Law

In Search of a Legal Model of Self-Employment in Poland

A Comparative Legal Analysis
Part II

edited by
Tomasz Duraj

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UNIWERSYTETU
ŁÓDZKIEGO

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Chapter I

Introduction into the international research project "In Search of a Legal Model of Self-Employment in Poland A Comparative Legal Analysis" – part II[1]

Tomasz Duraj
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We hereby present to you the result of the work of scholars from various European countries who joined the research project funded by the National Science Centre and led by Tomasz Duraj, titled "In Search of a Legal Model of Self-Employment in Poland. A Comparative Legal Analysis" (amount awarded: PLN 202,440). The project was ranked third in the OPUS 15 programme's legal panel. Work began in January 2019, and the team was joined by outstanding scholars from various academic centres around Europe: Prof. Catherine Barnard from the University of Cambridge, Prof. Rolf Wank from Ruhr-Universität Bochum, Prof. Gyulavári Tamás from Pázmány Péter Catholic University, Dr Ingrida Mačernytė Panomariovienė from the Law Institute of the Lithuanian Centre for Social Sciences, as well as Prof. Aneta Tyc, Dr Tatiana Wrocławska, Dr Marcin Krajewski, and Dr Mateusz Barwaśny from the University of Lodz.

The chief research objective tackled by the project participants consisted in a complex legal analysis of self-employment – not only from the perspective of Polish regulations and case law, but also with regard to solutions existing in international law, European Union law, and selected European countries. The area of study covered the legal systems of the United Kingdom, Germany, Austria, Spain, France, Italy, Hungary, as well as Lithuania, Latvia, and Estonia. Research design was rather innovative. To date, no large-scale research had been conducted into the legal environment as it pertains to self-employment, encompassing not only the Polish regulations and case law, but also the solutions adopted in international law, European Union law, and the laws of selected European countries. The inclusion of

1 The monograph was funded by the National Science Centre (agreement no. UMO-2018/29/B/HS5/02534, research project no. 2018/29/B/HS5/02534).

the regulations on self-employment in other countries, processed to fit within in the framework of a structured study, provides added value for Polish legal scholarship.

The final result of the international research project "In Search of a Legal Model of Self-Employment in Poland. A Comparative Legal Analysis" is the two twin studies to be published by Lodz University Press: one in Polish, in the form of a multi-author monograph, and the other one in English, in two parts. The first one has already been published in open access, as an issue of the journal *Acta Universitatis Lodziensis. Folia Iuridica* (vol. 103).[2] The volume includes papers on: self-employment in view of international law and European Union law (M. Barwaśny); self-employment in view of the laws of the countries that make up the United Kingdom (C. Barnard, D. Georgiou); self-employment in view of German and Austrian law (R. Wank); self-employment in view of Spanish law (A. Tyc); self-employment in view of French and Italian law (A. Tyc), as well as self-employment in view of Hungarian law (T. Gyulavári).

This monograph, in turn, contains five chapters, one introductory and four focusing on findings. Chapter II discusses self-employment in view of the legal systems of the Baltic states (I. Mačernytė Panomariovienė, T. Wrocławska). Chapter III presents an in-depth, multifaceted discussion of the Polish regulations that pertain to self-employment, taking into account the relevant scholarship and case law (T. Duraj). The chapter includes critical comments on the regulatory status quo as it pertains to self-employment in Poland. However, it leaves aside the insurance-related aspects of self-employment, because they are discussed separately in Chapter IV (M. Krajewski). The focus in Chapter IV is first on a theoretical review of self-employment in view of Polish regulations on social insurance, and then on an attempt to a devise a uniform, coherent concept of self-employment within the framework of the Polish social insurance system. The monograph ends with Chapter V (T. Duraj), which recapitulates the findings of the research project, and on their basis proposes an optimal legal model of self-employment in Poland, taking into account the Polish scholarship and case law to date, the relevant international and European Union law, and the solutions adopted in the European countries studied within the project. The comments as to the potential future regulatory approaches are designed to help the Polish legislator draft a new law on the legal status of self-employed workers, in order to systematically and comprehensively regulate the key aspects of self-employed work, with particular emphasis on the social protection of the workers. 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 proposed optimal legal model of self-employment in Poland outlined in this chapter has a universal dimension, going much beyond self-employment as such. The research results suggest certain conclusions that offer a springboard for

2 "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, https://www.czasopisma.uni.lodz.pl/Iuridica/issue/view/1759 (accessed: 10.09.2024).

a broader discussion about the future of labour law. They encourage reflection on the need and legitimacy of expanding the applicability of protective regulations of labour law, with a view to bringing under their umbrella various new groups of workers who provide work, independently, outside the employment relationship (in particular under conditions of dependence on the client). The scope of this protection and manner of its differentiation require further critical reflection and development.

Several research methods were employed throughout the project, as befits the multi-layered nature of the necessary research on the legal status of self-employed workers, and as befits the interdisciplinary approach to the issue. The key method was a formal dogmatic approach, which consist in a rigorous, multi-layered analysis of the norms that apply to self-employed workers. Furthermore, the legal comparative method was also applied to a large extent. The regulations in force in the selected legal systems of European countries studied within the research project were evaluated in terms of their potential usefulness for the Polish legal order, and have served as stepping stones towards the development of the legal model of self-employment in Poland. Taking into account the specific nature and special character of labour law, the monograph also engages with the axiological method, which consists in referencing the fundamental values that should guide the legislator in determining the legal situation of self-employed workers. Furthermore, the historical method was also used. It was helpful in demonstrating the changes in the legislator's approach to the protection of self-employed workers, which has resulted in the gradual expansion of labour law. This method is also present in the analysis of the legal mechanisms for preventing and eliminating bogus self-employment.

Throughout the project's duration, its participants published their partial findings in journals and monographs, and presented them at various international and regional conferences. The complete list of the publications and other knowledge dissemination efforts within the research project "In Search of a Legal Model of Self-Employment in Poland. A Comparative Legal Analysis" in the period 2019–2024 is available on the project's website hosted by the Faculty of Law and Administration at the University of Lodz.[3] With my heartfelt thanks to the project's participants for their professional expertise and commitment in pursuing the project's objectives, I hereby release into the hands of its readership the second part of the publication as an open-access multi-author monograph.

3 The project's website is: https://www.wpia.uni.lodz.pl/en/struktura/centra-naukowe/centrum-nietypowych-stosunkow-zatrudnienia/international-research-project-in-search-of-a-legal-model-of-self-employment-in-poland-comparative-legal-analysis (accessed: 10.09.2024).

Chapter II

Self-employment in the legal systems of the Baltic states

Ingrida Mačernytė-Panomariovienė
Tatiana Wrocławska
https://doi.org/10.18778/8331-526-3.02

1. Legal regulations concerning self-employment in the law of the Republic of Lithuania

1.1. Introductory remarks

According to the data of the Lithuanian statistical office, the number of self-employed persons in the country in 2018 amounted to 150,000. While the analysed group expanded to 152 550 in 2019, the following year saw a certain, albeit minor downward trend, with the number of the self-employed falling to 150 500.[1] Based on the data of the OECD and the applied definition of self-employment, the number of self-employed workers amounted to 11.8% of all working persons.[2] It is noted that the reasons for the popularity of this form of providing work in Lithuania are chiefly: financial facilities that began to be applied to persons who start their business activity as well as new forms of providing work, i.e. work via digital platforms. In practice, it is common for self-employed persons to combine this form of work with work under an employment relationship. Those who derive their income exclusively from self-employed activity make up for between 8.8% and 9% of all self-employed.[3]

When analysing the circumstances of choosing self-employed activity in a study conducted in Lithuania in 2017,[4] 57% of the respondents said it had been their own

1 Department of Statistics of the Republic of Lithuania, https://osp.stat.gov.lt/lt/statistiniu-rodikliu-analize?hash=61d4d5df-b701–4ace-95c9-a90637b733c4# (accessed: 17.07.2024).
2 *Self-employment rate (indicator)*, OECD, 2021, https://doi.org/10.1787/fb58715e-en
3 Department of Statistics of the Republic of Lithuania…
4 *Exploring self-employment in the European Union*, Eurofound, Publications Office of the European Union, Luxembourg 2017, https://www.european-microfinance.org/sites/default/

decision, 23% pointed to economic pressure, and 19% answered it had been a combination of those two reasons.[5] Interestingly, as many as 89% of the respondents stated they were satisfied with being their "own employers",[6] which is equal to the EU average, although as many as 58% of the study participants viewed running their own business as involving a high liability risk (a percentage well above the EU average of 26%).[7] Asked about the level of difficulty in terms of financial burdens and losses in the face of a prolonged illness, 48% of the respondents estimated their situation as difficult (which corresponds to the EU average).[8]

1.2. Definitions of self-employment

The status of the self-employed in Lithuania is to some extent regulated by insurance provisions: Sickness and maternity law; Social Insurance Act; Health insurance law[9] Under Article 2(9) of the Social Insurance Act,[10] the concept of persons who carry out self-employed business activity ("savarankiškai dirbantys asmenys"[11]) covers owners of individual (sole trader) enterprises, members in small partnerships, shareholders (in Lithuanian literally "full members") of companies and limited partnerships, as well as persons who run individual business activity within the meaning of the Income Tax Act (attorneys-at-law, attorney-at-law assistants, notaries, bailiffs, persons licensed to carry out business activity, and others), persons who carry out individual agricultural business activity, as well as persons who earn their income under a copyright contract or based on their sporting activity or activity carried out by performers (with the exception of persons who work under an employment contract).[12] Individual concepts concerning the self-employed are additionally specified under the Income Tax Act.[13] According to its provisions, individual activity is

files/document/file/exploring-self-employment-in-the-european-union.pdf (accessed 19.07.2021).

5 *Ibidem*, p. 11.

6 *Ibidem.*

7 *Ibidem*, p. 12.

8 *Ibidem*, p. 13.

9 Lietuvos Respublikos ligos ir motinystės socialinio draudimo įstatymas, "Valstybės žinios", 19.12.2000, no. 111–3574. New edition from 1.01.2017: no. XII-2501, 28.06.2016, published TAR 15.07.2016. Lietuvos Respublikos valstybinio socialinio draudimo įstatymas, "Lietuvos aidas", 31.05.1991, no. 107–0. New edition from 1.01.2017: no. XII-2508, 29.06.2016, published TAR 15.07.2016. Lietuvos Respublikos sveikatos draudimo įstatymas, "Valstybės žinios", 12.06.1996, no. 55–1287.

10 Lietuvos Respublikos valstybinio socialinio draudimo įstatymas, "Lietuvos aidas", 31.05.1991, no. 107–0. New edition from 1.01.2017: no. XII-2508, 29.06.2016, published TAR 15.07.2016.

11 This expression is translated as "self-employed person".

12 Article 9 of the Act. Lietuvos Respublikos gyventojų pajamų mokesčio įstatymas, "Valstybės žinios", 19.07.2002, no. 73–3085.

13 Article 2(7), (8) and (9) of the Act.

construed as "independent activity"[14] aimed at generating income or other economic benefits over a continuous (uninterrupted) period. This includes any independent trade or production activity, with the exception of trading in real estate and transactions involving financial instruments. In addition, it includes independent creative, scientific, and professional activities and other independent activities of a similar nature, as well as independent sporting activities and independent activities of performers. Subsequent provisions of the article in question add clarifications regarding sporting activities and the activity of performers. The latter is defined as the activity of a performer, i.e. an actor, singer, conductor, musician, or dancer, including other similar activities involving preparation for and participation in public performances. However, the term "performer" does not include persons who take part in the process of preparing and creating a work, but do not participate in its public performance.

As for the definition of self-employed activity, another thing worth noting is the Employment Act (employment law).[15] It should be added that before the law was passed, self-employed persons were mentioned in the Support for the Unemployed Act[16] in the context of encouraging them to set up one-person businesses. The law was replaced with the Employment of Residents Act, although in fact, it was not clear how a self-employed person should be perceived – due to the lack of clarifying criteria – until 2009, when the Employment Support Act came into force.[17] This regulation defines: the main forms of employment, the system of employment support for jobseekers, the purpose and tasks of entities that implement employment support policies, the organization and financing of labour market services and employment support measures, as well as responsibility for illegal work, undeclared work, and undeclared self-employment (Article 1(1) of the Act). The law introduces the concept of "employment", which means a paid or unpaid independent, semi-independent or dependent activity of an individual through which they obtain a livelihood, as well as an activity that a person undertakes in order to acquire work or professional skills or to perform other continual activities subject to the rules laid down in legal provisions. In turn, an "employed person" ("užimtas asmuo") is understood to mean a person involved in at least one of the following forms of employment: provides work on the basis of an employment contract or on the basis of a legal relationship

14 Literal translation from Lithuanian. The concept appears to be identical or closest to the concept of independent activity and activity as a self-employed person.

15 See Lietuvos Respublikos užimtumo įstatymas, 21.06.2016, TAR, 5.07.2016, no. 18825, no. XII-2470, https://e-seimas.lrs.lt/portal/legalact/lt/TAD/b9ca8ad03de611e68f278e2f1841c088?Positioninsearchresults=30&searchmodeluuid=c41da021-d897–416e-9712–16b8d7d9154e (accessed 19.07.2021).

16 Lietuvos Respublikos bedarbių rėmimo įstatymas, "Lietuvos aidas", 29.12.1990, no. 153–0.

17 Lietuvos Respublikos užimtumo rėmimo įstatymas, "Valstybės žinios", 30.06.2006, no. 73–2762, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.279173?jfwid=-1cefbq4aru (accessed: 19.10.2023). Under its Article 32, subsidies were provided for the self-employed, including start-ups.

equivalent to an employment relationship; performs self-employed activity (self-employed); or has performed unpaid contract work. Self-employment is one of the forms of employment within the meaning of the Act to which its provisions apply.[18] Meanwhile, under Article 4 of the Act, a "working person" ("asmuo yra laikomas dirbančiu") is understood to be a person who is employed under the provisions of the Lithuanian Labour Code or has a status equivalent to employment under an employment relationship.[19] Furthermore, the above provision lists the categories of persons treated equally to those working under an employment relationship. However, self-employed persons are not included on the list.[20] Thus, there are certain negative characteristics of the self-employed which exclude the legal qualification of those providing work as self-employed.

Subsequent provisions of the Employment Support Act offer also a definition of the self-employed person. Pursuant to Article 5, an independent self-employed worker ("savarankiškai dirbantis asmuo" in Lithuanian) is defined as a natural person carrying out an activity which, by its nature and content, is not an employment relationship or a legal relationship equivalent to an employment relationship, i.e. characterized by the subordination of the person performing the work to the person for whom the work is performed, but which is characterized by continuity or repetition and by the possibility of carrying out such activities in the future. The following types of activities are expressly listed in the regulation: "individual activity", activity related to establishing a legal person or another organizational structure, or other activity carried out in connection with the activity of a legal person, as well as activity on the basis of a receipt for the provision of agricultural and forestry services in accordance with the procedure established by the Provision of Agricultural and Forestry Services of the Republic of Lithuania Act.[21] It is noted that the concepts of "independence" and "self-reliance" in individual activity are key to distinguish this type of activity from work under an employment relationship or similar relationships. In essence, legal relations with the other party to the contract do not entail features that are characteristic and constitutive to employment relationships, i.e. agreement as to: remuneration for work, workplace, scope of activities, annual leave, and provision of working tools.

