germany, self-employed workers with a status similar to employees (i.e. the economically dependent self-employed workers) have the right to form associations, enter into collective bargaining agreements, and engage in industrial action, as long as their conduct is not in violation of cartel law. Even in Spain, which has regulated the protection of self-employed workers in a separate law (LETA), these workers can only become members of selected trade unions (they are not allowed to form their own trade unions) and establish, without applying for any permits, professional associations of self-employed workers (*asociaciones profesionales específicas de trabajadores autónomos*) to protect and defend their interests. These professional associations are specifically not classified as trade unions. They may enter into special professional interest agreements on behalf of the economically dependent self-employed workers, but these agreements are not binding (they are specifically not classified as collective agreements). Furthermore, only the economically dependent self-employed workers have the right to strike in Spain. The remaining self-employed workers only have the option of taking collective action to defend and protect their professional interests.[137]

However, the analysis in Chapter III of the book demonstrated that the manner of regulation of the protection of self-employed workers in the collective employment law in Poland raises far-reaching doubts and reservations. They result primarily from the flawed scope of collective protection for this category of workers, due to the reliance on the problematic mechanism of references to the relevant laws on the situation of employees (the method of labour law expansion). This raises many problems of interpretation, creating uncertainty as to the legal situation of self-employed workers in terms of practical application and exercise of their collective rights. In addition, very often – for instance in matters covered by the act on collective dispute resolution – this brings their rights to a par with those of employees, which

137 For more information see A. Tyc, *Self-employment in Spanish law*…, published as part of this research project.

is unfounded and which constitutes excessive interference of the Polish legislator with the principles of freedom of contract, freedom of business activity, and fair competition. Taking into account the following factors: the absence of any differentiation of the scope of collective protection of any categories of self-employed workers; the dominant model of trade union representation in Poland, which is primarily oriented towards facility-based trade union organizations, which in turn fails to take into account the specific nature of self-employment – overall, the state of Polish regulations in this area must be assessed negatively. Therefore, I propose the introduction of the following regulations for the legal protection of the collective rights and interests of self-employed workers:

1. The law on the legal status of self-employed workers should separately and comprehensively (in a manner modelled of the respective laws on employees) regulate the collective rights of self-employed workers, taking into account the specific nature of self-employment, with as few references as possible to the corresponding application of collective labour law. The references, if any, should be used very sparingly, so as not to duplicate the regulations that pertain to employees.[138] There is no reason to fully re-regulate the issue of union membership (act on trade unions) or the procedure for concluding collective agreements.[139] Separate regulation of the collective rights of self-employed workers will eliminate a number of interpretative doubts that arise on the basis of the current provisions of the trade union law, and will also restrict, as far as possible, the interference of the Polish legislator with the principles of freedom of contract, freedom of business activity, and fair competition.
2. When introducing distinctions in the area of collective rights of self-employed workers, the Polish legislator should differentiate the scope of protection on grounds of economic dependence of the workers. The broadest range of rights resulting from trade union law – i.e. a range of rights most similar to that available to employees – should apply to economically dependent self-employed workers, as defined by the law on the legal status of self-employed workers (see section 3.2.3). In contrast, a much smaller scope of protective guarantees should apply to self-employed workers who are not economically dependent on the client (see section 3.2.2).[140]
3. The law on the legal status of self-employed workers should guarantee the right to form and join trade unions to all self-employed workers as defined therein

138 Pursuant to § 4(1) of the Regulation of the President of the Council of Ministers of 20 June 2002 on the rules of legislative technique, an act must not contain provisions included in other acts.

139 It is worth mentioning that in Poland public consultations are being carried out regarding the draft act of 20 June 2024 on general collective agreements and specific collective agreements.

140 The Spanish legislator in LETA awards freedom of association to each self-employed worker (Article 19). However, specific collective rights resulting from freedom of association may differ based on the criterion of economic dependence.

(see section 3.2.2), as long as they have such rights and interests associated with their labour that can be represented and defended by a trade union.[141] In this regard, the Polish legislator should consider introducing certain instruments that would allow for effective verification, on the basis of objective criteria, whether a particular group of workers forming a trade union in fact has such rights and interests. This is because it is a sine qua non condition that self-employed workers must meet to qualify for the protection of trade union law.

4. The law on the legal status of self-employed workers must also include the mechanisms currently found in the act on trade unions, which address the issue of preventing discrimination on the basis of trade union membership or the decision not to join a trade union, or holding a trade union office (see section 3.3.3). The same mechanisms should apply to all self-employed workers, whether or not they are economically dependent on the client. In result, the Polish legislator will have to supplement the open list of grounds on which a self-employed worker is legally protected against discrimination and unequal treatment, adding the following criteria to the list: membership in a trade union, decision not to join a trade union, holding a trade union office.
5. Given that the freedom of association applies to very large groups of workers, and given that new, atypical forms of work are emerging constantly, the Polish legislator should consider shifting the entirety of collective labour law away from the (now increasingly outdated) model that prioritises facility-based trade union organizations, by granting them the greatest scope of powers in representing and defending the rights as well as the professional or occupational and social interests of workers. This model should be replaced by statutory mechanisms aimed at strengthening supra-facility union structures, which are much better at accommodating the needs of self-employed workers. In the current model, based around facility trade union organizations, the size of a facility trade union organization is measured taking into account the requirement of a certain length of the legal relationship with the client. Pursuant to Article25[1](1)(2) of the act on trade unions, the powers of a facility-based trade union organization are vested in an organization with at least 10 members – workers who are not employees, who have provided work for at least 6 months for an employer where this organization is present. This requirement may be insufficient in terms of ensuring stability of trade union organization's membership numbers, given how variable the level of civil-law based employment can often be. It would be much better to determine the size of a trade union organization solely on the basis of the number of economically dependent workers, as defined in section 3.2.3.

141 The 2018 draft of the Code of Collective Labour Law (Article 27(2)) guaranteed the right to establish and join trade unions to persons who were not employees if they: perform work in person, do not hire others to do the work, regardless of the legal relationship, and have group interests that can be protected by trade unions. This is an explicit reference to judgment issued by the Constitutional Tribunal on 2 June 2015, K 1/13, OTK-A 2015, no. 6, item 80, Dziennik Ustaw of 2015, item 791.

6. The law on the legal status of self-employed workers should ensure that all self-employed workers as defined therein (see section 3.2.2) are able to enjoy the protection guaranteed by the provisions of a general collective agreements and other collective agreements.[142] This is the direction taken in the draft act of 20 June 2024 on general and particular collective agreements (*układ zbiorowy pracy* and *inne porozumienie zbiorowe*, respectively). According to Article 3(1) of this draft act, a facility-based collective agreement (*zakładowy układ zbiorowy pracy*) or a supra-facility collective agreement (*ponadzakładowy układ zbiorowy pracy*) is made in order to determine the content of employment relations or other legal relationships that form the basis for providing work, and to specify the conditions for the provision of work. The facility-based collective agreement is made on behalf of all persons who provide work for the client that is the party to the agreement, unless otherwise stipulated in the agreement. A supra-facility collective agreement is made on behalf of all persons who provide work for the entities covered by its provisions, unless otherwise stipulated in the agreement (Article 4). The more favourable provisions of a collective agreement, as of the date of its entry into force, supersede – by operation of law – the terms of the whatever act of law served as the basis for the provision of work before (Article 9(4)). The less favourable provisions that apply to workers outside of an employment relationship are to be introduced by amendment to the terms of the whatever act of law served as the basis for the provision of work before (Article 9(6)). However, an important question arises regarding the procedure for making this change, since the provisions of the Civil Code do not provide for the option of termination the existing terms and conditions of work and pay, as is the case with regard to employment (Article 42 of the Labour Code). This is therefore far-reaching interference of the legislator with the principles of freedom of contract, freedom of business activity, and fair competition. However, the main drawback of the proposed regulation is that it fails to a resolve the key issue from the point of view of the effectiveness of collective protection of the

142 Nevertheless, the guidelines on applying EU competition law to collective agreements regarding the working conditions of solo self-employed persons, quoted above, suggest a limitation of conditions allowing for concluding collective bargaining agreements exclusively to economically dependent self-employed workers. The guidelines state that self-employed workers are in a situation comparable to employees, and thus their collective bargaining agreements regarding the working conditions do not infringe Article 101 of the Treaty on the Functioning of the EU, if they provide services exclusively or predominantly to one counterparty and are likely to be in a situation of economic dependence vis-à-vis that counterparty. Similar conclusions may be drawn from the 2007 and 2018 drafts of the Labour Code. Both of these documents limit the possibility of concluding collective agreements exclusively to economically dependent self-employed workers. Pursuant to Article 463 of the 2007 draft, these workers could be covered by various types of collective agreements made under the law. On the other hand, Article 183 of the 2018 draft stipulates that economically dependent self-employed workers could be covered by the collective agreements to the extent determined by the parties to the agreement.