However, when analysing the features of independence and self-reliance that characterize the activities of self-employed persons, attention is drawn to the fact that, actually, the characteristics of the employment relationship and employment

18 *Ibidem*, Article 3(2) of the Act.

19 *Ibidem.*

20 See more extensively on the subject in I. Mačernytė-Panomariovienė, T. Wrocławska, *The Right to Annual Leave as a Basic Guarantee for Safe and Healthy Conditions at Work. Remarks Based on Lithuanian and Polish Legal Regulations*, "Employee Responsibilities and Rights Journal" 2021, vol. 33, pp. 143 et seq.

21 *Ibidem*.

equivalent to the employment relationship[22] – which include consideration for work, carrying out the instructions of the employing entity, and the provision of work on a continual and not on a one-off basis – are difficult to distinguish from the characteristics of individual activity in the sense presented above. It is emphasized that additional difficulties in this respect are exacerbated by the increasing possibilities for flexible working arrangements under the employment relationship. For this reason, when deciding whether we are dealing with an individual activity of a self-employed person or with employment on the basis of an employment relationship, it is advisable to pay attention to the following considerations: the right of the party that orders work to give instructions concerning the place, time, and order in which work is to be performed; the right to give instructions as to how the work is to be performed; and the right to supervise the performance of the work at any working time. In addition, the right to paid time off for rest is likewise taken into account, similarly as the right to additional benefits in connection with business trips etc.[23] It is therefore possible to distinguish the work of self-employed persons from work under an employment relationship only on the basis of an assessment of all the above circumstances. It is highlighted, however, that it is the subordination to the instructions of the person ordering the work that makes it possible, in principle, to distinguish an employment relationship from similar paid employment under a civil law contract.[24] Another important point is that the 2016 amendments to the Lithuanian Labour Code clarify that an employment contract is a contract under which an employee undertakes, in a relationship of subordination, to provide work for the employer, and the employer undertakes to remunerate the employee in return (Article 32 of the Labour Code).[25] The Lithuanian provisions specify that subordination to the employer means the provision of work under conditions in which the employer has the right to supervise or direct both the whole and a part of the process of work provision by the employee, and the employee is obliged to comply with the employer's instructions and the workplace procedures. In such a relationship, it is the employer who bears the financial, economic, and production risks (Article 32(3) of the Labour Code).[26]

To go on, it should be noted that Article 6 of the law in question likewise contains a definition of individual activity, which, by the way, differs from the definition of individual activity provided in tax legislation.[27] The following types of "independent activity" carried out by a natural person are listed under the notion

22 Pursuant to the Employment Act. Lietuvos Respublikos užimtumo įstatymas, TAR, 5.07.2016, no. 18825.

23 T. Davulis, *Lietuvos Respublikos darbo kodekso komentaras*, Vilnius 2018, p. 133.

24 T. Davulis, *Darbo teisė: Europos Sąjunga ir Lietuva*, Vilnius 2004, p. 180.

25 Article 32.

26 T. Davulis, *Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m. Teisė 104*, Vilnius 2017, p. 13, https://www.zurnalai.vu.lt/teise/article/view/10842/8977 (accessed: 19.10.2023).

27 Lietuvos Respublikos gyventojų pajamų mokesčio įstatymas, "Valstybės žinios", 19.07.2002, no. 73–3085, https://www.e-tar.lt/portal/lt/legalAct/TAR.C677663D2202/asr (accessed: 18.07.2024).

of "individual activity": independent creative activity consisting in the creation of works that may be the subject of copyright and the transfer or assignment of the author's economic rights to the works created by them; activities carried out as a liberal profession, in which individuals with the requisite qualifications exercise personal, responsible, and professional independence through the provision of intellectual services to clients and the public, including the professions of lawyer, accountant, statutory auditor, lobbyist, financial advisor, tax advisor, architect, engineer, designer, psychologist, journalist, broker, bankruptcy receiver, corporate restructuring trustee, and similar activities; independent self-employed sporting activity, which consists in the performance of specific physical or mental activities based on established rules and organized in a specific form, as well as preparation for and participation in competitions, with the exception of sporting activities under an employment contract in the field of sporting activity; and independent activity of a performer, which is related to their activities concerning preparation for and participation in a public performance. However, the term "performer" does not include persons who take part in the process of preparing and creating a work, but do not participate in its public performance.

Moreover, Lithuanian law construes "individual activity" to cover: an independent activity of a coach when the coach has not concluded a coaching contract with an organization conducting physical education and sports training; scientific and other independent activities of a similar nature not classified as a liberal profession; other independent trade or production activities, with the exception of activities involving the sale or lease of real estate by nature and transactions in financial instruments; and agricultural activity. At this point, it is also worth mentioning laws that regulate the legal status of certain groups of persons who perform work, in particular: the Civil Code as regards entrepreneurs, the Notaries Act,[28] the Bailiffs Act,[29] the Legal Profession Act,[30] the Copyright and Related Rights Act,[31] the Private Detective Activities Act,[32] the Agriculture and Forestry Services on the Basis of a Receipt Act,[33] and the Families Act.[34] With regard to members of the liberal professions, there are separate statutory regulations on: health care,

28 Lietuvos Respublikos notariato įstatymas, "Lietuvos aidas" 1992, no. 192–0; Žin. 1992, no. 28–810. Consolidated version from 1.01.2021 until 30.06.2021.

29 Lietuvos Respublikos antstolių įstatymas, "Valstybės žinios", 29.05.2002, no. 53–2042. Consolidated version from 1.01.2021.

30 Lietuvos Respublikos advokatūros įstatymas, "Valstybės žinios", 6.04.2004, no. 50–1632, Consolidated version from 1.07.2020.

31 Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas, "Valstybės žinios", 9.06.1999, no. 50–1598.

32 Lietuvos Respublikos privačios detektyvinės veiklos įstatymas, TAR, 30.04.2015, no. 6577.

33 Lietuvos Respublikos žemės ūkio ir miškininkystės paslaugų teikimo pagal paslaugų kvitą įstatymas, "Valstybės žinios", 24.11.2012, no. 136–6965. Consolidated version from 10.06.2017 until 31.08.2021.

34 Lietuvos Respublikos šeimynų įstatymas, "Valstybės žinios", 2.03.2010, no. 25–1176. Consolidated version from 1.01.2019.

the public burden of paying tax, and social and health insurance contributions. Therefore, it is noted that the legislation pertaining to the so-called liberal professions is characterized by a separate subject of regulation, and the categories of subjects listed there are for the most part assessed as being outside the area of discussion on the extension of social guarantees.[35]

To go on, pursuant to Article 6(2) of the Employment Act, a natural person carries out "individual activity" according to the principles laid down in tax regulations. Under Article 2(7) of the Personal Income Tax Act,[36] "individual activity" is independent (self-employed) activity aimed at generating income or other economic benefits over a continual period. It can take the form of: independent trading or manufacturing activity with the exception of trade in real estate and transactions involving financial instruments; independent creative, scientific, professional, and other similar independent activity; independent sporting activity; and independent performing activity. When assessing whether an activity can be classified as individual activity, the principles of: self-reliance (independence); economic purpose (entrepreneurship); continuity; and attribution to specific types of activity, including the pursuit of the objective of profit and economic benefits (as combined with the element of entrepreneurship[37]), must be taken into account.[38] As regards the notion of "continuity", it is worth noting the position of the Lithuanian Supreme Administrative Court, which points to the following elements to be analysed: recurrent, consistent, and repeated conclusion of transactions, and the number of concluded transactions.[39] Bearing previous judgments of this court in mind, it can be concluded that the feature of continuity of activity is considered to be essential and attributive to individual activity.[40]

1.3. The scope of rights of the self-employed

Under the Constitution of the Republic of Lithuania of 2 October 1992,[41] every person (literally "each human being") has the right to freely choose a job or business and

35 E. Kavoliūnaitė-Ragauskienė, D. Pūraitė-Andrikienė, *Valstybės pareiga užtikrinti notarų paslaugų prieinamumą visuomenei ir notarų ekonominį nepriklausomumą ir nešališkumą: galimos priemonės ir jų privalumai bei trūkumai*, Vilnius 2020.

36 Lietuvos Respublikos gyventojų pajamų mokesčio įstatymas, "Valstybės žinios", 19.07.2002, no. 73–3085, https://www.e-tar.lt/portal/lt/legalAct/TAR.C677663D2202/asr (accessed: 18.07.2024).

37 Remark by I. Mačernytė-Panomariovienė.

38 The Supreme Administrative Court of Lithuania. Decision in an administrative case 19.10.2009, no. A-438–1270–09.

39 The Supreme Administrative Court of Lithuania. 20.10.2006 decision in an administrative case, no. A14–916/2006.

40 See remark by I. Mačernytė-Panomariovienė.

41 Constitution of the Republic of Lithuania of 2 October 1992, "Lietuvos Aidas", 1992, no. 220 (10.11.1992); "Valstybės Žinios" 1992, no. 33–10140 (30.11.1992), https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.1890/asr?positionInSearchResults=0&searchModelUUID=c41da021-d897–416e-9712–16b8d7d9154e (accessed: 18.07.2024).

the right to have proper, safe, and healthy conditions at work, including to receive fair pay for work and to have social security in case of unemployment. Moreover, under Article 49 of the Constitution, all working people (literally, "each working human being") should have the right to rest and leisure, including the right to an annual paid leave.[42] The essential differences between the concepts of "everyone" and "each working person" are emphasized in subject literature. The latter term refers to employment under an employment relationship as well as to other forms of professional activity. As for the constitutional guarantee of the right to paid maternity leave (Article 39(2)), it should be underlined that it refers to working women, that is – according to the position of the Constitutional Tribunal – not only women who work under an employment contract or in civil service, but also women who carry out other forms of professional activity, including self-employed activity.[43] The issue of the rights of self-employed women to paid maternity leave has been analysed also based on previous legislation.[44]

Under general Lithuanian legislation, the scope of protection of rights related to the work a person performs is unfavourable to self-employed workers, since the law fails to recognize the distinctness of the legal status of some groups of the self-employed. Noteworthy in this respect are also the provisions of the Lithuanian Civil Code containing the definition of an entrepreneur.[45] They are referred to in order to emphasize that natural persons carrying out business activities are entrepreneurs, and any person who carries out business or professional activity is obliged to take care of their own property and other matters related to the type of activity carried out.

As regards the provisions of the Lithuanian Labour Code, the labour rights it guarantees with regard to the legal regulation of working time, protection of the permanence of employment, provision of work tools, as well as the right to annual leave and parental leave are enjoyed by persons employed on the basis of employment contracts and persons in legal relationships equivalent to the employment relationship.[46] Thus, emphasizing the aspect of self-reliance and independence (lack of subordination), it is noted that the self-employed person decides on matters relating to work organization, holidays, business-related costs, and work tools by themselves.[47]

42 Articles 48 and 49 of the Constitution of the Republic of Lithuania; more in I. Mačernytė-Panomariovienė, T. Wrocławska, *The Right to Annual Leave*…

43 Persons who obtain their income from sporting activity are likewise treated as self-employed and covered by insurance. Decision of the Constitutional Court of the Republic of Lithuania of 19 December 2018 case no. KT23-N13/2018 https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta1885/content (accessed: 18.07.2024).

44 Decision of the Constitutional Court of the Republic of Lithuania of 26 September 2007, case no. 35/04–37/04–72/06 https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta564/content (accessed: 18.07.2024).

45 Article 2(4) of the Act.

46 See earlier remarks.

47 State Tax Inspectorate under the Ministry of Finance in 2019 January 1 Commentary on the Personal Income Tax Law of the Republic of Lithuania (1.01.2019 redakcija).

It is worth noting at this point that the occupational health and safety regulations in force under the Lithuanian Labour Code contain a reference to the provisions of the Health and Safety Act.[48] Its *de lege lata* rules apply only to persons working under employment contracts. That is why the self-employed are treated as responsible in their own right for safety in the process of providing work. It is emphasized that *de lege lata*, self-employed workerscan, however, voluntarily take out private accident insurance.[49] The problem of the lack of protection of the self-employed in the area of occupational health and safety was highlighted in the proposals for amendments to Lithuanian law, where the need to extend occupational health and safety protection to self-employed workers with regard to work on construction sites was emphasized.[50]

As for the issue of equal treatment and non-discrimination, pursuant to the Equal Pay for Men and Women Act,[51] the prohibition of discrimination on grounds of sex applies to all working persons, including the self-employed.[52] Provisions concerning self-employed workers in the area of non-discrimination (especially on grounds of sex) can be found in the Health and Maternity Insurance Act. They set the rules for determining insurance seniority[53] as well as the amount of sickness benefit and benefits granted in connection with maternity or childcare.[54]

The Lithuanian provisions in force contain no guarantees with regard to the self-employed workers' right to minimum wage.[55] This type of protection covers

48 Lietuvos Respublikos darbuotojų saugos ir sveikatos įstatymas, "Valstybės žinios", 16.07.2003, no. 70–3170, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.215253/asr?positionInSearchResults=0&searchModelUUID=c41da021-d897–416e-9712–16b8d7d9154e (accessed: 18.07.2024).

49 Social protection for the self-employed, Lithuania, July 2020, p. 14, https://www.missoc.org/documents/self-employed/2020_07/self_2007_lt_en.pdf (accessed: 18.07.2024).

50 Resolution no. 155 of the Government of the Republic of Lithuania of 10 March 2021 on the approval of the plan for the implementation of the provisions of the Programme of the Eighteenth Government of the Republic of Lithuania, TAR, 17.03.2021, no. 5318, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/bef7d43286fe11eb998483d0ae31615c/asr?positionInSearchResults=0&searchModelUUID=a6841f19-a282–4996–8e67–74930dc51718, https://www.e-tar.lt/portal/lt/legalAct/d698ded086fe11eb9fecb5ecd3bd711c (accessed: 18.07.2024). It has been recommended to adopt appropriate provisions and to amend the regulations of the Health and Safety Protection Act, the National Labour Inspectorate Act, and the Code of Administrative Offences.

51 Lietuvos Respublikos moterų ir vyrų lygių galimybių įstatymas, "Valstybės žinios", 23.12.1998, no. 112–3100.

52 Article 3 of the Act. The personal scope of the prohibition of discrimination on grounds of sex was also extended to the area of social security (Article 9 of the Act).

53 Article 5(3) of the Act.

54 Articles 14, 18, 21(3) and 24(4) of the Act.

55 See Article 141 of the Labour Code and the authorization for the Council of Ministers to determine the amount of the minimum wage.

exclusively employees within the meaning of the Labour Code.[56] However, an indirect incentive for the self-employed to receive at least the minimum wage is provided by the rules on insurance seniority and rules that render pensions dependent on the length of service, under which income amounting to at least the minimum wage is levied.