self-employed workers, namely the statutory relationship between the provisions of the B2B contract and the collective agreement. In the field of employment relations, there is complete consensus that the provisions of an employment contract may not be less favourable to the employee than those contained in the collective agreement, which sets the minimum standard for employee rights. In accordance with the principle of preference and application by operation of law, provisions of an employment contract that are less favourable are automatically null and void, and the relevant provisions of the collective agreement apply in their stead (Article 18 of the Labour Code). Given the legal nature of collective bargaining and the fundamental function of collective agreements, and in view of the ratio legis of their applicability to self-employed workers, I believe that the Polish legislator should make this mechanism of preference expressis verbis applicable to the provisions of B2B contracts.[143] In consequence, the law on the legal status of self-employed workers should mirror the mechanism set forth in Article 18 of the Labour Code, precluding the possibility of contractual exclusion of more favourable regulations of collective agreements. The civil law contract, to the extent that it provides for non-application of these regulations, should be *ex lege* null and void. A similar solution was provided for in the 2007 draft of the Labour Code, with the important difference that it was envisaged that this regulation would only apply to the economically dependent self-employed workers. According to Article 464 of the 2007 draft of the Labour Code, Article 9 thereof (establishing the hierarchy of sources of labour law) and Article 13 thereof (which provided for the principle of preference for employees) should apply accordingly to the rights and obligations of economically dependent self-employed workers.

7. The law on the legal status of self-employed workers should differentiate between the rights of self-employed workers to participate in collective dispute resolution using the criterion of economic dependence. Self-employed workers who are not economically dependent on the client (see section 3.2.2) should only have limited rights in this area. Taking into account the relevant standards of international law, I would limit their rights only to the option of taking certain forms of industrial action, but with the express exclusion of the right to strike.
8. In contrast, the right to participate in a strike – including taking part in a strike referendum – should be limited by the Polish legislator only to the economically dependent self-employed workers (see section 3.2.3). To make this right more effective, the law on the legal status of self-employed workers must put in place protective mechanisms for workers who choose to exercise it. In particular, they should be guaranteed effective protection against termination of the B2B contract and against any negative consequences of participation of in a legal

143 Perhaps the optimal solution would be to limit the applicability of this mechanism only to economically dependent self-employed workers by way of a statute, as provided for in Article 18 of the Labour Code (see section 3.2.3). See also: the guidelines of the European Commission of 9 December 2021 quoted above.

strike. In addition, for the duration of the strike, the client should not be able to hire temporary workers to substitute for the workers who are on strike.[144]

9. The law on the legal status of self-employed workers should guarantee to all self-employed workers, as defined therein, the right to hold trade union office. However, the new regulations must differentiate the scope of protection granted to persons holding trade union office based on the criterion of economic dependence. The self-employed workers who are not economically dependent on the client (see section 3.2.2) should only be guaranteed limited rights in this area.
10. The mere fact of holding a trade union office, and representing the rights and interests of workers, due to the high risk of conflict with the client, means that protection against termination of the civil law contract for all self-employed workers who hold a trade union office is justified. Nevertheless, the level of this protection should be lower, compared to employees who hold trade union office. Taking into account the specific nature of self-employment (where typically the legal bond with the client is not as strong as in the case of employees), and taking into account the need to limit interference with the principles of freedom of contract, freedom of business activity, and fair competition, I believe that the mechanism for obtaining prior approval for the termination of a B2B contract, or unilateral change in working conditions or remuneration to the detriment of the worker, should be expressly restricted only to the economically dependent self-employed workers (see section 3.2.3). In contrast, in the case of other self-employed workers who hold a trade union office, the client should be able to terminate the civil contract early or modify it to the detriment of the worker, with the caveat that sufficiently high compensation would be due in situations where this decision is not dictated by a flagrant violation of the contract. One might argue here, for instance, that appropriate compensation (regardless of the amount of damage suffered) might be equal to the amount of 6 months' worth of wages to which the person was entitled during their most recent period of employment, and if the worker were not paid on a monthly basis, the amount of 6 times the average monthly earnings in the national economy in the previous year.[145] In determining the amount of this compensation, the principles set forth in Article 32(1^4) of the act on trade unions should be taken into account. For self-employed workers who hold a trade union office and are not economically

144 The mechanism referred to in Article 8(2) of the act of 9 July 2003 on temporary employment must be applied to economically dependent self-employed workers. Under this provision, a temporary employee may not hired to perform the work for the benefit of the employer at the position on which an employee participating in a strike is employed. Compare M. Latos-Miłkowska, *Praca na własny rachunek a ochrona w zakresie zbiorowego prawa pracy*, "Acta Universitatis Lodziensis. Folia Iuridica" 2022, vol. 101: *W poszukiwaniu prawnego modelu ochrony pracy na własny rachunek w Polsce*, T. Duraj (ed.), pp. 200–201.

145 This should be the minimum amount guaranteed by the legislator. The amount could be then increased by way of a collective agreement or another agreement made between the client and trade unions.

dependent on the client, jurisdiction in any disputes arising from violations of laws related to trade union matters should fall to civil courts, with claims heard under the general rules set out in the Code of Civil Procedure.

11. If a client terminates the civil law contract with an economically dependent self-employed worker (see section 3.2.3) who holds a trade union office, or unilaterally modifies the provisions of the contract in violation of the requirement to obtain prior approval, this should result, as is the case at present, in the right of the worker in question to be paid compensation under the rules currently laid down in of Article 32(1^3) and Article 32(1^4) of the act on trade unions. However, the Polish legislator should introduce a regulation expressly stating that all disputes arising from the application of laws on trade unions with regard to economically dependent self-employed workers who hold a trade union office fall under the jurisdiction of labour courts, which are best equipped to hear such cases. Due to the similarity of the situation of these workers to employees, the provisions of the Code of Civil Procedure on proceedings in labour law cases should be applied accordingly in these matters too. This would ensure that these workers who hold a trade union office enjoy a privileged position before the courts, offering the possibility of faster and more effective enforcement of their claims.
12. The rights of self-employed workers to paid exemptions from work for the duration of performing their trade union duties (permanent and ad hoc exemptions) also require significant modification. In this area, Poland's current regulations offer too much protection to self-employed workers who hold trade union office, which constitutes excessive interference with the principles of freedom of contract, freedom of business activity, and fair competition, and which creates an additional financial burden for the client (to which the trade union is attached). The law on the legal status of self-employed workers should differentiate the scope of the exemption on the basis of economic dependence. Self-employed workers who are not economically dependent on the client (see section 3.2.2) should only be guaranteed the right to unpaid exemptions from the obligation to perform work of an ad hoc nature for the time necessary to perform an ad hoc activity arising from a union office inside or outside the workplace, if it cannot be performed on their own time. In contrast, economically dependent self-employed workers who hold trade union office should be guaranteed two categories of paid breaks, along the lines of the regulation that pertain to employees. First, the right to permanent exemption from work for the term of office on the board of the facility-based trade union organization. During the period of this exemption, the workers should have the rights or benefits of a worker who provides work, and the right to wages or cash payments, if the board of the trade union organization has requested it. The wages could be paid on the same basis as the pay for the period of the annual leave. Secondly, these workers must have a statutory right to paid time off from work of an ad hoc nature for the time necessary to perform an ad hoc activity arising from their union office inside or outside the workplace, if it cannot be performed on their own time. Given the need to pay

the workers for the duration of these breaks, and given the additional costs this generates for the client, the Polish legislator should introduce maximum limits on such paid ad hoc leave, which can be regulated more favourably for persons holding trade union office under a general or particular collective agreement.

13. Of course, with regard to all self-employed workers who hold a trade union office, the law on the legal status of self-employed workers should make it clear that, if the contract between the client and the worker specifies a deadline for the performance of work (e.g. for the completion of a task), this deadline is not to be extended by the time off work related to the performance of a trade union duty. The solutions proposed here are acceptable under the conditions of a market economy, although, in my opinion, they still raise a lot of questions, some of which also apply to employees who hold a trade union office.

3.3.9. Other rights of self-employed workers

In view of international law and European Union law, as well as the Polish Constitution, and taking into account the experiences of the European countries studied in the research project and the concepts articulated in the 2007 and 2018 drafts of the Labour Code, the law on the legal status of self-employed workers should also lay down other mechanisms that serve to protect self-employed workers, differentiating their scope of the basis of the criterion of economic dependency. However, I want to make it clear that in my opinion, not all of the proposals listed below should be immediately incorporated into the Polish legal order. Any and all decisions to this effect should be preceded by in-depth sociological and economic review, as well as a precise assessment of the expected social and economic outcomes for self-employed workers. Political and budgetary concerns will also play a significant role. Furthermore, the scope of protection extended towards self-employed workers may not become equal to the standards guaranteed to employees and may not excessively interfere with the principles of freedom of contract, freedom of business activity, and fair competition. If the scope of rights granted to self-employed workers is too large, this may bring the opposite effect to what is intended. This was pointed out by the European Economic and Social Committee in its own-initiative opinion *New trends in self-employed work: the specific case of economically dependent self-employed work* dated 26 February 2009, which noted that recognition of economically dependent self-employed work might lead to people hitherto defined as employees being transferred to the category of economically dependent self-employed work. With these aspects in mind, the following protective mechanisms dedicated to self-employed workers should be considered:

1. Giving labour courts jurisdiction over all matters pertaining to the rights of economically dependent self-employed workers. This is a point I made frequently when discussing the specific protective guarantees named above (Article 475 of the 2007 draft of the Labour Code and Article 186(2) of the 2018 draft of the

Labour Code). Matters involving other self-employed workers – i.e. those who are not economically dependent on the client – should continue to fall under the jurisdiction of civil courts.

2. At the request of an economically dependent self-employed worker, the duty of the client to confirm in writing the terms and conditions of the B2B contract, in particular the type of work to be provided, starting date, and rules that govern pay, within 7 days of the relevant request (Article 465 of the 2007 draft of the Labour Code). Failure to do so on the part of the client is considered an offence against the rights of workers and punishable by a fine (Article 383(1)). The 2018 draft of the Labour Code, in contrast, proposed that for this category of workers, there should be an absolute obligation to make all contracts for the provision of services in writing (Article 178(1)).
3. Statutory prohibition of any and all abusive clauses in the B2B contracts made with economically dependent self-employed workers. This is in line with the regulations in force in Spain, where Article 6(4) of LETA renders any abusive clause in a contract with a self-employed worker null and void by operation of law. If that is the case, the self-employed worker may also seek compensation.
4. Statutory guarantee of a notice period for contract termination in relation to a B2B contract with an economically dependent self-employed worker. According to Article 466 of the 2007 draft of the Labour Code, the notice period should be one week in the first year and two weeks in the second and subsequent years of the duration of the contract. Notice periods may be contractually extended, with the caveat that the period set for the client may not be shorter than the period set for the self-employed worker. The declaration of termination of a B2B contract by the client must be made in writing. Similar solutions in this regard are proposed in the 2018 draft of the Labour Code. Pursuant to its Article 179, the notice period for termination of a contract for the provision of services concluded by an economically dependent self-employed worker may not be shorter than 14 days in the case of provision of services for up to 182 days, and may not be shorter than 30 days otherwise. In determining the length of the period provision of service, the periods arising from several contracts are to be aggregated if the interval between them is shorter than 30 days. The notice of termination must be in writing.
5. Protection against immediate termination of the B2B contract with an economically dependent self-employed worker. The 2007 draft of the Labour Code stipulates that the client may terminate the contract without notice solely on grounds of non-performance or improper performance of the worker's obligations, or if circumstances arise that make further contractual relationship impossible. However, if the termination of the contract without notice was not justified, the worker is entitled to compensation in the amount of the minimum monthly wage (established pursuant to separate regulations) if the notice period was two weeks, and half of that amount if the notice period was one week. If the contract was made for a fixed time, in the event of termination without notice the economically dependent self-employed worker is entitled to compensation proportional to

the period remaining under the contract, but not exceeding the minimum wage (Article 468).

6. Including periods of economically dependent self-employed work in the calculations of total length of periods that serve as a basis for the possibility of exercising important rights characteristic of the employment relationship (*staż pracy*): such as annual leave, various types of seniority cash awards (*dodatek stażowy, dodatek jubileuszowy*), amount of severance pay, or length of the notice period prescribed for an employment contract. This type of protective mechanism is proposed in the 2007 draft of the Labour Code. Pursuant to its Article 473, the period of the economically dependent self-employed work, in which the worker received remuneration exceeding half of the minimum monthly wage established on the basis of separate regulations, is to be included in the period of the employment calculated under the conditions concerning employees. Currently, legislative work is being carried out in Poland (and is in an advanced stage) with a view to supplementing the Labour Code with a provision according to which all periods during which a person carries out business activity, either individually (i.e. as a sole trader) or in the form of a general partnership, as well as on the basis of a contract of mandate, a contract for the provision of services, or an agency contract, will count towards the length of this lifetime period of work (*staż pracy*).[146] While I support this kind of protective mechanism in principle, I believe that this proposal goes too far. In my opinion, this right should be reserved only for economically dependent self-employed work.
7. The 2018 draft of the Labour Code proposes a specific obligation for a client that hires economically dependent self-employed workers but that is also an employer as defined in Article 3 of the Labour Code, and that hires employees at the same time. According to Article 184 of the 2018 draft of the Labour Code, on request from the worker, the client under the circumstances (i.e. also an employer) is obliged to notify the self-employed worker of vacancies. The request should indicate the type of work that the economically dependent self-employed worker is qualified to take up. The mechanism is of course primarily designed to focus on employment opportunities.
8. Furthermore, the Spanish legislator in Article 4(3) of LETA lists the individual rights guaranteed to all self-employed workers in the course of exercise of their professional activity *(en el ejercicio de su actividad profesional*), which include:
   a) the right to vocational training and retraining;
   b) the right to reconcile work with personal and family life, including the right to suspend work in the event of the birth of a child, providing care jointly to a child, risks arising during pregnancy, risks arising during breastfeeding and adoption, providing care for adoption and providing foster care;

146 See also G.J. Leśniak, *Staż pracy liczony też dla samozatrudnionych i na umowach zlecenia?*, Prawo.pl, 23.01.2024, https://www.prawo.pl/kadry/wliczanie-dzialalnosci-gospodarczej-do-stazu-pracy-propozycja-mrpips,525051.html (accessed: 16.05.2024).

c) the right to sufficient social assistance and benefits in case of need, in accordance with social security legislation;
d) the right to individually perform actions arising from the self-employed worker's business activity.

4. Basic responsibilities of the self-employed worker

The law on the legal status of self-employed workers should also comprehensively list the fundamental obligations (including professional obligations) of self-employed workers. In creating this list, the criterion of economic dependence should be taken into account. In particular, the Polish legislator should enshrine the following obligations of self-employed workers in the law:

1. Obligations to comply with health and safety regulations and rules for self-employed workers whose work is organised by the client. In this area, the law on the legal status of self-employed workers should introduce a list of minimum requirements in terms of occupational health and safety obligations of these workers, taking into account the specific nature of self-employment (modelled on the relevant regulations pertaining to employees).[147]
2. Following the example of Spanish law, which lists the fundamental obligations of self-employed workers *(deberes profesionales básicos*) in Article 5 of LETA, the law on the legal status of self-employed workers should lay down the specifics of the following obligations[148]:
   a) to comply with the obligations arising from contracts signed by the workers, in line with the contracts' wording and effects, as long as these are by their nature in accordance with the principles of good faith, with custom, and with the law;
   b) to comply with common standards arising from the place of provision of services;
   c) to complete and to notify of entries and deletions and to pay contributions to the social security system under the conditions laid down by the relevant legislation;
   d) to comply with tax and budgetary obligations under current legislation;
   e) to comply with any other obligations imposed by applicable legislation;
   f) to comply with the ethical standards of the profession.
3. In reference to the list of basic duties of an employee set out in Article 100 of the Labour Code, the law on the legal status of self-employed workers must also specify the duties of self-employed workers in terms of:

147 The minimum set of health and safety obligations for self-employed workers whose work is organised by the client is included in section 3.3.2 of this chapter.