In terms of collective rights, and in particular freedom of association of the self-employed, we should note Article 50 of the Constitution. Pursuant to this provision, trade unions defend the professional, economic, and social rights and interests of employees. According to Article 51 of the Constitution, in defending their economic and social interests, employees have the right to strike, and the limitations of this right as well as the conditions and procedure for its implementation are established by the Trade Unions in the Republic of Lithuania Act.[57] Under Article 1 of said law, natural persons who possess capacity for work and legal capacity to act in law may establish and join trade unions. Pursuant to Article 2, members of trade unions who work legally under employment contracts or on other grounds stipulated by law in the territory of the Republic of Lithuania have all the rights and obligations of members of trade unions as set forth in the statutes of those organizations. Other trade union members, on the other hand, have all the rights and obligations of members under the terms of the trade union's statutes, with the exception of the right to vote on the decision to strike, the conclusion and implementation of collective bargaining agreements, and matters that may affect the rights and obligations of employees or persons employed on other legal bases. In light of the above provisions, it should therefore be assumed that, in principle, self-employed persons are not prohibited from joining trade unions; however, they are not covered by certain collective rights. The granting of freedom of association not only to employees, but also to other working persons (including the self-employed) is apparent also from Article 6 of the cited law, which refers to the conditions for the formation of a trade union. Lithuanian law, in addition to employees, provides in this article for a separate legal category – union founders – among the entities entitled to form a trade union.

However, according to T. Davulis, the legal regulation of the status of the self-employed as essentially subjects of tax and social security law places them, so to speak, in the area of collective labour law in the so-called grey zone. The problem seems to be, first of all, that the provisions of the Labour Code do not apply to them and, moreover, that they are not treated in this area on an equal footing with persons who provide work under an employment relationship. This is why self-employed workers are outside the scope of collective bargaining and have no possibility of

56 The minimum wage in Lithuania since 1.01.2021 has been EUR 642 per month and EUR 3.93 per hour worked. See order of the Council of Ministers of 14 October 2021, no. 1114 Dėl 2021 metais taikomo minimaliojo darbo užmokesčio, TAR, 15.10.2020, no. 21462, https://www.e-tar.lt/portal/lt/legalAct/b5aa4aa00ec311ebb74de75171d26d52 (accessed: 18.07.2024).

57 Lietuvos Respublikos profesinių sąjungų įstatymas, "Lietuvos aidas", 30.11.1991, no. 240–0, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.2293/asr (accessed: 18.07.2024).

applying pressure measures in the form of a strike. However, there are concerns regarding the fact that the Trade Union Act is not consistent with the provisions of the Employment Act (employment law) and the Labour Code. For this reason, there is no strict obligation to establish only trade union organizations of employees. However, even if trade unions of self-employed persons are accepted in Lithuania, they have no possibility to collectively negotiate and conclude agreements on the conditions of work and employment with regard to those persons from a practical point of view.[58] Another problem is the instability of the income earned by the self-employed and the fact that the sum of their income may be lower than the minimum wage, which is the basis for establishing the obligation to be insured and to pay compulsory social insurance contributions, especially for health and maternity insurance.[59]

The recognition of the self-employed as subjects of tax and social security law is confirmed by insurance regulations, which characteristically apply different solutions to separate categories of working persons.[60] Some of them include a much smaller range of social guarantees.[61] The obligation to pay pension as well as sickness and maternity insurance contributions (which cover the insured and the policyholder) pertains to persons covered by copyright, creators, performers, and persons who carry out sporting activity, except when such income is derived from individual activity.[62]

Among the solutions applicable to the self-employed in relation to the epidemiological situation, the rules concerning the application of special parental leave

58 T. Davulis, *Savarankiškai dirbančių asmenų teisė į kolektyvines derybas ir teisė į streiką. Darbo teisės iššūkiai besikeičiančiame pasaulyje*, Vilnius 2020.

59 *Ibidem,* p. 591.

60 It should be noted that from 1 January 2009, self-employed persons have been covered by the compulsory social insurance system (until then they had been insured on a voluntary basis). Lietuvos Respublikos valstybinio socialinio draudimo įstatymo 2, 3, 4, 5, 7, 8, 9, 29, 31 straipsnių pakeitimo ir papildymo įstatymas, "Valstybės žinios" 2008, no. 149–6019; Lietuvos Respublikos sveikatos draudimo įstatymo 2, 6, 8, 15, 16, 17, 18, 19 straipsnių pakeitimo ir papildymo įstatymas, "Valstybės žinios" 2008, no. 149–6022.

61 However, it is a condition that contributions are paid and that a certain income ceiling is reached. *Exploring self-employment*…, p. 49. See S. Spasova, D. Bouget, D. Ghailani, B. Vanhercke, *Access to social protection for people working on non-standard contracts and as self-employed in Europe. A study of national policies*, European Social Policy Network (ESPN), European Commission, Brussels 2017, pp. 76–81. This applies to income taxation, health insurance, and social security for copyright holders and performers. R. Birštonas, N.J. Matulevičienė, J. Usonienė, *Atlikėjo samprata intelektinės nuosavybės ir mokesčių bei valstybinio socialinio draudimo įstatymuose*, "Socialinių mokslų studijos" 2011, vol. 3(1), p. 239.

62 It should be noted that from 1 January 2009, self-employed persons have been covered by the compulsory social insurance system (until then they had been insured on a voluntary basis). Lietuvos Respublikos valstybinio socialinio draudimo įstatymo 2, 3, 4, 5, 7, 8, 9, 29, 31 straipsnių pakeitimo ir papildymo įstatymas, "Valstybės žinios" 2008, no. 149–6019; Lietuvos Respublikos sveikatos draudimo įstatymo 2, 6, 8, 15, 16, 17, 18, 19 straipsnių pakeitimo ir papildymo įstatymas, "Valstybės žinios" 2008, no. 149–6022.

are worthy of attention.[63] In this context, many EU Member States have introduced special leave provisions, often referred to as the "corona leave". Twenty EU Member States,[64] including Lithuania, guaranteed parental support arrangements in situations where neither parent was able to provide care for the child due to the need to work. This special parental leave varies according to eligibility conditions (e.g. age of the child), payment conditions (e.g. percentage of previous earnings, lump sum), and the parents' work situation.[65] Likewise noteworthy among the solutions addressed to the self-employed during the pandemic period are those relating to sickness benefits.[66] From 1 January 2021, self-employed persons could claim an unemployment benefit of EUR 260 for a whole month, but special conditions had to be met in order to receive it.[67] As from 1 July 2022, these benefits are no longer paid after the end of the quarantine.

1.4. Conclusion

To sum up the analysis of the legal status of the self-employed, the main problem of Lithuanian legislation appears to be not only the terminological diversity and the conceptual superstructure found in the various laws regulating the legal situation of the self-employed, but also the fact that, despite the extensive casuistry of the regulations relating to the various groups of the self-employed, the labour provisions do not reflect the need to extend employment rights to this category of working persons.[68] Despite the various forms of self-employment and the differences between various groups of self-employed persons, insurance and tax regulations and the Employment Act generally view the self-employed as individuals who organize their work, working time, rest, and working tools, bear the risks of their activities independently, and can privately insure themselves against accidents.[69] It is true that the self-employed are not prohibited from joining trade unions. However, under Lithuanian law, making use of freedom of association seems to be unjustified. The need for changes extending the scope of rights in the area of working time, health

63 S. Spasova, D. Ghailani, S. Sabato, S. Coster, B. Fronteddu, B. Vanhercke, *Non-standard workers and the self-employed in the EU: social protection during the Covid-19 pandemic*, Brussels 2021, p. 39, https://www.etui.org/sites/default/files/2021–03/Non-standard%20workers%20and%20the%20self-employed%20in%20the%20EU%20social%20protection%20during%20the%20Covid-19%20pandemic-2021_0.pdf (accessed: 18.07.2024).

64 See *ibidem.*

65 *Ibidem.*

66 *Ibidem,* p. 31.

67 See *Socialinė apsauga: kas keičiasi nuo liepos 1 dienos?*, 28.06.2021, https://www.sodra.lt/lt/situacijos/svarbi-informacija-draudejams-covid-19/ismokos-savarankiskai-dirbantiems-asmenims (accessed: 18.07.2024). Cf. also S. Spasova, D. Ghailani, S. Sabato, S. Coster, B. Fronteddu, B. Vanhercke, *Non-standard workers*…, pp. 16–18.

68 T. Davulis, *Savarankiškai dirbančių asmenų*…, pp. 39–78.

69 Lietuvos Respublikos Vyriausybės 2021 m. kovo 10 d. nutarimas no. 155.

protection, and occupational health and safety is addressed only to specific groups of working persons. These include, in particular, those working on construction sites and through digital platforms.

2. Legal regulations concerning self-employment in the law of the Republic of Latvia

2.1. Introductory Remarks

According to OECD data and the definition of self-employment, the number of self-employed workers in the Republic of Latvia in 2021 constituted 11.6% of the total workforce.[70] Meanwhile, according to ILO data, this rate oscillated at 11.3% in 2020. Moreover, ILO's statistics include an analysis of trends over the past 20 years (1991–2019).[71] The chart shows a sharp acceleration in the growth of self-employment in 1996 and the highest ceiling ever reached – at 19.43% of the total workforce in 1997. In contrast, according to World Bank data covering the period from 2010 to 2020, the scale of self-employment followed a similar developmental trend, i.e. remaining on average at around 11.5% of the total workforce. An exception in the form of a significant increase in self-employment was recorded in 2016, to a level of 12.5–13.0%.[72] In terms of national data and the definition of self-employment, the development trends of self-employment were also analysed taking into account the group of entities with no employees.[73]

Among the reasons for choosing self-employment in Latvia, 49% of the respondents in a 2017 survey[74] answered it had been their own decision, while 26% pointed to necessity due to a lack of alternative work opportunities. A combination of both circumstances was mentioned by 22% of the respondents.[75] As regards the level of satisfaction with being self-employed, as many as 88% of the respondents (slightly below the EU average) reported satisfaction with being their own boss,[76] while only

70 *Self-employment rate (indicator)*…

71 *Self-employed, total (% of total employment) (modeled ILO estimate) – Latvia*, International Labour Organization, ILOSTAT database. Data retrieved on 29.01.2021, https://data.worldbank.org/indicator/SL.EMP.SELF.ZS?locations=LV (accessed: 18.07.2024).

72 See also the percentage of the self-employed by sex: *Latvia – Self-employed; Total (% of total employed)*, https://tradingeconomics.com/latvia/self-employed-total-percent-of-total-employed-wb-data.html (accessed: 18.07.2024).

73 R. Karnite, *Latvia: Self-employed workers*, Observatory: EurWORKTopic, 22.02.2009, https://www.eurofound.europa.eu/publications/report/2009/latvia-self-employed-workers (accessed: 18.07.2024).

74 *Exploring self-employment*…

75 *Ibidem,* p. 11.

76 *Ibidem.*

22% rated being self-employed as involving a high liability risk (slightly below the EU average of 26%). The rate of self-employed workers who considered their situation to be difficult in terms of the financial burden in the case of prolonged illness was 53% (slightly above the EU average of 48%).[77]

2.2. Definitions of self-employment

It is noted that the Social Insurance Act in the Republic of Latvia contains a definition of self-employment,[78] although the distinction between employees and self-employed persons in the Latvian legal system is laid down in tax legislation.[79] The presence of at least one of six criteria set out in the Income Tax Act determines when a working person should be considered an employee rather than a self-employed.[80] First and foremost, the source of income is decisive in qualifying a person as a self-employed worker, who is not covered by labour law provisions. Then, under Article 1(3) of the Social Insurance Act, which was amended in 2017, a self-employed person is an individual who earns income (or revenue) as: a person with a permanent residence in the Republic of Latvia who receives royalty (remuneration for copyright or related rights), with the exception of individuals to whom copyright has been transferred; a sworn: notary, attorney-at-law, accountant (auditor), bailiff; a practising: physician, pharmacist, veterinarian, optician; another natural person with a permanent

77 *Ibidem,* p. 13.

78 State Social Insurance Act, 1.10.1997, https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=59891&p_lang=. See also the text of the law available at: https://likumi.lv/ta/en/en/id/45466-on-state-social-insurance (accessed: 18.07.2024).

79 Personal Income Tax Act, https://likumi.lv/ta/en/en/id/56880-on-personal-income-tax (accessed: 18.07.2024).

80 *Exploring self-employment*…, p. 41. They are listed in Article 8(2)(2) of the Personal Income Tax Act. Pursuant to the provision, it is deemed that a natural person (payer) gains revenue on which a payroll tax is due if at least one of the following characteristics apply to them:
1) the payer is economically dependent on the persons for whom they provide services;
2) the payer bears financial risk in connection with performing non-commercial work or in the event of loss of the debtor's debt;
3) the payer is integrated into the business for which they provide their services. Integration into the business within the meaning of the relevant chapter means the existence of areas of work or recreation, the obligation to follow the business's internal procedural provisions, and other similar characteristics;
4) the payer can take actual annual leaves and holidays following relevant procedures in connection with the business's internal procedural provisions or the work schedule of other natural persons employed in the business;
5) the payer's work is performed under the supervision or instruction of another person and the payer cannot engage their own staff or subcontractors to carry out their work;
6) the payer does not own fixed assets, materials, or any other assets used in the business activity (the criterion does not cover passenger cars or separate personal instruments used to carry out work duties).

residence in the Republic of Latvia and who has registered as a payer of income tax on business activity; an owner (owners) of a farm (fishery) who manages such farm (fishery) without being in an employment relationship with their farm's (fishery's) administrative authority, if no manager (director) has been appointed (elected) in such a farm (fishery) in compliance with the procedures laid down in law; a person with a permanent residence in the Republic of Latvia whose work is remunerated from foreign technical assistance funds and loans from international financial institutions granted to the Republic of Latvia; an individual entrepreneur, including an individual entrepreneur operating a taxi or a passenger car for the purpose of commercial passenger transport; a micro-enterprise taxpayer.[81]

Individuals who wish to carry out self-employed activity in Latvia have to register at the competent tax office. A self-employed person, just as an employer, is considered a payer of advance personal income tax. They have the right to choose the type of income rate, which depends on the kind of business activity.[82]

Moreover, legal scholars emphasize that the criterion of economic dependence (submission, subordination, lack of independence) is taken into account in order to reveal abuse in the form of the so called bogus self-employment and to counteract

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81 3) **self-employed person** – a person who earns income (or revenue) as:
- a) [3 April 2019];
- b) [25 November 1999];
- c) a person whose permanent place of residence is in the Republic of Latvia and who earns income from intellectual property, except for an heir to copyright and another successor in title of copyright, and who has registered as an economic activity income taxpayer;
- d) a sworn notary;
- e) a sworn advocate;
- f) a sworn auditor;
- g) a doctor in practice, a pharmacist in practice, a veterinary practitioner, an optometrist in practice;
- h) another natural person whose permanent place of residence is in the Republic of Latvia and who has registered as an economic activity income tax payer;
- i) an owner (owners) of a farm (fishing undertaking) who, not being in legal employment relationship with an administrative authority of his or her farm (fishing undertaking), performs the management function of such a farm (fishing undertaking) if, in accordance with the procedures laid down in law, a manager (director) has not been appointed (elected) in such a farm (fishing undertaking);
- j) a person whose permanent place of residence is in the Republic of Latvia and whose work is remunerated from foreign technical assistance resources and loans from international financial institutions granted to the Republic of Latvia;
- k) a sworn bailiff;
- l) an individual economic operator, including an individual economic operator who is driving a taxi or passenger car for the commercial carriage of passengers;
- m) a micro-enterprise taxpayer.

82 Section 13. Registration of Persons and Employers Subject to Social Insurance (1) Employers and self-employed persons shall be registered with the Taxpayer Register of the State Revenue Service in accordance with the procedures stipulated by the Cabinet.

fictitious self-employment.[83] Still, there are no other laws containing provisions that would define or specify the concept of a self-employed person, although the expression "self-employment" appears in the texts of various normative acts, which will be discussed further on.

2.3. The scope of rights of the self-employed

Pursuant to Article 91 of the Constitution of the Republic of Latvia, all human beings are equal before the law and the courts. Moreover, human rights should be realized without discrimination of any kind. Another noteworthy law in this context is the Act of 20/06/2001 – Labour Law.[84] Despite containing an open list of anti-discrimination criteria, it applies exclusively to employment relationships and employees. Nevertheless, the principle of non-discrimination against self-employed workers is governed by the provisions of the Law of 19 December 2012 on Prohibition of Discrimination of Natural Persons – Economic Operators.[85] Rules concerning self-employed activity are covered in this law next to provisions concerning business activity. Non-discrimination under the act refers, among others, to: access to self-employment, and access to goods and services of self-employed persons; and with regard to business activity, it refers to: accessing, starting, and running business activity, and starting or running other activities in relation to self-employment activities, and covers all types of professions that are not carried out under an employment relationship, including, for example, the legal professions and artists.[86] Legal scholars point out certain regulatory shortcomings. They stress that equal access to vocational training, upgrading or acquiring new vocational qualifications, which is strongly emphasized vis-à-vis persons employed on the basis of employment relationships, does not appear in the provisions of the anti-discrimination law in question.[87]

Pursuant to Article 107 of the Constitution of the Republic of Latvia, every employed person has the right to receive commensurate remuneration for work done, which may not be less than the minimum wage established by the state, and has

83 *Exploring self-employment*…, pp. 39, 41.

84 Latvia Labour Law, http://likumi.lv/doc.php?id=26019 (accessed: 19.10.2023).

85 Law on Prohibition of Discrimination of Natural Persons – Economic Operators [Fizisko personu – saimnieciskās darbības veicēju diskriminācijas aizlieguma likums], https://likumi.lv/ta/en/en/id/253547 (accessed: 18.07.2024); A. Dimitrovs, *Equality Law in Latvia: Current Trends and Challenges*, "The Equal Rights Review" 2012, vol. 9, https://www.equalrightstrust.org/ertdocumentbank/err9_Dimitrovs.pdf (accessed: 18.07.2024).

86 A. Kamenska, *Country Report: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78. Latvia*, European Network of legal experts in gender equality and non-discrimination, European Commission, Luxembourg 2020, p. 35, https://www.equalitylaw.eu/downloads/5274-latvia-country-report-non-discrimination-2020–1-97-mb (accessed: 18.07.2024).

87 *Ibidem,* p. 36.

the right to weekly holidays and a paid annual leave.[88] The Constitution omits to expressly restrict the above privileges to employees in the statutory sense only. However, it is noted that the self-employed enjoy no minimum wage guarantee. The desire to reduce employment costs paired with the lack of minimum wage protection give rise to a tendency on the part of those commissioning work to force their economic subordinates to switch to self-employment as sole proprietors. This is why ascertaining economic dependency is identified as a key element in counteracting forced self-employment.[89] The above has more far-reaching consequences, including the exercise of other rights under employment, as self-employed persons do not enjoy the benefit of regulations on working time, accidents at work, and occupational diseases.

With regard to collective rights, the constitutional provisions on freedom of association and the right to collective bargaining ensure that everyone has the right to form and join associations, political parties, and other public organizations (Article 102 of the Constitution). Employed persons have the right to conclude collective agreements and the right to strike (Article 108 of the Constitution).[90] On the other hand, the Latvian Law on Trade Unions,[91] with regard to the regulation of the right of coalition, emphasizes the aspect of non-discrimination, understanding by this term the right of everyone to establish and join a trade union without any discrimination. Furthermore, under the provisions of this act, a person's membership of a trade union and the desire to join or not to join that organization may not constitute grounds for restricting that person's rights (Article 4).[92] Although the law does not prohibit the self-employed from exercising freedom of association, in practice these persons are not covered by collective representation or collective bargaining. It is stressed that, with regard to self-employed workers, the most questionable issues are: the subject of the negotiations, the party with whom the negotiations would be conducted, and the fact that the relationship with the self-employed is based on civil law contracts.[93] The above means that the self-employed are excluded *de lege lata* from one of the fundamental elements of collective bargaining at company level.[94] That is why Latvian legal scholars claim that it is not possible for gainfully self-employed workers to join trade unions operating at workplace level. That said,

88 Constitution of the Republic of Latvia of 15 February 1922, https://likumi.lv/ta/en/en/id/57980 (accessed: 18.07.2024).

89 *Exploring self-employment*…, p. 39.

90 Constitution of the Republic of Latvia of 15 February 1922 [consolidated version] (Art. 102 & 108)…

91 Law on Trade Unions (*Arodbiedrību likums*), 6.03.2014, http://likumi.lv/doc.php?id=265207 (accessed: 18.07.2024).

92 A. Kamenska, *Country Report: Non-discrimination*…, p. 36.

93 R. Karnite, *Latvia: Self-employed workers*…, p. 59. See also Table 10: Organizations open to the self-employed in different countries, p. 56.

94 *Exploring self-employment*…, p. 59.

they emphasize that there are no legal obstacles to the self-employed joining sectoral trade unions and employers' organizations.

The regulation of the definition of a self-employed person through tax provisions based on the type of activity has the result that the status is relevant also to the scope of insurance cover under insurance provisions.[95] Self-employed persons earning a certain income are obliged to pay social insurance contributions,[96] in which case their rights in the area of insurance benefits are similar to those of employees. According to the Latvian Law On State Social Insurance, self-employed workers whose income reaches a minimum amount relative to the base set by the Council of Ministers are subject to pension, disability, maternity and sickness insurance, health insurance, and parental insurance.[97] The differences in the contributions paid in this respect, compared to those paid for employees, depend on the amount of income earned and the type of activity carried out. Moreover, Latvian insurance legislation distinguishes between the self-employed who are employers and those who are employed by several employers or who are simultaneously an employee and a self-employed person.[98] The self-employed, unlike employees, are not covered by insurance for accidents at work and occupational diseases, and are not subject to unemployment insurance.[99] As regards sickness benefits, the self-employed are covered by the general insurance scheme.[100] When comparing the situation of the self-employed to employees, differences are present also in terms of the contribution base.[101]

2.4. Conclusion

In the Latvian legal system, the criteria verifying the economic dependence of the self-employed are found in the tax law. The above is decisive also for the remaining

95 *Living and Working*, State Employment Agency Republic of Latvia, 2.03.2020, https://www.nva.gov.lv/en/living-and-working-conditions (accessed: 18.07.2024). Article 5(3)(2) of the Law On State Social Insurance [Likums par sociālo drošību], 7.09.1995, https://likumi.lv/ta/en/en/id/36850 (accessed: 18.07.2024).

96 *Exploring self-employment*…, p. 50. Compare report: S. Spasova, D. Bouget, D. Ghailani, B. Vanhercke, *Access to social*…, pp. 76–81.

97 Law On State Social Insurance, 1.10.1997, https://likumi.lv/ta/en/en/id/45466-on-state-social-insurance (accessed: 18.07.2024). See: *Exploring self-employment*…, p. 52.

98 *I am self-employed*, State Revenue Service, https://www.vid.gov.lv/en/i-am-self-employed (accessed: 18.07.2024).

99 *Social protection for the self-employed. Latvia, July 2020*, MISSOC – Mutual Information System on Social Protection, https://www.missoc.org/documents/self-employed/2020_07/self_2007_lv_en.pdf (accessed: 18.07.2024).

100 *Exploring self-employment*…, p. 51; S. Spasova, D. Bouget, D. Ghailani, B. Vanhercke, *Access to social*…, p. 71.

101 *Social protection for the self-employed. Latvia*…, pp. 5–6.

particularities of the status and rights of the various groups of self-employed workers, which is particularly evident in the social security system.

With regard to the protection of the self-employed, special attention should be paid to the provisions of the Latvian law concerning the prohibition of discrimination against natural persons who are entrepreneurs. Unfortunately, the labour legislation lacks solutions extending rights to certain categories of the self-employed. Moreover, given the lack of statutory minimum wage guarantees for the self-employed, the decision to switch to self-employment is in practice often forced.

3. Legal regulations concerning self-employment in the law of the Republic of Estonia

3.1. Introductory Remarks

According to ILO data for the period 1991–2019, Estonia experienced a significant increase in self-employment in 1999, 2004, and 2007.[102] This form of professional activity reached its lowest point in the analysed period in 2002. Importantly, a steady upward trend has been recorded since another significant decline in self-employment in 2008. The number of self-employed workers reached 10.99% of the total workforce in 2019.[103] Noteworthy among the statistics presented are those for the period 2000–2007 that concern the self-employed who employ no workers.[104] They show that the number of these people is far greater than the number of entities with employees.[105] On the other hand, according to ILO estimates presented by the World Bank, based on the adopted definition of self-employment, the number of gainfully self-employed people in Estonia amounted to 10.48% of the total workforce in 2020.[106]

When analysing the circumstances accompanying the decision to become self-employed in Estonia in a 2017 survey,[107] up to 57% of the respondents pointed to self-employment as a consequence of their own choice, while 22% – of compulsion

102 *Self-employed, total (% of total employment) (modeled ILO estimate) – Estonia*, International Labour Organization, ILOSTAT database. Data retrieved on 29.01.2021, https://data.worldbank.org/indicator/SL.EMP.SELF.ZS?locations=EE (accessed: 18.07.2024).

103 *Latvia – Self-employed; Total (% of total employed)*… See also the percentage of self-employed persons by sex.

104 Also data by sector of business activity are provided.

105 See the sources, studies, and data presented in the work: L. Roosaar, K. Nurmela, *Estonia: Self-employed workers*, Observatory: EurWORKTopic, 2.02.2009.

106 *Estonia – Self-employed; Total (% of total employed)*, https://tradingeconomics.com/estonia/self-employed-total-percent-of-total-employed-wb-data.html (accessed: 18.07.2024).

107 *Exploring self-employment*…, p. 13.

due to the lack of alternatives to work. A combination of both circumstances was the reason in the case of 13% of the respondents.[108] As many as 92% of the respondents reported satisfaction with being their own employer,[109] a percentage slightly above the EU average of 89%. Interestingly, only 12% rated being self-employed as involving a high liability risk (well below the EU average of 26%). The rate of self-employed workers who considered their situation to be difficult in terms of the financial burden in the case of prolonged illness was as high as 51% (slightly above the EU average of 48%).[110]

3.2. Definitions of self-employment

Self-employment in Estonian law is legally defined as sole proprietorship. A sole proprietor can be any natural person provided that they apply for registration with the register of businesses.[111] Legal scholars note that a self-employed worker can be any natural person who offers goods or services for sale on their own behalf and as part of their regular activity. It is emphasized that a self-employed person or a business entity of which that person is the owner is not a legal person within the meaning of the law.[112]

Sources of Estonian law regulating the situation of the self-employed include tax acts: the Income Tax Act[113] and the Social Taxes Act.[114] The former law contains a definition of economic activity. According to § 14(2) of the Income Tax Act, it is an independent economic or professional activity of a person (including the professional activity of a notary or bailiff and the creative activity of a creator) whose purpose is to obtain income from the production, sale, or intermediation of goods, the provision of services, or other activities, including creative or scientific activities.[115] By the 2020 amendment, the cited law gained a section 22, which refers expressly to self-employed workers.[116]

108 *Ibidem,* p. 11.
109 *Ibidem.*
110 *Ibidem,* p. 13.
111 *Definition of self- employment*, [in:] *Social protection for the self-employed. Estonia, July 2020*, MISSOC – Mutual Information System on Social Protection, p. 3, https://www.missoc.org/documents/self-employed/2020_07/self_2007_ee_en.pdf (accessed: 18.07.2024).
112 See the sources, studies, and data presented in the work: L. Roosaar, K. Nurmela, *Estonia: Self-employed…*
113 Income Tax Act, Passed 15.12.1999, RT I 1999, 101, 903, Entry into force 1.01.2000, https://www.riigiteataja.ee/en/eli/530012014003/consolide (accessed: 18.07.2024).
114 Social Tax Act Passed 13.12.2000, RT I 2000, 102, 675, Entry into force 1.01.2001, partially 1.01.2002, https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/530042021006/consolide (accessed: 18.07.2024).
115 RT I, 23/12/2013, 1 – entry into force 1.01.2014.
116 RT I, 21/04/2020, 1 – entry into force 1.07.2020.

Sources of Estonian law that enable a comparison of the status of the self-employed and those employed under an employment relationship include the Commercial Code, the Employment Contracts Act, and the Contract Law Act.[117] The Contract Law Act defines five different service contracts: the authorization contract, the service contract, the intermediation contract, the agency contract, and the mandate contract. Any person, including a self-employed worker, may enter into a specific type of contract. Consequently, the legal relations of the parties to such a contract are governed by the provisions of contract law. However, it is noted in subject literature that service contracts are often used also instead of an employment contract. The purpose of such practice is to conceal the employment relationship (so-called "bogus self-employment"). If abuse is found, it must be assumed that the income of self-employed persons will be treated as income from an employment relationship and not as business profit, with consequences in terms of insurance and tax law, as well as in the area of social protection and collective representation ("bogus self-employment").[118]

The growing flexibilization of forms of employment and the development of labour activity through digital platforms renders it more difficult to distinguish between self-employment and the employment relationship. Estonia lacks legislation regulating the provision of work in new forms such as platform work. Nor is there case law confirming that persons working through platforms are treated equally to those who provide work under an employment contract. As a result, if platform workers do not meet the legal conditions that prejudge their recognition as employees under labour law, they are excluded from the protection guaranteed by labour law.[119]

3.3. The scope of rights of the self-employed

The 1992 Constitution of the Republic of Estonia[120] contains a number of general guarantees on non-discrimination, health protection, freedom to choose employment and to engage in economic activity, state supervision of working conditions, and freedom to form and join trade unions. While the above guarantees are phrased

117 *Exploring self-employment*…, p. 50.

118 L. Roosaar, K. Nurmela, *Estonia: Self-employed*…

119 I. Mačernytė-Panomariovienė, R. Krasauskas, V. Mačiulaitis, G. Tavits, M. Ericson, A. Kārkliņa, *Some Aspects of Improving the Legal Regulation of Labor Relations: Thirty-Years' Experience of The Baltic States*, "International Social Science Journal" 2022, vol. 72, issue 246 (special issues), pp. 1237–1253, https://doi.org/10.1111/issj.12385

120 The Constitution of the Republic of Estonia, 30.12.2020 (revised translation), passed 28.06.1992, RT 1992, 26, 349, Entry into force 3.07.1992, https://www.riigiteataja.ee/en/eli/ee/rhvv/act/530122020003/consolide (accessed: 18.07.2024).

broadly as the rights of "every citizen",[121] the conditions and modalities for the exercise of individual rights are determined by separate laws. According to § 12 of the basic law, everyone is equal before the law. No one may be discriminated against on the grounds of nationality, race, colour, sex, language, origin, religion, political or other views, property or social status, or on other grounds. Under § 28 of the Constitution of the Republic of Estonia, everyone is entitled to protection of their health. Furthermore, Estonian citizens are entitled to state assistance in the case of old age, incapacity for work, loss of provider, or need. Under § 29 of the basic law, they are entitled to freely choose their area of activity, profession, and position of employment, and the working conditions are subject to state supervision. Moreover, everyone is free to belong to unions and federations of employees and employers. These organizations may assert their rights and lawful interests by means which are not legally prohibited, and the procedure for resolution of labour disputes is provided by law. Pursuant to § 31 of the Estonian Constitution, Estonian citizens have the right to engage in entrepreneurial activity and to form commercial associations and federations.