148 For more information see A. Tyc, *Self-employment in Spanish law*…, published as part of this research project.

a) conscientious and diligent performance of work required in vocational (professional) relations. All self-employed sole traders are expected to have a higher level of professionalism when carrying out their duties. Pursuant to Article 355(2) of the Civil Code, the due diligence of the debtor in the scope of their business activity is determined taking into account the professional nature of this activity.[149] In result, the level of conscientiousness and diligence expected in the professional relationship is much higher than in the employee-employer relationship. The self-employed worker is expected to have high qualifications, expertise and adequate training within the relevant industry. This includes developments in science and technology as well as the relevant legal norms and the professional rules applicable to the given sector of professional activity (e.g. rules of the art of construction, medicine, finance and accounting, law)[150];
b) due care for the interest of the client, including in particular refraining from competitive activities under the terms of the B2B contract. In this respect, the Polish legislator should guarantee the economically dependent self-employed workers protection modelled on the provisions of the Labour Code pertaining to the situation of employees;
c) protection of client's property;
d) confidentiality of information the disclosure of which could be harmful to the client;
e) compliance with the order and organisation of work, including working time, established by the client organising the self-employed worker's work. In the case of economically dependent self-employed workers, the law on the legal status of self-employed workers must introduce a separate obligation to confirm the number of hours of work performed for a specific client that is subject to the protection of payment of the minimum hourly rate;
f) respect for the principles of social coexistence in the workplace.

149 For more information see K. Czub, *Komentarz do Article 355 KC*, [in:] M. Balwicka-Szczyrba, A. Sylwestrzak (eds.), *Kodeks cywilny. Komentarz aktualizowany*, LEX 2024.

150 In its judgment of 6 October 2016. (I ACa 246/16, LEX, no. 2162996), the Court of Appeal in Łódź held that the standard of due diligence included in Article 355(2) of the Civil Code means that the diligence required in relations of a given type will have to be taken into account in relation to the knowledge, experience, and practical skills required of an operator undertaking a certain activity. The high degree of diligence required of a debtor is a direct result of the fact that the expectations of a person entering into a contract with them are usually higher than those of a person who is not engaged in the activity in question professionally. The legislator therefore presumes that this person not only has more knowledge and experience than the non-practitioner, but is more reliable and has greater foresight than the non-practitioner.

5. Legal mechanisms against bogus self-employment

As discussed in Chapter III of the monograph, the mechanisms in place in Poland to counteract the prevalence of self-employment under conditions typical of an employment relationship are ineffective, and the rates of bogus self-employment remain very high. Therefore, urgent intervention by the legislator is needed in this area to create a greater synergy between mechanisms to counteract this problem not only by means of labour law but also to tax law and social security law.[151] An analysis of the legislation of the other European countries studied in this research project has demonstrated that bogus self-employment is prevalent in most of them, and that the legal mechanisms in place in those countries are not sufficiently effective in combating this pathology either. In this context, there is a need to create an optimal model for counteracting bogus self-employment that takes into account the standards of international and European Union law and the requirements of the Polish Constitution, as well as the experience of the European countries studied in the research project.

In considering potential solutions to effectively and efficiently prevent and eradicate bogus self-employment in Poland, the following aspects should be noted:

1. The two-tier approach to self-employment with a focus on the notion of economic dependence, proposed in this chapter of the monograph, will undoubtedly have an impact on reducing the rates of bogus self-employment in Poland. It is likely to discourage both clients and self-employed workers from trying to circumvent labour laws. The former will no longer be able to use self-employment to significantly lower labour costs, while the latter will be satisfied with the protection guaranteed to them by the legislator outside the employment relationship (especially in economically dependent self-employed work). However, it is important to bear in mind that too much protection for self-employed workers can be counterproductive. This was pointed out by the EESC in its above-mentioned opinion of 26 February 2009, which noted that recognition of economically dependent self-employed work might lead to people hitherto defined as employees being transferred to the category of economically dependent self-employed work. This might lead to an increase in bogus self-employment, which conceals the employment relationship. Therefore, the limits of the statutory protection of self-employed workers must be skilfully and reasonably drawn, so as not to tip the scales to either side.
2. In order to increase the effectiveness of legal mechanisms intended to prevent and eradicate counteracting bogus self-employment in Poland, it is necessary to clarify the notion of "employer's direction" in Article 22(1) of the Labour Code.

151 In this part of the work, I focus primarily on the mechanisms of preventing and eradicating bogus self-employment specific to labour law. The analysis of these mechanisms from the perspective of social insurance law was made by Marcin Krajewski in the previous chapter of the monograph.

Currently, the law provides no concrete clarification of what this term means, while the scholarship and case law offer a broad variety of interpretations.[152] It is therefore necessary for the Polish legislator to clarify the definition of the employment relationship enshrined in Article 22 of the Labour Code, by indicating the list of minimum elements that satisfy the requirement of "employer's direction," the existence of which in a specific legal relationship – on the basis of an analysis of the actual conditions under which work is being performed in a specific situation – would allow the existence of an employment relationship to be established. In result, a clear boundary could be drawn between an employment relationship and a civil law-based relationships,[153] giving both the authorities (such as the Labour Inspection) and labour courts an important and effective instrument to curtail bogus self-employment. The main issue is that Article 22 of the Labour Code should be amended to specify the universal core components, the presence of which in a given legal relationship would determine its character (creating certainty that it is in fact an employment relationship), and the absence of which would constitute sufficient grounds for challenging the existence of the employment relationship. The core of employee subordination indicated here should be defined by the Polish legislator to allow this relationship to be identified and distinguished from civil law-based forms of work while at the same time not undercutting the autonomy available to independent, highly specialised employees, and not preventing further development of flexible forms of work, including self-employed work. In view of the standards of international and European Union law, the legislation of the European countries studied in the research project, as well as the provisions of Polish labour law and the body of scholarship and case law, it appears that the minimum core component of "employer's direction" in any employment relationship is the right of the employer (i.e. a manger acting on behalf of the employer) to specify the employee's duties, by way of issuing binding orders and instructions. This includes duties relating to both the subject matter of the work (the type of tasks and the manner in which they are to be performed) and the place and time of its performance (the core of the powers of direction).[154] The employer may choose not to exercise this power, giving the employee far-reaching autonomy and independence, but this power is at all times (on an ongoing basis during the course of the employment) vested in the employer on the basis of the employment relationship. Moreover, the orders and instructions in question do not necessarily always have to touch upon the essence of the work provided (the manner in which it is performed). They

152 See the in-depth review of literature and case law on 'employer's direction', [in:] T. Duraj, *Podporządkowanie pracowników*…, pp. 45 et seq.

153 For more information see T. Duraj, *Granice pomiędzy stosunkiem pracy a stosunkiem cywilnoprawnym – głos w dyskusji*, "Gdańsko-Łódzkie Roczniki Prawa Pracy i Prawa Socjalnego" 2017, no. 7, pp. 61 et seq.

154 This element is not present in self-employed work, and its presence should always lead to the conclusion that the legal relationship in question is an employment relationship.

may only specify certain, often secondary, duties of the employee relating to the technical and organisational side of the provision of work. This view is, as the law stands, expressed – although this is not made sufficiently explicit – in the current provisions of Polish labour law.[155] It follows indirectly both from Article 22(1) of the Labour Code, under which "an employee undertakes to perform work of a specific kind for the employer and under the employer's direction and at a place and time designated by the employer," and from Article 100(1) of the Labour Code, which states that "an employee is obliged to perform work conscientiously and diligently and to comply with their superiors' instructions concerning work, if they are not contrary to the provisions of the law or the employment contract." A clearer articulation, in Article 22 of the Labour Code, of the term "employer's direction" is the only effective measure able to eradicate bogus self-employment, because in self-employment, this kind of dependence on the employer does not exist, and the client does not have the power vis-à-vis the self-employed worker to specify, in a binding manner, the obligations related to the tasks performed[156] on an ongoing basis. I therefore propose that the Polish legislator should re-articulate the definition of the employment relationship in Article 22 § 1 of the Labour Code to be worded as follows: "Through the establishment of the employment relationship, the employee undertakes to perform work of a specific type for the benefit and at the risk of the employer, under the employer's direction which gives the employer the right to specify, by means of binding orders and instructions, the employee's duties, and the employer undertakes to employ the employee for pay".[157]

3. The analysis presented in my monograph *Podporządkowanie pracowników zajmujących stanowiska kierownicze w organizacjach* demonstrates that the employer's direction is the only feature that truly distinguishes the employment relationship from other relationships constituting the basis for the provision of work (including those carried out under conditions of self-employment), and is the

155 For more information see T. Duraj, *Podporządkowanie pracowników*…, pp. 74 et seq.

156 The only exceptions are instructions and directions with regard to compliance with health and safety regulations and rules as defined in Article 211(2) of the Labour Code, which, in my opinion – with a view to protecting the life and health of workers at the place of work – may also be given to self-employed workers whose work is organised by the client.