Provisions that are likewise noteworthy in this regard are regulations on equal treatment and prohibition of discrimination, which apply to the self-employed. Pursuant to § 2(1) of the Equal Treatment Act from 2008,[122] it is prohibited to discriminate against persons on the grounds of nationality, ethnic origin, race, or colour, as well as in the determination of conditions for access to employment, self-employment, or occupation, selection criteria and conditions for recruitment as well as promotion and membership of an employee or employer organization, including a professional organization, and the granting of benefits by such organizations. In turn, under § 2(2) of the law, discrimination against persons on the grounds of religion or other beliefs, age, disability, and sexual orientation is prohibited, among others, in the context of setting conditions for access to employment, self-employment, or occupation, including selection criteria and recruitment conditions as well as promotion and membership in an organization of employees or employers. The self-employed may join trade unions if the union's statutory provisions provide for this possibility,[123] or they may be represented by certain employers' organizations, including certain agricultural organizations.[124] This position is asserted by the provisions of the Estonian Trade Unions Act.[125] In terms of the collective rights of the self-employed, however, the lack of trade union representation of their rights is highlighted, despite the fact that, with regard to the self-employed who do not use

121 In principle, however, citizens of foreign states and stateless persons in Estonian territory enjoy this right equally with citizens of Estonia, unless the law provides otherwise.

122 Equal Treatment Act, Passed 11.12.2008, RT I 2008, 56, 315, Entry into force 1.01.2009, https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/503052017002/consolide (accessed: 18.07.2024).

123 *Ibidem.*

124 *Ibidem.*

125 Trade Unions Act, Passed 14.06.2000, RT I 2000, 57, 372, Entry into force 23.07.2000, https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/528122020008/consolide (accessed: 18.07.2024).

the labour of others, the need for such representation is explicitly noted due to their status, which is characterized by many features typical of the employment relationship.[126] Recognizing the problems that arise in this area, including in the context of collective bargaining regulations, the development of specific forms of representation dedicated to the self-employed is proposed as an alternative solution.[127]

When it comes to the status of self-employed persons in terms of work-related guarantees, it should be noted that in Estonia, the laws regulating the conditions for the provision of work by employees do not apply to the self-employed. This is in particular true for the Employment Contracts Act (Töölepingu seadus), the Holidays Act (Puhkuseseadus), and the Working Time and Rest Act (Töö- ja puhkeaja seadus). The same applies to the law on minimum wage. Under the Employment Contracts Act,[128] it is full-time employees who are guaranteed a minimum wage.[129] Meanwhile, the self-employed organize their own working hours and the extent of their leave entitlement, and may introduce related provisions in their service contracts. With regard to the guarantees on the right to maternity and parental leave, it is emphasized that self-employed workers organize their working time themselves and, in order to receive relevant benefits, they must be interested in doing so.[130]

At this point, it is important to mention the amendments made to the Occupational Health and Safety Act, which have been in force since March 2021.[131] This law – pursuant to § 1(3)(4) – applies also to natural persons working under a service contract (hereinafter referred to as service provider) to the extent provided for in § 12(4) to (9) and § 24(2) of the law. By virtue of the provisions of § 12 defining general health and safety requirements, it is indicated that the service provider ensures the responsible and correct use of work equipment, personal protective equipment, and other equipment owned by the service provider in any case related to the work performed. If employees of two or more employers work at the workplace at the same time, these entities should coordinate their actions to prevent hazardous situations. Employers must inform each other and their employees or representatives of labour of any hazards occurring at the joint workplace and of measures to avoid them, as well as of the organization of rescue and first aid (prevention and information duties). Furthermore, if, in addition to the employees of one or more employers,

126 L. Roosaar, K. Nurmela, *Estonia: Self-employed*…

127 *Ibidem.*

128 See § 29–32 of the Employment Contracts Act 17/12/2008; RT I 2009, 5, 35 https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/502062021007/consolide (accessed: 18.07.2024).

129 S. Laukineitis, *Minimali mėnesio alga Estijoje išaugo daugiau nei 8 proc.*, 2.01.2020, Lrytas, https://www.lrytas.lt/verslas/rinkos-pulsas/2020/01/02/news/minimali-menesio-alga-estijoje-isaugo-daugiau-nei-8-proc--13111298 (accessed: 18.07.2024).

130 L. Roosaar, K. Nurmela, *Estonia: Self-employed*…

131 Occupational Health and Safety Act Passed 16/06/1999, RT I 1999, 60, 616Entry into force 26.07.1999, https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/522042021002/consolide (accessed: 18.07.2024) [RT I, 29.12.2020, 2 – entry into force 1.03.2021], § 1(1)(4) of the Act [RT I, 29.12.2020, 2 – entry into force 1.03.2021].

a service contractor also works at the workplace, the employer should, if necessary, inform them of the aforementioned circumstances. In such cases, the employers may agree on the manner in which the aforementioned obligation will be fulfilled or appoint a person to organize the work to fulfil the aforementioned obligations.[132] In such a situation, the service contractor informs the person organizing the work or, in their absence, the employer of the risks involved in the activity and ensures that their actions do not endanger the workers. Service contractors working in the same working environment inform each other of the hazards of their activities and ensure that they do not endanger the persons performing the work.[133] The provisions of § 24 of the Occupational Health and Safety Act concerning the handling and registration of accidents at work and occupational diseases are relevant, as well. Pursuant to § 24(2), if a service contractor suffers an occupational accident in a situation provided for in § 12(6) of the cited law, all the activities relating to the event provided for in this chapter will be carried out by the person organizing the work or, in their absence, by the employer.[134]

In terms of social protection, the rights of the self-employed are largely shaped in a similar way to those of employees in an employment relationship.[135] It is pointed out that in Estonia, self-employed persons are covered by a number of systemic arrangements including family benefits, health care, sickness, maternity, disability, and pension benefits. Exceptions (in the form of partial availability) relate to maternity/paternity benefits, unemployment benefits, social assistance, and benefits for accidents at work and occupational diseases.[136] Unemployment insurance is voluntary. This seems to mean that self-employed persons can make use of private insurance schemes. The definition of a jobseeker contained in the Labour Market Services and Benefits Act likewise may be useful in the area in question.[137] However, by virtue of the Unemployment Insurance Act's[138] definition of an insured person, persons who:

132 If employers fail to sign such an agreement and appoint an appropriate person, they are jointly and severally liable for failing to fulfil their prevention and information duties.

133 RT I, 29.12.2020, 2 – entry into force 1.03.2021.

134 *Ibidem.*

135 *Social protection for the self-employed. Estonia*…, pp. 4–21. Full access to the social protection system through compulsory insurance, universal benefits, or means-tested benefits is independent of the employment status. Compare report: S. Spasova, D. Bouget, D. Ghailani, B. Vanhercke, *Access to social*…, pp. 76–81.

136 This means that (a) self-employed workers have only partial access to benefits due to the statutory differentiation of eligibility conditions and duration of benefits compared to dependent employment, and (b) if insurance-based benefits and non-contributory benefits coexist, they only have access to the latter. See S. Spasova, D. Bouget, D. Ghailani, B. Vanhercke, *Access to social*…, p. 76.

137 Labour Market Services and Benefits Act passed 28.09.2005, RT I 2005, 54, 430; entry into force 1.01.2006, https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/511062021003/consolide (accessed: 18.07.2024).

138 Unemployment Insurance Act passed 13.06.2001, RT I 2001, 59, 329; entry into force 1.01.2002, https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/522122020002/consolide (accessed: 18.07.2024).

are sole proprietors or notaries, bailiffs, or other independent public professionals or freelance artists within the meaning of § 3 of the Artists and Artistic Associations Act who are considered sole proprietors for tax purposes, or are members of the managing or controlling body of a legal person within the meaning of § 9 of the Income Tax Act to whom the Employment Contracts Act does not apply, are excluded from the scope of the concept. Nevertheless, the lump-sum unemployment benefit provided for in the Estonian legal system is described as universal.[139] The above unemployment benefit is paid according to rules common to both employees and the self-employed.[140] However, the self-employed are not subject to insurance for accidents at work and occupational diseases.[141]

When it comes to the legal solutions applied during the pandemic period, it should be emphasized that Estonia did not provide for access to unemployment benefits for the self-employed. However, it was among the countries that abolished or shortened waiting periods for sickness benefits.[142] In addition, paid sick leave regardless of the cause of illness was available to working people in Estonia who cared for a sick child, a family member, or a dependent person. Still, unlike in many other countries, Estonia did not provide working parents with special parental leave during the pandemic.[143]

3.4. Conclusion

Changes that affected the situation of the self-employed in the Estonian legal system concerned tax law, sickness insurance (the waiting period for sickness benefit was shortened), pension law (the possibility to join the second pillar of pension insurance was introduced), and occupational health and safety.[144] It is noteworthy that Estonian law provides for no specific criterion based on which it would be possible to treat self-employed workers who are also employers and those who do not employ others differently. This is a questionable solution, as the latter category of individuals is in a situation most similar to employees, which speaks in favour of granting them additional guarantees similar to those enjoyed by persons who provide work under an employment relationship.[145] A 2021 study on the epidemiological situation and Estonian unemployment regulations highlighted the exclusion of this category of

139 *Exploring self-employment*…, p. 50.
140 *Ibidem.*
141 *Accidents at work and occupational diseases*, [w:] *Social protection for the self-employed. Estonia*…, p. 13.
142 S. Spasova, D. Ghailani, S. Sabato, S. Coster, B. Fronteddu, B. Vanhercke, *Non-standard workers*…, pp. 26, 29.
143 *Ibidem,* pp. 41, 42.
144 *Ibidem.*
145 L. Roosaar, K. Nurmela, *Estonia: Self-employed*…

people's right to unemployment benefits as one of the relevant points relating to the status of the self-employed.[146]

Closing remarks

1. The status of self-employed persons in the Baltic states varies considerably. Although each of these countries has a definition of self-employment, some of those definitions are very casuistic, covering various categories of self-employed (Latvia), others are detailed definitions of various legal aspects relating to self-employment (Lithuania), and others still propose a rather general concept of self-employment, which results in blurring the boundaries between various categories of self-employed workers (Estonia). Sometimes, the criterion of economic dependence is exposed as a rationale for distinguishing self-employment from employment relationship in order to prevent abuse (Latvia, Estonia), and sometimes a broader view of subordination and dependence in the employment relationship, which contrasts the broad features of independent, individual and self-employed activities, is used for that purpose (Lithuania).
2. In all the analysed states, significant changes in the legal status of the self-employed have taken place in recent decades. The consequence of the reforms introduced, either extending social guarantees or providing for the facilitation of economic activity, has been an increase in the number of self-employed persons. Currently, in the legislation of the Baltic states, with exceptions relating to the issue of accidents at work and occupational diseases and unemployment insurance, the self-employed are entitled to most of the insurance benefits guaranteed to employees. However, their right depends on the income earned and the contributions paid. For this reason, there is a serious risk of a complete lack of social protection for the self-employed in some Baltic states (Lithuania). The need to address accidents at work, occupational diseases, and the risk of unemployment is quite uniformly emphasized in each of the countries studied, and this is particularly true for certain categories of self-employed persons. Areas of activity and industries are mentioned in subject literature (platform work, construction sector) where the protection of the self-employed in terms of health and safety – including especially as regards working time, breaks, and rest – should be similar to that guaranteed by the law to employees.
3. In all the Baltic states, the need to take firm steps to counter bogus self-employment and to force people who are economically dependent on the employing entity into self-employment is recognized. Counter-measures include: the characteristics of self-employed activity developed in case law and doctrine, enabling

146 S. Spasova, D. Ghailani, S. Sabato, S. Coster, B. Fronteddu, B. Vanhercke, *Non-standard workers*…, p. 16.

it to be distinguished from the relations in force in the employment relationship (Lithuania); the examination of the existence of economic dependency criteria under insurance laws (Latvia); and the analysis of cases concerning forced transition to self-employment (Estonia).

4. The need to enhance the collective rights of self-employed workers, especially those who are not employees, given that they perform work in conditions similar to employees, is fairly uniformly emphasized in all the Baltic states. However, despite the fact that the self-employed are not prohibited by law from joining trade unions in the countries studied, trade union representation of their collective rights and interests is seen as meaningless due to their inability to exercise most of the rights enjoyed by employees (including in the areas of working time, health and safety at work, and minimum wage). Consequently, it is pointless for self-employed workers to participate in collective bargaining and collective agreements.
5. One of the main problems concerning the legal protective guarantees for the self-employed seems to be that, despite their great diversity in terms of their legal situation, they are often quite collectively perceived as economic entities organizing their own work and bearing the risk of their own activity (being their own employers). At the same time, however, it should be noted that in all the states analysed, it is increasingly emphasized that the development of new forms of employment (e.g. platform work) as well as work in the construction sector show many similarities in terms of the way work is provided to conditions typical of the employment relationship. In light of the above, the announcement of legal steps aimed at increasing the protection of certain categories of self-employed persons in the areas of working time and health and safety (Lithuania) and attempts to extend protection in case of unemployment (Estonia) should be viewed as positive.

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Chapter III

Self-employment under Polish law Comments on the current legal landscape

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1. Introduction

Since the early 1990s, Poland (alongside many Western European countries) has seen a proliferation of atypical legal frameworks for providing work.[1] It is a process that, at its core, transfers of the risk of operating a business onto the workers. While these atypical frameworks include a broad variety of legal relationships within which work is provided, one of them in particular has seen a great rise in popularity: namely, self-employment, which is also sometimes referred to as "own account work", "individual economic activity" or operating as a sole trader.

In this chapter I set out, primarily, to offer a comprehensive review of self-employment in the Polish legal system, including the relevant Polish legislation, court rulings, and Polish legal scholarship on the issue. On the basis of this review, I argue that the Polish legal system fails to account for self-employment in a comprehensive manner that would systematically address the key aspects of work provided by self-employed workers, including the fundamental principles of work provision,

1 Cf. e.g A. Chobot, *Nowe formy zatrudnienia: kierunki rozwoju i nowelizacji*, Warszawa 1997; P.L. Davies, *Zatrudnienie pracownicze i samozatrudnienie w świetle common law*, [in:] *Referaty na VI Europejski Kongres Prawa Pracy i Zabezpieczenia Społecznego. Warszawa, 13–17 września 1999: Kongres pod patronatem Jerzego Buzka Prezesa Rady Ministrów Rzeczypospolitej Polskiej*, Warszawa 1999; J. Jończyk, *O szczególnych formach zatrudnienia i formach ubezpieczeń społecznych*, [in:] Z. Kubot (ed.), *Szczególne formy zatrudnienia*, Wrocław 2000; Z. Kubot, *Szczególne formy zatrudnienia i samozatrudnienia*, [in:] Z. Kubot (ed.), *Szczególne formy zatrudnienia*…; Z. Hajn, *Elastyczność popytu na pracę w Polsce. Aspekty prawne*, [in:] E. Kryńska (ed.), *Elastyczne formy zatrudnienia i organizacji pracy a popyt na pracę w Polsc*e, Warszawa 2003; Ł. Pisarczyk, *Różne formy zatrudnienia*, Warszawa 2003; A. Musiała, *Zatrudnienie niepracownicze*, Warszawa 2011; J. Jończyk, *Rodzaje i formy zatrudnienia*, "Praca i Zabezpieczenie Społeczne" 2012, no. 6, pp. 2 et seq.; M. Gersdorf, *Prawo zatrudnienia*, Warszawa 2013.

working conditions, social protections, and the legal status of self-employed workers. The Polish legislator's approach lacks coherence, and the regulations are *ad hoc* and haphazard. This causes problems both theoretical (in scholarship) and practical (in judicature), and in consequence, the legal status of self-employed workers remains unclear. In the absence of legal regulation that would specifically and comprehensively address self-employment and clarify the legal status of self-employed workers, the presumption must be made that these issues are governed by and large by the general provisions of constitutional law, economic law, civil law, social insurance law, and tax law.[2]

There is no uniform definition of self-employment in the Polish legal system. The Polish legislator has neither developed a legal definition of the term itself nor created a properly developed conceptual matrix of the terms that are used to describe it. Yet self-employment is complex in nature and broad in scope, which compounds the difficulties related in interpretation. Self-employment in Poland covers a broad scope of categories: sole traders operating on the basis of registration with CEIDG (Centralna Ewidencja i Informacja o Działalności Gospodarczej – Central Registration and Information on Business); partners in general partnerships regulated by the Civil Code; workers in freelance professions; etc. This generates far-reaching controversies and discrepancies regarding the interpretation of "self-employment" in literature both on economics and on the law. In result, it is difficult to determine precisely who qualifies as a self-employed worker, and thus to whom the provisions governing this legal situation actually apply, which in turn renders the status of this category of workers unclear.

The increasing prevalence of self-employment wherein workers operate under conditions very similar to employees – with heavy dependence on a client whose dominant negotiating position skew the terms of cooperation in a manner that is unfavourable to the worker – has forced the Polish legislator to bring this category of workers under a protective umbrella made up of rights that, until recently, were reserved exclusively for employees.[3] This trend of granting greater legal protection to self-employed workers is in line with both international and European Union standards that broaden the scope of protective regulations to cover all working people (using the terms *workers* or *travailleurs* in a broad sense).[4] It is also well aligned

2 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.

3 Cf. T. Duraj, *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.; T. Duraj, *The Limits of Expansion of Labour Law to Non-labour Forms of Employment – Comments de lege lata 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.

4 See further T. Barwaśny, *Self-Employment in the Light of International and Union 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. 29 et seq.

with the Polish Constitution,[5] which offers a broad range of protective guarantees.[6] Currently under Polish law self-employed workers enjoy: protection of life and health, which in principle covers all self-employed workers in a facility belonging to the entity organising the work;[7] safeguards against discrimination and guarantees of equal treatment;[8] minimum wage guarantees and wage protection safeguards[9]; protection of motherhood and parenthood;[10] freedom of association in trade unions and collective labour rights.[11] In this chapter, I argue that the Polish legislator's

Cf. A. Musiała, *Reperkusje pojęcia "worker" w polskim prawie pracy*, "Monitor Prawa Pracy" 2018, no. 5, pp. 7 et seq.

5 Basic Law of 2 April 1997, Dziennik Ustaw, no. 78, item 483 as amended.

6 M. Gersdorf, *Między ochroną a efektywnością. Systemowe i terminologiczne aspekty objęcia cywilnoprawnych umów o zatrudnienie ustawodawstwem pracy*, "Praca i Zabezpieczenie Społeczne" 2019, no. 1, pp. 2 et seq.

7 T. Duraj, *Kilka refleksji na temat ochrony prawnej osób pracujących na własny rachunek w zakresie bezpiecznych i higienicznych warunków pracy*, [in:] A. Górnicz-Mulcahy, M. Lewandowicz-Machnikowska, A. Tomanek (eds.), *Pro opere perfecto gratias agimus. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Kuczyńskiemu*, Wrocław 2022, pp. 69 et seq.; T. Duraj, *Legal protection of the self-employed to the extent of safe and hygienic working conditions – assessment of Polish regulation*, [in:] *CER. Comparative European Research Conference, London, April 25–27, 2022*, London 2022, pp. 103 et seq.

8 T. Duraj, *Protection of the self-employed to the extent of non-discrimination and equal treatment – an overview of the issue*, "Acta Universitatis Lodziensis. Folia Iuridica" 2022, vol. 101: *W poszukiwaniu prawnej modelu ochrony pracy na własny rachunek w Polsce*, ed. T. Duraj, pp. 161 et seq.

9 T. Duraj, *Ochrona wynagrodzenia za pracę w zatrudnieniu cywilnoprawnym – refleksje na tle ustawy o minimalnym wynagrodzeniu za pracę*, [in:] A. Tomanek, R. Babińska-Górecka, A. Przybyłowicz, K. Stopka (eds.), *Prawo pracy i prawo socjalne: teraźniejszość i przyszłość. Kksięga jubileuszowa dedykowana Profesorowi Herbertowi Szurgaczowi*, Wrocław 2021, p. 49 et seq.; T. Duraj, *The guarantee of a minimum hourly rate for self-employed sole traders in Poland*, [in:] *MMK 2021. International Masaryk Conference*, Hradec Králové 2021, pp. 433 et seq.

10 See, for example: R. Babińska-Górecka, *Uprawnienia związane z rodzicielstwem osób wykonujących pracę zarobkową*, [in:] G. Goździewicz (ed.), *Umowa o pracę a umowa o zatrudnienie*, Warszawa 2018, pp. 127 et seq.; T. Duraj, *Uprawnienia samozatrudnionych matek związane z rodzicielstwem – wybrane problemy*, "Studia Prawno-Ekonomiczne" 2019, vol. 113, pp. 11 et seq.; T. Duraj, *Uprawnienia związane z rodzicielstwem osób samozatrudnionych – uwagi de lege lata i de lege ferenda*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2019, vol. 26, part 4, pp. 341 et seq.; T. Duraj, *The legitimacy of protection of parental rights of persons working outside the employment relationship in the light of the international, EU and Polish laws*, [in:] *CER Comparative European Research Conference, London, October 28–30, 2019*, London 2019, pp. 73 et seq.

11 T. Duraj, *Prawo koalicji osób pracujących na własny rachunek*, [in:] J. Stelina, J. Szmit (eds.), *Zbiorowe prawo zatrudnienia. XVII Regionalna Konferencja Prawa Pracy, Gdańsk, 12–14 czerwca 2017*, Warszawa 2018, pp. 127 et seq.; T. Duraj, *Self-employment and the right of association in trade unions*, [in:] *CER. Comparative European Research Conference, London, March 28–30, 2018*, London 2018, pp. 58 et seq.; T. Duraj, *Prawo koalicji osób pracujących zarobkowo na własny rachunek po nowelizacji prawa związkowego – szanse i zagrożenia*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2020, vol. 27, part 2, pp. 67 et seq.; T. Duraj, *Collective rights of the self-employed following the amendments to the Polish Trade Union Law*,

efforts to expand legal protections to self-employed workers are chaotic and ill-considered. While the general trend towards increasing the protective standards for these workers must be assessed positively, it would be difficult to argue, as the law stands, that there is a strong legal structure designed to protect self-employed workers in today's Poland. On the contrary, in my opinion, even a cursory glance at the legislation reveals the absence of a comprehensive approach to the issue. Instead, the legislation is fragmented, lacking internal coherence, prone to *ad hoc* changes introduced without a consistent foundational concept, often in response to fleeting political motivations. The regulations designed to protect self-employed workers are not properly aligned either with international and European Union standards or with the Polish Constitution (which I discuss in greater detail further herein). The rights guaranteed to self-employed workers are scattered across numerous legislative instruments, and these in turn rely on a vague and insufficiently articulated conceptual matrix and unreasonably varied criteria that determine the scope of application of the protective regulations. The Polish legislator appears to be fully overlooking the factor of economic dependence of the workers on the client, even though this aspect guides the protective guarantees found in the legislations of many of the European countries, including Spain, Italy, and Germany, as discussed in more detail in the papers in the first part of this volume.[12] Therefore, the aim of this chapter is to review the shortcomings of Polish legislation that create the legal context of self-employed work, including in particular the rights granted to self-employed workers. The key problem raised herein, namely the expansion of protective labour law provisions to cover self-employed workers, is only a small part of a broader discussion about the future of labour law. Indeed, some Polish scholars argue that labour law should be expanded to cover non-employment relations as well, including self-employment, which involves the replacement of labour law by employment law.[13]

Hradec Králové, Czech Republic 2020, QUAERE, vol. X, p. 1348 et seq; T. Duraj, *Collective rights of persons engaged in gainful employment outside the employment relationship – an outline of the issue*, "Acta Universitatis Lodziensis. Folia Iuridica" 2021, vol. 95: *Collective Labour Law or Collective Employment Law? Protection of the rights and collective interests of persons engaged in gainful employment outside the employment relationship. Second National Scientific Conference on "Atypical Employment Relations"*, T. Duraj (ed.), pp. 7 et seq.; T. Duraj, *Ochrona osób samozatrudnionych w świetle przepisów zbiorowego prawa pracy po zmianach – wybrane problemy*, [in:] *Zatrudnienie w epoce postindustrialnej. XXII Zjazd Katedr i Zakładów Prawa Pracy i Ubezpieczeń Społecznych*, K. Walczak, B. Godlewska-Bujok (eds.), Warszawa 2021, pp. 63 et seq.; T. Duraj, *Powers of trade union activists engaged in self-employment – assessment of Polish legislation*, "Acta Universitatis Lodziensis. Folia Iuridica" 2021, vol. 95, T. Duraj (ed.), pp. 83 et seq.; A. Tyc, *Collective Labour Rights of Self-Employed Persons on the Example of Spain: Is There Any Lesson for Poland?*, "Acta Universitatis Lodziensis. Folia Iuridica" 2021, vol. 95, T. Duraj (ed.), pp. 135 et seq.

12 See "Acta Universitatis Lodziensis. Folia Iuridica" 2023, vol. 103. Cf. also A. Tyc, *Self-Employment or Subordinated Work? The Cases of Italy and Spain*, "Praca i Zabezpieczenie Społeczne" 2020, no. 12, pp. 20 et seq.

13 See for example: M. Gersdorf, *Prawo zatrudnienia*…, pp. 180 et seq.

A further objective of this chapter is also to offer a theoretical discussion of bogus self-employment, which is a thoroughly prevalent problem in today's Poland.[14] Studies suggest that this pathological development is also present in other European countries, but not nearly on the scale that is occurring in Poland. The Polish Economic Institute estimates that the number of self-employed workers where the arrangement is solely intended to circumvent labour law regulations fluctuates between 130 000 and 180 000 workers. In my opinion, this is a gross underestimate; the actual number is likely to be closer to 500 000.[15] According to the Institute's estimates, in the period 2010–2020, bogus self-employment remained at a similar level (with the highest rate recorded in 2018), and was most prevalent in the following market sectors: IT (26 000 workers), professional and academic (25 000 workers), healthcare (24 000 workers), transport (17 000 workers), construction (17 000 workers), industry (13 000), finance and insurance (12 000), and commerce and vehicle repair (11 000). The aim of this chapter is to offer an in-depth examination of the causes and circumstances surrounding self-employment undertaken in violation of labour law regulations, and to assess the effectiveness of the mechanisms designed to counteract such bogus self-employment.[16] The current regulations are insufficient and ineffective.[17]

The considerations discussed in this chapter will serve to develop a new model of self-employment in Poland, to find an optimal redefinition of the status of self-employed workers that takes into account the standards of international law and European Union law as well as the Polish Constitution, viewed in light the experience of the European states studied in this project[18]. This chapter incorporates excerpts from other studies drafted in the course of the project, in which partial results of my research on the legal model of self-employment in Poland were previously published.

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14 T. Duraj, *Problem wykorzystywania pracy na własny rachunek w warunkach charakterystycznych dla stosunku pracy*, [in:] A. Musiała (ed.), *Nauka i praktyka w służbie człowiekowi pracy: Inspekcja pracy – wyzwania przyszłości*, Poznań 2017, pp. 103 et seq.

15 See further T. Duraj, *Kilka uwag na temat stosowania pracy na własny rachunek z naruszeniem art. 22 Kodeksu pracy*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2023, vol. 30, no. 3, pp. 175 et seq.

16 Polish Economic Institute calculations for 2020 made for PKD (Polish Classification of Economic Activity) sections in which bogus self-employment is estimated to be higher than 4000 persons.

17 T. Duraj, *Prawne mechanizmy przeciwdziałania stosowaniu samozatrudnienia w warunkach charakterystycznych dla stosunku pracy*, [in:] *MMK 2017. Mezinárodní Masarykova Konferenci – International Masaryk Conference*, Hradec Králové, Magnanimitas 2017, vol. VIII, pp. 355 et seq.

18 This will be the subject of my chapter "The legal model of self-employment in Poland – the employment law perspective," which is the last chapter in this volume.

2. Self-employment in Poland: numbers and statistics

Since the early 1990s, Poland has seen a rapid rise in self-employment, following the introduction of economic freedoms and private property rights typical of the market economy. In effect of the initial transformation, the number of self-employed workers rose sharply from 7.9% in 1990 to 12.8% in 1993.[19] A slowdown in the business boom followed, and in 1994, the number dropped to 9.4%, mainly due to obstacles of a legal nature, such as the introduction of statutory restrictions as well as tax and insurance law regulations that were seen as unattractive. There was also a shortage of capital, skills, and business knowhow, while inexpensive bank loans were relatively inaccessible.

Some of the barriers and limitations disappeared or were removed with time, and the early 2000s saw a rise in self-employment again. According to the Statistics Poland (GUS), in the third quarter of 2013, self-employed workers accounted for 18.4% of the workforce. In the first quarter of 2020, this number stood at around 1.33 million. After the COVID-19 pandemic, in the fourth quarter of 2021, GUS data put the number of self-employed workers at nearly 1.39 million. In 2012–2015, the number stood at 1.1 million, with an increase of around 4.5% in 2016 and a further increase of 4.3% in 2017.[20]

According to OECD data, the level of self-employment in Poland in 2021 stood at 19.73%, significantly exceeding the European Union average. Statistics Poland, in its data for the fourth quarter of 2022, puts the number of economically active Poles at 16.8 million, which includes 3.13 million persons earning an income on their own account (18.63%).[21] This group includes 686 000 employers, i.e. traders with at least one hired worker. Once this number is deducted, the remaining number of self-employed, own-account workers, in the last quarter of 2022, stood at 2.45 million.[22] This is a fairly large proportion of the workforce: almost every sixth

19 The data quoted here include the share of employers and self-employed workers (other than those in the individual farming sector) in the total number of persons active on the labour market.