157 Legislative work is currently underway at the Polish Ministry of Labour to modify the Labour Code definition of the employment relationship. According to Marcin Stanecki (Chief Labour Inspector), the new definition would consist of six or seven structural premises based on the existing case law of labour courts. In addition to the criterion of direction, these would be: the employer deciding on the place of work, remuneration, contractors, image, clothing, or tools for work, [in:] G. Osiecki, T. Żółciak, *Potężne narzędzie dla Państwowej Inspekcji Pracy? "Decyzja nawet wbrew woli"*, Money.pl, 24.07.2024, https://www.money.pl/gospodarka/potezne-narzedzie-dla-panstwowej-inspekcji-pracy-decyzja-nawet-wbrew-woli-7052282342533760a.html?fbclid=IwY2xjawEhaZtleHRuA2FlbQIxMAABHW2zCU42cts6lVzNMeEa9U1LDVs1j_5rtQaYsO3cfPFsjW_jLZgG9JLpEA_aem_fcml736KfG1DAIAvmBvl6g (accessed: 25.07.2024). Without knowing the details of the concept, I am completely unconvinced by it at this stage.

foundation of the economic and social nature of subordinated employment.[158] The other structural features of the employment relationship can only be used as complementary criteria that, in a subsidiary manner, help to draw a clear boundary between the employment relationship on the one hand and self-employment and other forms of non-employee work relationships on the other hand, and in this way only contribute to the effectiveness of the efforts to eradicate bogus self-employment. Nevertheless, drawing on international and European Union documents, as well as on the experience of the countries studied in the research project, there is a need to introduce auxiliary (supplementary) criteria into the Polish legal order, which will allow, in practice, for a more effective differentiation of self-employment in the proposed definitional approach (see sections 3.2.2 and 3.2.3) from the employment relationship as defined in Article 22(1) of the Labour Code. In this respect, the criteria set out by the EESC in its opinion on the abuse of self-employed status[159] may prove helpful. When considering the employment status of a person who is nominally self-employed and is prima facie not considered as an employee, it can be presumed that there is an employment relationship and that the person for whom the service is provided is the employer if at least five of the following criteria are satisfied in relation to the person performing the work: they depend on one single person for whom the service is provided for at least 75% of his income over a period of one year; they depend on the person for whom the service is provided to determine what work is to be done and where and how the assigned work is to be carried out; they perform the work using equipment, tools or materials provided by the person for whom the service is provided; they are subject to a working time schedule or minimum work periods established by the person for whom the service is provided; they cannot sub-contract their work to other individuals to substitute them self when carrying out work; they are integrated in the structure of the production process, the work organisation or the company's or other organization's hierarchy; the person's activity is a core element in the organization and pursuit of the objectives of the person for whom the service is provided, and they carry out similar tasks to existing employees, or, in the case when work is outsourced, they perform tasks similar to those formerly undertaken by employees. In turn, ILO Recommendation No. 198[160] on the employment relationship indicates in paragraph 13 that Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include: (a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration

158 For more information see T. Duraj, *Podporządkowanie pracowników*…, pp. 59 et seq.

159 Own-initiative opinion *Abuse of the status of self-employed*, OJ C 161, 06.06.2013, p. 14.

160 ILO Recommendation no. 198 of 31 May 2006 – Employment Relationship Recommendation, https://www.gov.pl/attachment/a08c9ded-3193-43bc-b9fd-925e4c09dfc1 (accessed: 24.05.2024).

of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work; (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker. In my opinion, in view of the above, the most important auxiliary criteria to be taken into account in assessing whether a situation is one of genuine self-employment or bogus self-employment, and ones that the Polish legislator should enshrine in the law, should be as follows: the worker's integration into the structures of the production process; the organisation of work or the hierarchy of the enterprise (full integration into a given organisation); absence of autonomy on the part of the worker with regard to the time and place of work (except in cases where this results from the specific nature of the services provided, e.g. work in a hospital); the performance of work without the economic risk associated with the status of a sole trader; the responsibility of the client towards third parties for the performance of work and its result; performance of work of the same type as, or in substitution for, workers employed concurrently by the client.

4. In order to improve the effectiveness of the existing mechanisms to prevent and eradicate bogus self-employment, consideration should be given to increasing the penalties that may be imposed on businesses that enter into civil law contracts under conditions where, according to Article 22(1) of the Labour Code, an employment contract should be concluded (Article 281(1)(1) of the Labour Code). The current maximum fines that may be imposed by labour inspectors (up to a maximum of PLN 2,000, and up to PLN 5,000 for re-offending), as well as the fines that may be applied by criminal courts (from PLN 1,000 to PLN 30,000) fail to serve the function they are supposedly designed to serve, i.e. to penalise and prevent abuses of the law. In fact, they actually encourage bogus self-employment, which creates much greater benefits than losses for businesses. At this point, let me note – with a negative assessment – the 2021parliamentary bill introducing amendments to the act on the Labour Inspection and to the Code of Civil Procedure,[161] which grants the district labour inspectors the power to issue administrative decisions that establish the existence of an employment relationship, if a labour inspector determines that the legal relationship between the parties, despite the nature of the contract concluded between them, has the characteristics of an employment

161 Publication no. 1134.

relationship.[162] In my opinion, by no means does this proposal solve the problem of bogus self-employment (since an appeal against this decision can be made with a labour court),[163] and the authoritative determination by a state administration body of the content of the employment relationship between the parties (the decision would be immediately enforceable) would be glaringly inconsistent with the contractual nature of this relationship, which is created by a joint declaration of intent made between the parties.[164] Moreover, there would be the risk of violating the constitutional principles of certainty of the legal order, and of respecting the citizens' ability to trust the state. Cases might arise where the decision of a labour inspector to establish the existence of an employment relationship would be taken in a discretionary manner, on the basis of the subjective belief of the inspector. The proper assessment of the situation would depend primarily on the training and preparation of the labour inspector issuing the specific administrative decision. The same facts might lead to different outcomes in terms of finding (or not) that there was an employment relationship. Additionally, there is the issue of liability for erroneous decisions in this respect, which would have to be considered to have been issued in gross violation of the applicable law, resulting in their subsequent revocation in court proceedings.

5. Both the Labour Inspection and the labour courts, including in particular the Supreme Court, should make more effective use of the mechanisms already in place to prevent and eliminate bogus self-employment. In particular, there is the question of effective enforcement of Article 22(1)[1] of the Labour Code, which unequivocally

162 Currently, on the initiative of the Labour Inspectorate, legislative work is underway in Poland to revive this proposal by introducing the relevant power into the act on the Labour Inspection. A labour inspector would then have the statutory right to issue an administrative decision (an independent order) transforming self-employment carried out under conditions characteristic of an employment relationship into an employment contract. The decisions in these cases would be immediately enforceable, and the inspector would take the decision on a discretionary basis if, for example, four of the six (seven) defining prerequisites of an employment relationship included in the Labour Code were met. M. Stanecki, [in:] G. Osiecki, T. Żółciak, *Potężne narzędzie*…

163 Contrary to the expectations behind the proposed regulations, these solutions could lead to an increase in the duration of court proceedings, as entities that hire self-employed workers would frequently bring appeals against the inspectors' decisions, meaning that the labour court, in addition to having to carry out a substantive assessment of the given (employment) relationship, would additionally have to examine the legality of these orders. Another flaw of the proposal is it did not grant to the concerned worker the right to appeal to the labour court against the decision determining the existence of an employment relationship. Depriving the crucial person involved in the matter of the right to challenge this decision in court violates the principle of equal treatment of the parties to the administrative proceedings before the district labour inspector for determining the existence of an employment relationship.

164 A broader analysis of this proposal is beyond the scope of this monograph. A number of pertinent critiques of the cited draft can be found in the opinion of 19 May 2021 prepared by the Supreme Court. See https://orka.sejm.gov.pl/Druki9ka.nsf/0/57FAEBAB216A1EC3C12586DF0043A6DD/%24File/1134-005.pdf (accessed: 5.09.2024).

states that a work relationship that exists under conditions characteristic of an employment relationship is, in fact, an employment based on an employment contract, regardless of the formal name of the contract entered into by the parties.[165] I see a very significant role for the Supreme Court in the proper interpretation of this regulation. For many years, it has unfortunately been guided primarily by the principle of the will of the parties (freedom of contract) when determining the existence of an employment relationship, giving it primacy over the mandatorily applicable provision of Article 22(1)[1] of the Labour Code. I am aware that changing this ill-conceived line of jurisprudential thinking is a process that requires time. Unfortunately, it is sad to note that even now there are judgments in which the Supreme Court repeats – which is, in my opinion, harmful – the notion expressed in the judgment of 3 June 1998,[166] stating that "Article 22(1) and Article 22(1)[1] of the Labour Code are not intended to prevail over the principle of *pacta sunt servanda*".[167]

6. To ensure greater effectiveness of the Labour Inspection's work with a view to curtailing bogus self-employment, there is a need for significant reinforcements in terms of staffing and financing. The current staffing level of 1,500 labour inspectors is glaringly inadequate, and most certainly fails to give the Labour Inspection the ability to properly carry out its statutory tasks, including in the area of preventing and eliminating bogus self-employment.[168]
7. The presumption of the existence of an employment relationship,[169] which some see as the best antidote against bogus self-employment, must be assessed

165 In this respect, it is necessary to develop appropriate guidelines for the Labour Inspection and labour courts. The fact that it is possible to effectively combat pathologies on the Polish labour market is well demonstrated by the practice of the Social Insurance Institution (ZUS) and the Supreme Court in the fight against bogus contracts for specific work (*umowa o dzieło*), the purpose of which was to circumvent the regulations governing the use of contracts for services similar to orders. In result of a restrictive interpretation of the regulations and a uniform line of rulings, this pathology was effectively eliminated without changing the law. See, e.g. ruling of the Supreme Court of 9 April 2019, II UK 105/18, LEX, no. 2642763; ruling of the Supreme Court of 16 April 2019, I UK 172/18, LEX, no. 2647569; ruling of the Supreme Court of 17 April 2019, II UK 123/18, LEX, no. 2650733; judgment of the Supreme Court of 3 October 2013, II UK 103/13, OSNP 2014, no. 9, item 134; judgment of the Supreme Court of 28 August 2014, II UK 12/14, LEX, no. 1521243. On the topic of effective reduction of the scale of the use of bogus contracts for a specific task (*umowa o dzieło*) in connection with the adoption of a consistent and uniform line of jurisprudence by the Social Insurance Institution and the Supreme Court see T. Duraj, *Koncepcja umowy o dzieło twórcze. Analiza krytyczna*, "Acta Universitatis Lodziensis. Folia Iuridica" 2019, vol. 88, pp. 69 et seq.

166 I PKN 170/98, OSNP 1999, no. 11, item 369.

167 For instance, see the recent judgment of the Supreme Court of 23 June 2021, I PSKP 18/21, LEX, no. 3223823.

168 The new Chief Labour Inspector, Minister Marcin Stanecki, points directly to this issue and argues in favour of hiring new inspectors to reach a level of 3000 inspectors, [in:] G. Osiecki, T. Żółciak, *Potężne narzędzie*…

169 According to M. Gersdorf, the mechanism of the presumption of an employment relationship is the result of an archaic approach to the prevailing economic conditions, a failure to

negatively.[170] This is, of course, hardly a new development. As early as 2006, ILO Recommendation no. 198 (Employment Relationship Recommendation) was adopted, which provided for a presumption of an employment relationship. In accordance with paragraph 11(b) of this instrument, in order to facilitate the establishment of the existence of an employment relationship, member states should, within the framework of national policy, consider the possibility of introducing in their legal orders a legal presumption that an employment relationship exists when one or more of the indicators set out in the above-cited paragraph 13 of this document are present.[171] There have already been attempts in the past to introduce this mechanism into the Polish legal order, but they ultimately failed.[172] I am referring here to the 2018 draft of the Labour Code, which expressis verbis provided for the presumption of an employment relationship, stating that the performance of work under the conditions characteristic of an employment relationship was in fact an employment relationship, regardless of the name of the contract entered into

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recognise the heterogeneity of the market and the dangers inherent in it. See M. Gersdorf, *Nowe trendy…*, pp. 35 et seq.

170 In Poland, as the law stands, there is no presumption of an employment relationship in the Labour Code. This is the consensus in the scholarship and case law. (For more information see T. Duraj, *Granice pomiędzy…*, pp. 61 et seq.). In the judgment of 27 May 2010 (II PK 354/09, LEX, no. 598002), the Supreme Court unequivocally ruled that Article 22(1)[1] of the Labour Code (which stipulates that employment under the conditions characteristic of an employment relationship as defined in Article 22(1) of the Labour Code is employment on the basis of an employment relationship, regardless of the name of the contract entered into by the parties) does not create a legal presumption of an employment relationship. In the judgment of 2 August 2000 (I PKN 754/99, Lex, no. 1224661), the same Supreme Court also ruled that the above-cited provisions of the Labour Code give no reasons to find that any work provision happens as part of an employment relationship. See also e.g.: judgment of the Supreme Court of 29 June 2010, I PK 44/10, OSNP 2011, no. 23-24, item 294; judgment of the Supreme Court of 7 July 2000, I PKN 727/99, Lex, no. 1223707; judgment of the Supreme Court of 23 September 1998, II UKN 229/98, OSNP 1999, no. 19, item 627.

171 With reference to platform work, this is enshrined in the 2024 Directive of the European Parliament and of the Council on improving working conditions in platform work; Article 5(1) stipulates that the contractual relationship between a digital labour platform that controls the performance of work and a person performing platform work through that platform is to be legally presumed to be an employment relationship, if there is the element of control and supervision, according to national law, collective agreement, or practice in member states, taking into account the case law of the CJEU. For more information see T. Duraj, *Implementacja do polskiego porządku prawnego Dyrektywy platformowej – problem domniemania stosunku pracy (wprowadzenie do dyskusji)*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2024, vol. 31, part 4 (submitted for publication).

172 Proponents of the presumption of an employment relationship believe that this mechanism would help to overcome axiological barriers and strengthen the protection of the employee by giving the employment relationship stronger protection. See, e.g. A. Sobczyk, *W sprawie ustalenia istnienia stosunku pracy*, [in:] T. Kuczyński, A. Jabłoński (eds.), *Prawo pracy i prawo zabezpieczenia społecznego. Teraźniejszość i przyszłość. Księga jubileuszowa profesora Zdzisława Kubota*, Warszawa 2018, pp. 199 et seq.; A. Musiała, *Glosa do wyroku SN z dnia 22 kwietnia 2015 r., II PK 153/14*, OSP 2016, no. 6, pp. 865 et seq.

by the parties. In particular, work provided by self-employed workers within the organisational unit of the client is work performed under an employment contract (Article 47(1)). Significant doubts concerning the determination of whether the work is carried out in the form of employment or self-employment are to be resolved by the court in favour of the employment relationship (presumption of employment relationship). The burden of proof is on the employer denying the existence of this relationship (Article 50). In establishing the existence of an employment relationship, the court determines that it has been established on the basis of the type of employment contract that best suits the purpose of the employment (Article 51). The proposed construction of the presumption of an employment relationship has a number of significant drawbacks. Firstly, it violates the provisions of the Constitution of the Republic of Poland, in particular the principle of freedom of economic activity (Article 20 of the Constitution of the Republic of Poland) and the principle of freedom of choice and pursuit of a profession (Article 65(1) of the Constitution of the Republic of Poland). It is also incompatible with the permissible degree of interference with civil liberties and rights, which, under Article 31(3) of the Polish Constitution, can only be restricted in exceptional cases, only by a statute, and only if necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or the freedoms and rights of others. These restrictions must not affect the essence of freedoms and rights, which is precisely the situation in the concept under consideration. Secondly, the construction of a presumption of an employment relationship would lead to an excessive interference with one of the fundamental principles of freedom of contract (Article 353^1 of the Civil Code) and freedom to choose the basis of work provision. Thirdly, the construction fails to solve any of the current problems that arise in terms of drawing the distinction between employment and self-employment. This is due to the fact that the 2018 draft of the Labour Code refers, in its Article 50, to the criterion of direction.[173] The client, in order to rebut the presumption of an employment relationship, would have to demonstrate before the court that the work was not performed under its direction. The problem is that the Polish law (as mentioned earlier) contains no definition of the term "direction" and therefore the presumption of an employment relationship could prove to be irrebuttable. Fourthly, since self-employed workers would likely be the most frequent claimants initiating these proceedings, because on the whole self-employed workers tend to be generally dissatisfied with their status due to the lack of minimum protective guarantees, the implementation of this mechanism would result in the labour courts being flooded with (often unsubstantiated) claims to recognize the claimant's employee status, which would paralyse the system. Fifthly, I am also not convinced by the proposed solution in the directive on improving working conditions in platform work to grant labour