20 W. Szkwarek, *Rośnie liczba "samozatrudnionych"*, Bankier.pl, https://www.bankier.pl/wiadomosc/W-Polsce-coraz-wiecej-samozatrudnionych-7796723.html (accessed: 30.12.2019). See also M. Skrzek-Lubasińska, Z. Gródek-Szostak, *Różne oblicza samozatrudnienia*, Warszawa 2019, pp. 33 et seq.

21 *Aktywność ekonomiczna ludności Polski – 4 kwartał 2022 roku,* Statistics Poland, 27.04.2023, https://stat.gov.pl/obszary-tematyczne/rynek-pracy/pracujacy-bezrobotni-bierni-zawodowo-wg-bael/aktywnosc-ekonomiczna-ludnosci-polski-4-kwartal-2022-roku,4,49.html (accessed: 17.02.2024).

22 These figures also include the agriculture, forestry, hunting and fishing sectors. Excluding the sectors indicated here, the number of self-employed non-employers in Q4 2022 was 1.36 million. The differences between the CSO and OECD data are due to the different methodology for counting self-employed workers. In particular, the CSO, unlike the OECD, does not include unpaid helping family members, who are treated as a separate category of labour contractors in the statistics, among the self-employed.

person who works in Poland is self-employed, using their own knowledge, skills, and qualifications. Between 2013, when the number stood at approximately 2.23 million, and 2022, when it oscillated around 2.49 million, the number rose by 260 000.

3. The laws on self-employment

There is an absence in Poland of any comprehensive legal instrument that would serve as a focal point of the regulation of self-employment and clarify the legal status of self-employed workers. Consequently, it must be assumed that the general provisions of constitutional law, economic law, civil law, social insurance law, and tax law all apply.

The core legal instrument establishing the fundamental rules of the social and economic system in Poland is the Constitution of the Republic of Poland of 2 April 1997. While the Constitution itself contains no provisions that would refer to self-employment *expressis verbis*, its norms nonetheless apply to self-employed workers. Under Article 20, a social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners forms the basis of the economic system in Poland. The principle of freedom of economic activity means that every citizen – including, of course, those who wish to provide services while being self-employed – has the guaranteed freedom to undertake and carry out economic activity, independently, in any form allowed by the law. This general freedom includes specifically the freedom to choose the type of economic activity and the freedom to start and stop it.[23] Under Article 22, this freedom may only be restricted by a statute, and only for reasons of vital public interest. Restrictions on self-employment may therefore only result from: statutory regulations laying down certain conditions (e.g. in the form of licencing); regulations concerning protection of human life and health; as well as conditions specified by the legislator in regulations pertaining to the natural environment, the construction industry, energy, water, health, fire safety, etc.[24] The constitutional principle of freedom of economic activity is complemented by Article 65(1) of the Constitution, which guarantees everyone the freedom to choose and pursue an occupation and the freedom to choose the place of work. Article 65(5) of the Constitution is also important from the point of view of promoting self-employment: it stipulates that public authorities must pursue policies aiming at full, productive employment by implementing programmes to counteract unemployment. Therefore, the public authorities must take measures encourage person who are not active on the labour market to take up work, including measures that would encourage these persons towards entrepreneurship and self-employment.

23 M. Granat, [in:] W. Skrzydło (ed.), *Polskie prawo konstytucyjne*, Lublin 2002, pp. 155–156.
24 B. Banaszak, *Prawo konstytucyjne*, Warszawa 2001, p. 238.

Furthermore, the Constitution lays down a number of protections. They cover not only employees (i.e. workers in employment relationships), but also other citizens and other workers, including self-employed workers.[25] These guarantees pertain in particular to: life and health; family protection; minimum wage; protection of human dignity; protection against discrimination and unequal treatment; freedom of association. In the context of constitutional protection of self-employed workers, Article 2 is also noteworthy: it stipulates that the Republic of Poland is a democratic state that is governed by the rule of law and that respects the principles of social justice. Article 24, in turn, reads: "Work shall be protected by the Republic of Poland. The State shall exercise supervision over the conditions of work." These constitutional guarantees will be discussed in greater detail in further sections of this chapter.

From the point of view of commercial law, the position of self-employed workers is no different from other traders; the general rules on starting and operating a business laid down in the act of 6 March 2018 – Law on Traders apply to self-employed workers.[26] According to its Article 3, business activity is an organised profit-oriented activity carried out on the trader's own account and in a continuous manner.[27] A natural person who wants to become a sole trader registers with the CEIDG, as do the persons who wish to become partners in a general partnership or to work in the freelance professions. In exceptional cases, the legislator allows natural persons to carry out so-called unregistered business activity (Article 5); this applies when the income generated from this activity is, in any given month, less than 75% of the minimum remuneration as specified in the act of 10 October 2002 on the minimum remuneration for work[28] and the person has not been registered as a trader in the last 60 months.[29]

Another legal instrument applicable to self-employed workers is the act of 23 April 1964 – Civil Code,[30] which regulates the contract underlying the provision of self-employment. Typically, it is a contract for services (*umowa o świadczenie usług*) made between the self-employed worker and the client. There is a broad consensus in the scholarship on the subject that the contract for services is a civil law

25 See W. Skrzydło, [in:] *Polskie prawo konstytucyjne*…, p. 171.

26 Uniform text: OJ 2024, item 236.

27 See A.K. Kruszewski, *Komentarz do art. 3*, [in:] A. Pietrzak (ed.), *Prawo przedsiębiorców. Komentarz*, LEX, 2019.

28 Uniform text: OJ 2020, item 2207.

29 This only applies to individuals who do not carry out business activities under a general partnership agreement and who do not carry out regulated activities, i.e. those that require permits or concessions.

30 Uniform text: Dziennik Ustaw of 2023, item 1610 as amended.

contract generally falling into the B2B domain[31] – a professional business contract.[32] While 'business contract' is not a legal term, scholarship generally agrees that there are several features that distinguish the contracts in this category. The most important of these include: far-reaching freedom of the parties in determining their rights and duties;[33] standardization and often template-based content (contracts drafted to match a predetermined model); complexity legal structure (drafting the contract requires extensive legal, commercial, and managerial skills); long-term duration and an expectation of a professional standard of diligence (much higher than the standard of diligence required of an employee).[34] The absence of regulations that would specify the material elements (*essentialia negotii*) of commercial contracts that serve as a basis for self-employed work means that they qualify as unnamed contracts (*umowy nienazwane*) in the Polish legal system. Consequently, they are governed by the provisions of the Civil Code on contracts (in general, not on any specific type of contract), by the entirety of the general part of the law of obligations, and also possibly, *mutatis mutandis*, by the provisions on the contract on mandate, in line with Article 750 of the Civil Code. The parties are free to arrange the legal relationship at their discretion, by exercising their freedom of contract, limited only by the essential nature of the relationship (Article 353^1 of the Civil Code). Another potentially limiting ramification is that commercial contracts may not contravene the law or the principles of social co-existence, or be aimed at circumventing the law (Article 58 of the Civil Code). Freedom of contract gives the parties flexibly in adjusting the contract to their needs and interests, and to be responsive to the shifts in general economic circumstances. In practice, this freedom of the parties creates a risk of abuse by the client, i.e. the party that, as a rule, has a dominant position and is able to impose unfavourable conditions on the self-employed worker with regard to the work (services) to be provided under the contract.[35] The limited

31 See Z. Kubot, *Szczególne formy zatrudnienia i samozatrudnienia*…, p. 17; Ł. Pisarczyk, *Różne formy zatrudnienia*…, p. 135; M. Sewastianowicz, *Przewidywane kierunki zmian nietypowych form zatrudnienia w Polsce*, [in:] M. Rymsza (ed.), *Elastyczny rynek pracy i bezpieczeństwo specjalne. Flexicurity po polsku?*, Warszawa 2005, p. 130.

32 Cf.: S. Włodyka, *Umowa gospodarcze (handlowe) i ich charakterystyka*, [in:] S. Włodyka (ed.), *Prawo umów w obrocie gospodarczym*, Kraków 1993, p. 25; A. Doliwa [in:] T. Mróz, M. Stec (eds.), *Prawo gospodarcze prywatne*, Warszawa 2005, pp. 500 et seq.; M. Safian, *Umowa – podstawowe źródło zobowiązań w obrocie*, [in:] J. Okolski (ed.), *Prawo handlowe*, Warszawa 1999, pp. 829 et seq.

33 Article 353^1 of the Civil Code applies here, according to which parties entering into a contract may arrange the legal relationship at will, as long as its content or purpose do not contradict the nature of the relationship, the law, or the principles of social co-existence.

34 Cf. A. Doliwa, [in:] T. Mróz, M. Stec (eds.), *Prawo gospodarcze prywatne*…, pp. 501–502.

35 The risk of exploitation of the dominant position and unilaterally imposing the terms of a B2B contract by the client is most prevalent for self-employed workers who only have one client and are economically dependent on that client. Very often, the client is the former employer of these workers.

scope of protective statutory guarantees for self-employed workers[36] means that the degree to which the worker is able to secure good terms and conditions depends critically on the relative position of worker in negotiating a commercial (B2B) contract. Yet typically, B2B contracts between clients and self-employed workers transfer a significant part of the inherent risk associated with the services onto the self-employed worker. This pertains chiefly to the economic risk relating to the achievement of specific results; often, the contract makes the self-employed worker strictly responsible for the results of the work to be rendered under the contract.[37] The worker's remuneration is made contingent on the completion of agreed tasks, and the duration (i.e. sustainability) of the contract is made to hinge on the effects of the work provided by the worker. The self-employed worker is also made to bear the social risks inherent to the worker's life, such as the risk of ill health, the risk of absences for reasons not related to health, the risks associated with pregnancy, or the absence of any paid leave to meet the personal needs of the worker. Furthermore, the self-employed worker carries the risk of financial liability for their obligations as a sole trader – and under Polish law, in line with the general principles of civil law, a sole trader is liable with all of their assets for any liabilities incurred in connection with running their business. The same is true for partners in a general partnership who are sole traders; they are liable for the obligations of the partnership, both with the partnership's assets and with their personal assets, jointly and severally (Article 864 of the Civil Code).[38]

Own-account workers operating as sole traders also assume full responsibility for meeting their social security obligations. In general, they have obligations in this area imposed on them by the law, and several of these obligations fall into the domain of public (rather than private) law. Chief among them are the obligations specified in social security insurance laws. Pursuant to Article 6(1)(5) of the act of 13 October 1998 on the social security insurance system,[39] natural persons conducting non-agricultural activity in the territory of the Republic of Poland are subject to compulsory pension and disability insurance. Furthermore, self-employed workers are also mandatorily subject to accident insurance and health insurance. (In contrast, under Article 11 of the same act, paying sickness benefit insurance contributions is voluntary.) The insurance obligation arises from the date of commencement of economic activity and lasts until the date of its cessation, excluding the period for which the activity is suspended (Article 13(4)). Registration for insurance must be made within 7 days of commencement of economic activity. The insurance contributions are payable by the self-employed workers in their entirety, from their own funds.[40]

36 A broader analysis of these provisions is provided later in this chapter.

37 Cf. Z. Kubot, *Szczególne formy zatrudnienia i samozatrudnienia*…, pp. 19–20.

38 See further A. Nowacki, [in:] K. Osajda (ed.), *Kodeks cywilny. Komentarz*, vol. IIIB, Warszawa 2017, pp. 1084 et seq.; P. Nazaruk, [in:] J. Ciszewski, P. Nazaruk (eds.), *Kodeks cywilny. Komentarz aktualizowany*, LEX, 2023.

39 Uniform text: Dziennik Ustaw of 2023, item 1230 as amended.

40 For more on the insurance status of self-employed workers, see the chapter IV in this volume.

A natural person who becomes a sole trader in accordance with the procedures and principles set out in the Law on Traders is also subject to taxation, as regulated by the act of 26 July 1991 – Personal Income Tax Law.[41] Work (services) provided under the conditions of self-employment is subject to taxation in accordance with the rules applicable to non-agricultural business activity.[42]

Prima facie, it might appear that labour law as such has no application to self-employed workers. After all, the subject matter of labour law is employment, i.e. voluntarily subordinated work, wherein the worker (employee) undertakes to perform, in person, for remuneration, activities of a specified type, for the benefit of the employer and under the employer's direction, at a place and time designated by the employer and at the risk of the employer (Article 22 of the Labour Code[43]). Meanwhile, work carried out by a self-employed worker is performed under conditions of independence and autonomy, without the component of subordination, on the account of and at the risk of the worker rather than of the employer (or, in this relationship, the client). Hence, self-employed workers generally fall within the civil law regime, and in consequence, they provide work on the basis of civil law contracts, such as a service contract, a contract to perform a specific task, or a contract of agency, as discussed above. However, the increase in popularity of self-employment, wherein the workers very often operate under conditions very similar to those of employees, has created the necessity of expanding the scope of certain protective regulations of the labour law, which until recently had been reserved exclusively for the employment relationship.[44] In result, as the law stands, self-employed workers do in fact enjoy some protections that are laid down in the Labour Code. This concerns primarily the protection of life and health: under Article 304(1) of the Labour Code, the employer must ensure safe and healthy working conditions for persons who engage in business activity on their own account in the workplace or in another place designated by the employer; this also applies to traders who are not employers, if they in fact organise the work carried out by self-employed workers (Article 304(3)(2) of the Labour Code). These regulations further reference Article 207(2) of the Labour Code, which lists some (though not all) of the employer's fundamental obligations in the area of life and health protection. Consequently, when it comes to life and health protection, clients with self-employed workers must provide these workers with a standard of protection rather similar to that guaranteed to employees.[45] The Labour Code also includes

41 Uniform text: Dziennik Ustaw of 2024, item 226 as amended.

42 I will address this issue in more detail later in this chapter, when discussing bogus self-employment in breach of labour law.

43 Act of 26 June 1974. – Kodeks pracy, Uniform text: Dziennik Ustaw of 2023, item 1465; hereinafter the Labour Code.

44 T. Duraj, *Praca na własny rachunek a prawo pracy*, "Praca i Zabezpieczenie Społeczne" 2009, no. 11, pp. 24 et seq.

45 See further in this chapter. Cf. also: T. Wyka, *Konstytucyjne prawo każdego do bezpiecznych i higienicznych warunków pracy a zatrudnienie na podstawie inne niż stosunek pracy oraz praca na własny rachunek – uwagi* de lege ferenda, "Gdańskie Studia Prawnicze" 2007, vol. XVII,

certain safeguards relating to motherhood specifically and parenthood in general. The act of 24 July 2015 amending the Labour Code (which entered into force on 2 January 2016[46]) created legal mechanisms that extend certain parenthood-related rights to self-employed workers, as long as they are paying the sickness and maternity benefit insurance contributions into the social security system; again, these payments are voluntary in Poland. Specifically, the insured woman (the child's mother) and the other insured person (either the child's father or another immediate family member) have the right to receive a maternity benefit for a period corresponding in duration to the period of maternity leave and parental leave (and, for fathers, also of paternity leave). In the case of a self-employed mother, the only condition that must be met is giving birth to a child or adopting a child. In the case of a self-employed father or another immediate family member, the condition is that they must stop working for pay, in order to provide care for the child, in person.[47]

Yet another legislative instrument that applies to self-employed workers is the act of 3 December 2010 on the implementation of certain European Union provisions on equal treatment,[48] which creates safeguards against discrimination and unequal treatment that apply to all sole traders. Article 8(1)(2) prohibits unequal treatment of natural persons on the grounds of sex, race, ethnic origin, nationality, religion, belief, worldview, disability, age, or sexual orientation with regard to pursuing a business, a trade, or a profession.[49]

Furthermore, the act of 22 July 2016 amending the act on minimum remuneration for work and certain other acts[50] extended, as of 1 January 2017, minimum wage protections to own-account workers who provide work on the basis of a contract of mandate and a contract for the provision of services similar to mandate (Article 750 of the Civil Code),[51] as long as these workers provide the

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pp. 331 et seq.; T. Wyka, *Bezpieczeństwo i ochrona zdrowia w zatrudnieniu niepracowniczym*, [in:] Z. Kubot (ed.), *Szczególne formy zatrudnienia…*; M. Mędrala, *Obowiązki ze sfery bhp w zatrudnieniu niepracowniczym*, "Annales Universitatis Mariae Curie-Skłodowska" 2015, vol. LXII, pp. 143 et seq.; M. Raczkowski, *Bezpieczne i higieniczne warunki pracy w zatrudnieniu cywilnoprawnym*, "Praca i Zabezpieczenie Społeczne" 2019, no. 1, pp. 66 et seq.