173 The same reference is made in the directive on improving working conditions in platform work (Article 5(1)).

inspectors the power to initiate proceedings on the presumption of an employment relationship.[174] The mechanism does not eliminate the risk of discretionary decisions on the subject, all the more so since it makes the presumption of an employment relationship dependent on the criterion of direction, which, under Polish labour law, is interpreted in a variety of ways across scholarship, case law, and practice. In addition, burdening the Labour Inspection with additional duties in terms of verifying the legality of employment and initiating proceedings concerning the presumption of an employment relationship will exacerbate the already-existing problems of its inefficiency. The directive on improving working conditions in platform work, by introducing the presumption of an employment relationship, optimistically assumes that, in order for inspection bodies to be able to enforce the directive, member states must ensure that their inspection staff is trained and prepared for the challenge. This requires adequate staffing as well as access to relevant specialised training. Meanwhile, the Polish Labour Inspection is already overburdened, due to its remit being constantly expanded by the legislator. It is also permanently underfunded, and the current staffing level of 1,500 labour inspectors nationwide is absolutely insufficient. Sixthly, the introduction of the presumption of an employment relationship into the Polish legal order would simply cause a boom in unreported employment, with workers deprived of any protection at all.[175] Converting all work-centred relationships into employment relationships would render many businesses unprofitable, since high labour costs (especially in the form of public-law levies) erode their competitiveness and render them incapable of generating a profit.[176]

8. An additional boost to the effectiveness of the efforts to eliminate self-employment in breach of Article 22 of the Labour Code should be provided by the tax law regulations that should prevent, more effectively than is currently the case, by means of Article 5b of act on the person income tax,[177] workers who are falsely self-employed from applying the more favourable taxation rules. Furthermore, social insurance law should require full coverage of civil law contracts constituting the basis for self-employment in terms of social insurance contributions.[178]

174 According to the proposed wording, the decision on the presumption of employment would be immediately enforceable.

175 According to data from Statistics Poland, the frequency of informal work arrangements has significantly dropped in the recent years, from 880.000 in 2017 (5,4% of all workers) to 324.000 in 2022 (2,0%). The introduction of the construction of a presumption of an employment relationship could significantly worsen these statistics.

176 Some workers prefer self-employment, as a more flexible and financially advantageous form of providing paid work. For more criticism of the construction of the presumption of an employment relationship, see T. Duraj, *Implementacja do polskiego porządku*…

177 Act of 26 July 1991 on personal income tax, uniform text Dziennik Ustaw of 2024, item 226 as amended.

178 The matter is discussed in more detail in the chapter IV by Marcin Krajewski.

6. Liability for violations of regulations intended to protect self-employed workers

The proposed legal model of self-employment in Poland should be complemented by regulations laying down the rules for the liability of the client (entity commissioning the work) towards the self-employed workers for violations of the regulations designed to offer protection to these workers, as well as for the liability for using self-employment in an attempt to circumvent labour law. This is necessary to guarantee the full effectiveness of the provisions of the act on the legal status of self-employed workers, and will ensure that these workers are actually able to benefit from the rights and protections laid down in the law. I therefore believe that the following regulations should be introduced into the act on the legal status of self-employed workers:

1. As a first step, the scope of the Labour Inspection's powers with regard to self-employment should be extended, in terms of what and whom it can inspect. These powers should cover all entities that commission self-employed work regardless of their legal status and of the extent to which they hire labour,[179] as well as to all areas of regulation in which the legislator guarantees protection to self-employed workers. In particular, the Labour Inspection's powers must cover: protection against discrimination, unequal treatment and harassment; respect for dignity and other personal rights; protection of remuneration, including remuneration above the minimum hourly rate and the permissibility of deductions; parental rights; the right to rest; the use of monitoring or sobriety checks in the workplace. As the law stands, the scope of the Labour Inspection's powers is very limited and covers only selected areas, namely: 1) health and safety at work; 2) the legality of employment or other legal relationships on the basis of which work is provided, particularly in the context of false (bogus) employment; 3) the payment of remuneration only at the minimum hourly rate; 4) the assignment to self-employed workers of commercial work or activities in commercial establishments on Sundays and public holidays and on certain other days covered by the statutory prohibition; 5) road transport as regards self-employed drivers. The Labour Inspection has no powers when it comes to other issues not expressly mentioned by the legislator. This is incompatible with the Constitution of the Republic of Poland and with the norms of international laws that require that the supervisory powers of the state, by means of national authorities, in respect of compliance with the regulations governing working conditions and protection in the exercise of an

179 Unlike in the case of employment, the scope of the Labour Inspection's powers as regards entities that hire self-employed workers is very limited and includes a closed list of entities, enumerated by the legislator in Article 13 of the act on the Labour Inspection, in relation to which the authority may carry out inspection activities.

occupation, should cover all workers, regardless of the legal basis on which they provide work.[180]

2. In order to boost the effectiveness of the statutory protection guaranteed to self-employed workers, the provisions governing liability for petty offences (*wykroczenia*) should be amended. It is necessary to extend the personal and material scope of this liability to include infringements concerning self-employed workers, so that these offences should be considered offences against the rights of workers.[181] As the law stands, this liability mainly concerns breaches of labour law that constitute offences against employee rights.[182] Only to a very limited extent does it pertain to non-employee relations. This applies in particular to: responsibility for the state of health and safety at work (Article 283 of the Labour Code), concluding civil law contracts in conditions where, pursuant to Article 22(1) of the Labour Code, contracts of employment should be concluded (Article 281(1)(1) of the Labour Code) and paying the person accepting a commission or providing services a remuneration for each hour of order performance or provision of services in an amount lower than the applicable minimum hourly rate (Article 8e of the minimum wage act). The idea here, in contrast, is that this liability should cover any entity (and persons acting on its behalf) that commissions work from self-employed workers, and should apply to all violations of the provisions guaranteeing the protection of this category of workers. Such an extended list of offences would have to be expressly included in the law on the legal status of self-employed workers. The 2007 draft of the Labour Code provided in its Article 383 as follows: if any entity contracting work to economically dependent self-employed workers (or a person acting on its behalf): 1) fails to confirm in writing the contract concluded with the worker who requested such confirmation; 2) violates the provisions on the parental rights of the worker; 3) fails to pay the remuneration or other benefit to which the worker is entitled within the stipulated time limit or unduly reduces the amount of such remuneration or benefit or makes unjustified deductions, is punishable by a fine.
3. The Polish legislator should consider increasing the penalties that can be applied for offences against the rights of workers. The current level of fines imposed by labour inspectors by way of criminal fines (up to a maximum of PLN 2,000, and up to PLN 5,000 in the case of repeated offences), as well as the level of penalties applied by criminal courts (from PLN 1,000 to PLN 30,000) fail to serve their basic functions (to penalise and prevent), and actually encourage offences against the

180 For more information see T. Duraj, *Podstawa zatrudnienia a postępowanie kontrolne Państwowej Inspekcji Pracy*, "Ubezpieczenia Społeczne. Teoria i Praktyka" 2024 (in print).

181 In the Criminal Code, the title of Chapter XXVIII is: Crimes against the rights of persons who work for money.

182 As indicated by the very title of Chapter XIII of the Labour Code: Liability for offences against the rights of employees. For more information see S. Kowalski, *Wykroczenia związane z zatrudnianiem pracowników i innych osób wykonujących pracę zarobkową. Komentarz do ustaw szczegółowych*, Warszawa 2019.

rights of workers, which may work out to be more profitable for businesses than compliance with the law.

4. The Polish legislator should expand the subjective scope of criminal liability of the client for offences against the rights of workers. As the law stands, although Chapter XXVIII of the Penal Code is entitled: *Crimes against the rights of persons who work for money*, often criminal law protection is limited only to employees, using this term expressis verbis, leaving out the self-employed workers and other persons who provide work. This is evident in relation to two criminal acts: malicious or persistent violation of an employee's rights (Article 218 of the Criminal Code) and endangering the life or health of an employee (Article 220 of the Criminal Code). There are therefore reasonable doubts both in legal scholarship and in case law as to whether the criminal law protection in these situations applies only to employees within the meaning of Article 2 of the Labour Code or whether it should also be extended, as the title of Chapter XXVIII of the Penal Code would suggest, to all persons performing work (and therefore also to self-employed workers).[183] In its case law, the Supreme Court has attempted to extend this protection not only to employees but also to workers who provide work on the basis of bogus (inappropriately made) civil law contracts. In this respect, the Supreme Court resolution of 15 December 2005 played an important role.[184] According to its reasoning, the main object of protection in the norms contained in Article 220 of the Criminal Code is the rights of a person in an employment relationship within the meaning of Article 22(1) of the Labour Code, i.e. in such a relationship as (taking into account its actual features) is or should be established by means of one of the legal acts specified in Article 2 of the Labour Code. However, this expansive interpretation is opposed in criminal law scholarship. According to Jacek Izydorczyk, "substantive criminal law is a so-called close-ended branch of law, and any 'broadening interpretations' – including, above all, as it refers to any suspects or defendants in criminal trials – are manifestly prohibited." This also applies to the legal qualification of the conduct under Article 220 of the Criminal Code. Therefore, urgent intervention of the Polish legislator is necessary in this regard, expressly extending the criminal law protection regulated in Chapter XXVIII of the Criminal Code to self-employed workers and other persons performing work. I also believe that the list of prohibited acts in Chapter XXVIII of the Criminal Code should be supplemented with the offence of mobbing, as a glaring example of the violation of the rights of workers.

183 For more information see J. Izydorczyk (and the literature and case law cited therein): *Prawnokarna ochrona pracownika na podstawie przepisów art. 220 Kodeksu karnego*, "Acta Universitatis Lodziensis. Folia Iuridica" 2022, vol. 101, pp. 205 et seq.

184 I KZP 34/05, OSP 2006/7-8/93.

7. Mechanisms for promoting self-employment in Poland

The law on the legal status of self-employed workers should also provide a basis for improving the mechanisms designed to promote self-employment, so as to more effectively encourage individuals to start their own business, which would contribute to reducing the scale of unemployment in Poland. The current regulations fail to offer convincing incentives to use the funds available to those who contemplate becoming a sole trader. The analysis presented in Chapter III of the monograph shows that the large number of requirements that must be satisfied in order to be eligible for a subsidy from the Labour Fund, as well as the very complicated procedure for obtaining the funds, results in relatively low uptake. Therefore, the Polish legislator, in addition to relevant mechanisms in the area of tax law and insurance law (which should be designed to encourage taking the risk of self-employment) must simplify the procedures related to the availability of financial assistance from the Labour Fund, including the costs of legal aid, consultancy and advisory services related to the becoming a sole trader.

I believe that the best solution would be to create a separate chapter in the law on the legal status of self-employed workers, which would comprehensively regulate all issues concerning the promotion of self-employment, taking into account the specific nature of this form of work. I believe that regulating the matter in the act of 20 April 2004 on the labour market and employment services[185] would not be the best option, because this act regulates the entirety of issues related to tackling unemployment. Promotion of self-employment, as a matter of marginal significance to that larger issue, would get lost in the multitude of complex regulations and would not be properly exposed. The Polish legislator should take the Spanish LETA as the model here. Title V of LETA, on promoting self-employment, comprehensively regulates all the relevant matters. In its general provisions, LETA states that the public authorities, within the scope of their powers, should adopt a policy to promote self-employment, with the aim to create and develop economic and professional initiatives of self-employed workers. Key elements of this policy include, in particular: (a) removing the obstacles that prevent the launching and developing of self-employed ventures; (b) facilitating and supporting various self-employment initiatives; (c) introducing exemptions, reductions and waivers with regard to social security contributions; (d) promoting the spirit and culture of entrepreneurship; (e) promoting vocational training and readaptation for those intending to become self-employed; (f) providing the necessary information and technical advice; (g) facilitating access to technological and organisational innovation processes, in order to improve the productivity of self-employed work; (h) creating an environment conducive to the development of economic and professional initiatives in self-employment; (i) supporting entrepreneurs in innovative activities related to new sources of employment, new technologies or activities of public, economic

185 Uniform text: Dziennik Ustaw of 2023, item 735 as amended.

or social interest (Article 27 of LETA). The development of policies to promote self-employment aims to achieve efficiency in equalising opportunities between women and men, with a particular focus on disadvantaged or under-represented groups, offering preferential treatment to persons with disabilities. In addition, the Spanish legislator promotes vocational training and technical counselling for those intending to run a sole proprietorship. According to Article 28 of LETA, promotion of self-employment aims in particular to: integrate it into the educational system, including the vocational training system; promote further training and readaptation of self-employed workers; facilitate their access to vocational training programmes aimed at improving their professional preparation and developing their managerial skills. The promotion of self-employment should also take into account the need for information and technical advice and the creation of communication and cooperation mechanisms between self-employed workers. The public authorities, within their remit and within the framework of their commitments in the European Union, should adopt financial assistance programmes for entrepreneurial economic initiatives, as well as foster the promotion of self-employment through appropriate fiscal policies (Article 29 of LETA). Other interesting solutions were proposed in the United Kingdom, where the legislator is introducing a number of mechanisms to support entrepreneurship and self-employment.[186]

Legislative work is currently underway to adopt a new law on the labour market and employment services. Unfortunately, the Polish legislator failed to draw the right conclusions from the current regulatory status, and therefore the solutions proposed in the draft with regard to the promotion of individual entrepreneurship and self-employment merely perpetuate the shortcomings of the act of 20 April 2004, introducing extensive requirements and complex procedures for applying for financial aid to start operating as a sole trader. Without going into the details of the proposed legislation,[187] the document proposes the introduction of the following mechanisms for promoting self-employment:

1. Providing financial assistance from the Labour Fund to an unemployed person or jobseeker in acquiring knowledge, skills or qualifications that increase the chances of taking up and maintaining employment, finding other work opportunities, or becoming a sole trader (Article 99 of the draft).
2. One-off financial assistance from the Labour Fund granted at the discretion of *starosta* to start operating as a sole trader, including the costs of relevant legal assistance, consultancy and advisory services, in an amount specified in the

186 For more information see the chapter written as part of this research project by C. Barnard and D. Georgiou: *Self-employment in UK law*, "Acta Universitatis Lodziensis. Folia Iuridica" 2023, vol. 103, pp. 97 et seq.

187 A detailed analysis of the draft act on the labour market and employment services is beyond the scope of this monograph and requires separate study. Furthermore, the draft is merely a preliminary proposal of legislative solutions, which may still be subject to many modifications.

agreement, but not higher than 6 times the average monthly wage (Article 147 et seq. of the draft).

3. Business start-up loan financed from the Labour Fund or European Union funds for: the unemployed; those not in employment or other work; jobseekers not in employment or other work; carers of a disabled person; final year students not in employment or other work; returnees from abroad. In addition, the draft provides for the possibility of financing (from the same sources) advisory and training services for persons who have been granted a start-up loan (Article 172). The loan is to be granted at the request of the eligible person, upon presentation of a description and a cost estimate of the intended business activity, in an amount to be specified in the agreement, but not higher than 20 times the average monthly wage. The loan can represent up to 100% of the cost of starting a business. Its interest rate is to be fixed at 0.25% per annum. The repayment period of the loan may not exceed 7 years, with the possibility of a grace period for repayment of the principal of up to 12 months. Repayment of the loan is to be made to the account of the relevant financial intermediary, and the borrower is not to bear the fees and costs for granting and servicing the loan (Article 174).

8. Final comments

A detailed review of self-employment in light of international law, European Union law, selected national legal systems as well as the Polish legal system served as a basis for creating a proposed legal model of self-employment in Poland that fully takes into account the foundational assumptions set out in the introduction to this chapter. This comprehensive approach to the legal situation of self-employed workers facilitates a redefinition of the legal status of these workers, acknowledging the need to provide them with adequate protective guarantees that account for the specific nature of self-employment while at the same time allowing for differentiation on the basis of the workers' economic dependence on the client.

The optimal model of self-employment in Poland, proposed in the monograph, clarifies the legal situation of self-employed workers in terms of the principles of service provision, working conditions, responsibility for performance of the work, and the scope of social and insurance protection. Its implementation will contribute to resolving a number of disputes and clarifying a number of doubts that currently exist in legal scholarship and in case law. The proposals, comments, and suggestions contained herein should help the Polish legislator to draft the law on the legal status of self-employed workers that will regulate, in a comprehensive and systematic manner, the most important aspects of self-employed work, with particular emphasis on the social protection of the workers.

The remarks formulated at the conclusion of the research project offer an important contribution to the development of labour and social security law scholarship,

enriching relevant the discourse. They also have a universal value, going well beyond the issue of self-employment: the research results provide a basis for general conclusions indicating new directions for the future development of labour law. They prompt reflection on the legitimacy of extending labour law protections to different categories of workers who provide work outside the employment relationship (especially under conditions of economic dependence on the client), on the scope of this protection, and on the most important criteria for its differentiation. The problem requires reflection on the very foundations of labour law and its most fundamental legal constructions. It is linked to the concept of the expansion of labour law into non-employment relations (including self-employment), the consequence of which may well be the replacement of labour law by so-called employment law.

The proposals and suggestions made herein should be treated as a voice in the discussions on the optimal model of legal protection of self-employment (non-subordinated employment) in Poland, and as a contribution to a broader debate on this issue among academics and practitioners dealing with employment law in its broadest sense. At this point, as head of the international research project, I would like to thank all the participants for their outstanding commitment and valuable contribution to the research project and to its results, which have culminated in this monograph.

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