46 Act of 24 July 2015 amending the Labour Code and certain other acts, Dziennik Ustaw of 2015, item 1268.

47 See further in this chapter. Cf. also, inter alia: M. Mędrala, *Uprawnienie rodzicielskie niepracowników na gruncie prawa pracy i ubezpieczeń społecznych*, [in:] J. Czerniak-Swędzioł (ed.), *Uprawnienia pracowników związane z rodzicielstwem*, Warszawa 2016, pp. 24 et seq.; R. Babińska-Górecka, *Uprawnienia związane z rodzicielstwem…*, pp. 127 et seq.; M. Latos-Miłkowska, *Ochrona rodzicielstwa osób zatrudnionych na podstawie umów cywilnoprawnych*, "Praca i Zabezpieczenie Społeczne" 2019, no. 1, pp. 71 et seq.

48 Uniform text: Dziennik Ustaw of 2023, item 970.

49 See further below. Cf. also M. Barzycka-Banaszczyk, *Dyskryminacja (nierówne traktowanie) w stosunkach cywilnoprawnych*, "Praca i Zabezpieczenie Społeczne" 2019, no. 1, pp. 6 et seq.

50 Dziennik Ustaw of 2016, item 1265.

51 See further in the following section. Cf. also: A. Tomanek, *Status osoby samozatrudnionej w świetle znowelizowanych przepisów o minimalnym wynagrodzeniu za pracę*, "Praca i Zabezpieczenie Społeczne" 2017, no. 1, 13 et seq.; E. Maniewska, *Zakres uniformizacji ochrony wynagrodzenia*

service in person, without hiring employees or other contracted labour; as of 1 July 2024, the minimum wage in Poland stands at is PLN 28.10 gross per hour. This applies to natural persons who provide work for the client and have no freedom to choose the place and time when the work is carried out, and their remuneration is purely commission-based (Article 8d(1)(1) of the minimum wage act[52]). Further minimum wage safeguards include: a prohibition on waiving the right to remuneration; a prohibition on transferring this right to third parties; a requirement that remuneration must be paid in money; a requirement concerning the frequency of payments (for contracts for a period longer than 1 month – at least once a month, Article 8a of the minimum wage act).

A further category is statutory regulations on collective labour law, which have also been applicable to self-employed workers since 1 January 2019. The right to form and join trade unions was granted to certain categories of self-employed workers under the act of 5 July 2018 amending the act on trade unions and certain other acts.[53] Specifically, this right is now afforded to self-employed workers who provide work for remuneration without hiring others for this purpose, and have rights and interests related to the performance of that work that can be represented and defended by a trade union (Article 2(1) in conjunction with Article 1^1(1) of the Trade Union Law of 23 May 1991[54]). Thanks to trade union membership – with the option of either forming non-employee unions or joining employee unions on the same terms as employees – the self-employed workers may pursue an extended scope of protection on an individual level, especially with regard to: remuneration, working time, annual and parental leave, other types of leave, and the duration and sustainability of the relationship within which work is performed. Under Article 21(3), trade unions formed by self-employed workers may enter into collective agreements designed specifically for this category of workers. Moreover, under the act of 23 May 1991 on resolution of collective disputes,[55] self-employed workers are granted the right to engage in collective bargaining in order to find resolution of collective disputes, as well as the right to strike and to participate in other forms of protest within the limits laid down in the law. According to Article 6 of that same act of 23 May 1991, the provisions thereof that refer to employees apply *mutatis mutandis* to persons other than employees who work for money. Self-employed workers who serve as trade union officials may also exercise the right granted by the Polish legislator to persons holding an office in trade union structures, such as paid breaks

za pracę w umownych stosunkach zatrudnienia, "Praca i Zabezpieczenie Społeczne" 2019, no. 1, pp. 29 et seq.; A. Sobczyk, *Wynagrodzenie minimalne zleceniobiorców*, "Praca i Zabezpieczenie Społeczne" 2012, no. 8, pp. 2 et seq.

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

53 Dziennik Ustaw of 2018, item 1608.

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

55 Uniform text: Dziennik Ustaw of 2020, item 123.

from work (either on a an *ad hoc* basis or as a standing arrangement) or protection their contracted status[56].

Finally, self-employment is also referenced in the segment of labour law that aims to encourage unemployed persons to take up self-employment as a framework for engaging in independent economic activity. The chief legal instrument in this area is the act of 20 April 2004 on the promotion of employment and on the institutions of the labour market,[57] and the key component of these regulations is financial aid available from the Labour Fund for expenses related to launching a business. This includes the costs of relevant legal assistance, consultancy, and advisory services. *Starosta* (head of the local authority at the level of *powiat*, the middle tier of Poland's territorial division) may give to an unemployed person, or to a job-seeking carer of a disabled person, when that carer is not employed and does no other work for money, one-off funding from the Labour Fund, to cover the costs of launching a business, including the costs of relevant legal assistance, consultancy, and advisory services, in an amount specified in the relevant agreement, not exceeding the amount of 6 times the average monthly wage (Article 46(1)(2)). Article 46(5) further specifies that the amount of the average monthly wage is measured against the date of the relevant agreement with the unemployed person. This amount of funding is discretionary. It is paid out at the request of the interested party submitted to the labour office.[58] In terms of formalities, the funds are provided on the basis of an agreement, obligatorily made in writing, by *starosta* as one party and the unemployed person as the other party. The person applying for the funding must meet several requirements, listed in the regulation issued by the Minister of Family, Labour, and Social Policy of 14 July 2017 on Labour Fund funding to cover the costs of equipping a new workplace or supplementing the equipment of a workplace and launching a business.[59] Due to the large number of requirements that must be met, and to the complexity of the application process, the effectiveness of this mechanism has been relatively low.[60]

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56 See further in the following section. Cf. also: K.W. Baran, *O zakresie prawa koalicji w związkach zawodowych po nowelizacji prawa związkowego z 5 lipca 2018 r.*, "Praca i Zabezpieczenie Społeczne" 2018, no. 9, pp. 2 et seq.; P. Grzebyk, Ł. Pisarczyk, *Krajobraz po reformie. Zbiorowa reprezentacja praw i interesów zatrudnionych niebędących pracownikami*, "Praca i Zabezpieczenie Społeczne" 2019, no. 1, pp. 81 et seq.

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

58 The terms and conditions of the business start-up grant vary depending on the office where the application is made and the funds available to the office. In 2024, the maximum amount of the grant is PLN 46 610.

59 Uniform text: Dziennik Ustaw of 2022, item 243.

60 See further T. Wrocławska, *Komentarz do art. 46*, [in:] Z. Góral (ed.), *Ustawa o promocji zatrudnienia i instytucjach rynku pracy. Komentarz*, vol. II, LEX, 2016. See also the (critical) report issued by the Supreme Audit Office: *Dotacje z Funduszu pracy na podjęcie działalności gospodarczej w Polsce wschodniej*, Najwyższa Izba Kontroli, Delegatura w Lublinie, 2014, https://bip.nik.gov.pl/kontrole/wyniki-kontroli-nik/pobierz,llu~p_14_093_201409150934111410773651~01,typ,kk.pdf (accessed: 21.01.2024).

There are also additional mechanisms that are designed to promote and support persons interested in operating as sole traders dedicated specifically to persons with disabilities. Under Article 12a of the act of 27 August 1997 on occupational and social reintegration and work opportunities of persons with disabilities,[61] a disabled person registered with a district labour office as an unemployed person or as a job seeker and not employed, may receive a one-off grant from the State Fund for Rehabilitation of Persons with Disabilities in order to launch a business, in the amount specified in the agreement concluded with *starosta*: 1) the amount of 6 times the average monthly wage, if the person undertakes to continue operating the business for a minimum of 12 months; 2) the amount of 6 to 15 times the average monthly wage, if the person undertakes to continue operating the business for a minimum of 24 months, as long as that person has not previously received a non-refundable public grant for the same purpose. The decision to grant these funds is made on a discretionary basis by *starosta*.[62]

4. Definition of self-employment

Just like in international law, European Union law,[63] and the laws of many European countries examined in this project, there is no definition of self-employment in the Polish law, even though the term itself is used *expressis verbis.* For instance, the act of 20 April 2004 on the promotion of employment and on the institutions of the labour market, in laying down the specific of what constitutes vocational guidance as one of the of the labour market related services, notes that it consists, *inter alia*, in offering assistance to the unemployed and to jobseekers in choosing a suitable trade, profession or place of work, in particular by providing information on trades and professions, o the labour market, and on "self-employment" (Article 38(1)(1(a)). Another example is Article 11(1) of the act of 14 February 1991 – Law on Notaries,[64] in which one of the requirements necessary to be appointed as a notary public may be met by a person who is a citizen of another country, if the person has the right to take up employment or "self-employment" in the territory of the Republic of Poland under the provisions of the law of the European Union. In other legal instruments, however, the Polish legislator uses different terms to refer to self-employment, and in result, there is no uniform,

61 Uniform text: Dziennik Ustaw of 2024, item 44.

62 See further E. Staszewska, *Komentarz do art. 12a*, [in:] *Rehabilitacja zawodowa i społeczna oraz zatrudnianie osób z niepełnosprawnościami. Komentarz*, LEX, 2023.

63 See T. Barwaśny, *Self-Employment in the Light…*, pp. 29 et seq. The CJEU jurisprudence accepts that it is an activity carried out by a natural person outside a subordinate employment relationship with regard to working conditions and pay, carried out on his/her own responsibility in return for remuneration paid directly to that person and in full (judgment of 20.11.2001 in case C-268/99 – self-employment of prostitutes in the Netherlands).

64 Uniform text: Dziennik Ustaw of 2022, item 1799, as amended.

consistent matrix of terms and concepts. For example, the Polish Labour Code uses the term "a person running a business on their own account" (Article 304(1) and (3), Article 304^1). The act on minimum wage includes the term "a natural person running a business", and the act on trade unions uses a broader term "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 (Article 1^1(1) of the act on trade unions).

Difficulties related to the interpretation of the term "self-employment" arise from the fact that self-employment is complex in nature: it may involve a vast number of different activities. Ángel Luis Sánchez Iglesias[65] notes that the complex nature of self-employment (and the variety of situations in which it can occur) hinders the effort to articulate a clear uniform vision of self-employed workers as a group. This produces far-reaching divergence of interpretations of the term, both in economic sciences and in legal scholarship.[66] In consequence, it is difficult to determine precisely who qualifies as "self-employed" under Polish law, and to whom the provisions that use this term actually apply.

In the broadest sense, "self-employment" refers to a situation in which a person carries out economic activity in such a manner that, from the legal standpoint, this person bears all the economic consequences and risks, and is liable with their personal property, without limitation.[67] In legal scholarship, self-employment is usually equated with working on one's own account.[68] The Polish term, *samozatrudnienie*, is derived from the English 'self-employment'. According to Jan Jończyk, a better translation of self-employment into Polish would be '*sięzatrudnienie*,' which would reflect its essence better.[69] In fact, Bolesław Ćwiertniak argues against continued use of *samozatrudnienie*.[70]

In my opinion, in view of the relevant Polish regulations, *samozatrudniony* – a self-employed person – is a natural person who provides work (services) in

65 A.L. Sánchez Iglesias, *Analiza społecznych i ekonomicznych skutków nietypowych form zatrudnienia w Unii Europejskiej na przykładzie Hiszpanii*, [in:] M. Rymsza (ed.), *Elastyczny rynek pracy*…, p. 166.

66 Cf.: J. Wiśniewski, *Istota samozatrudnienia*, "Studia z Zakresu Administracji i Zarządzania UKW" 2013, vol. 3, pp. 41 et seq.

67 Cf.: T. Szanciło, *Przedsiębiorca w prawie polskim*, "Przegląd Prawa Handlowego" 2005, no. 3, pp. 8–9; C. Kosikowski, *Pojęcie przedsiębiorcy w prawie polskim*, "Państwo i Prawo" 2001, no. 4, p. 20; A. Doliwa, [in:] T. Mróz, M. Stec (eds.), *Prawo gospodarcze prywatne*…, p. 39; E. Kryńska, *Dylematy polskiego rynku pracy*, Warszawa 2001, p. 108.

68 Cf. inter alia: I. Boruta, *W sprawie przyszłości prawa pracy*, "Praca i Zabezpieczenie Społeczne" 2005, no. 4, p. 3; Z. Kubot, *Szczególne formy zatrudnienia i samozatrudnienia*…, p. 8; P.L. Davies, *Zatrudnienie pracownicze*…, p. 199. Cf. also: Z. Hajn, *Elastyczność popytu na pracę*…, p. 75; Ł. Pisarczyk, *Różne formy zatrudnienia*…, p. 134. According to Z. Hajn, *Self-employment consists in providing services as part of the person's own business*, [in:] Z. Hajn, *Elastyczność popytu na pracę*…, pp. 79 and 80.

69 J. Jończyk, *O szczególnych formach*…, p. 40.

70 B. Ćwiertniak, *Indywidulane prawa pracy. Stosunek pracy*, [in:] K.W. Baran (ed.), *Prawo pracy*, Kraków 2005, p. 171.

person to at least one trader, an organisational unit that is not a trader, or an agricultural business (i.e. the client), on terms typical for a B2B relationship, at that natural person's own responsibility and risk, without management from the client, within the framework of registered business activity as defined in the Law on Traders, without employing other workers for this purpose and without hiring others to perform work on the basis of civil law contracts. Let us inspect the subsequent elements of this definition. Beyond doubt, self-employment involves the provision of work (services) to the client on terms typical for a B2B relationship, without management from the client, by a natural persons conducting business activity as a trader at the natural person's own responsibility and risk.[71] Under the act of 6 March 2018 – Law on Traders, the status of a trader is held only by those natural persons who carry out business activity in an organised and continuous manner on their own account. According to Article 4(2) of the same Law on Traders, partners in a general partnership (*spółka cywilna*) are also considered traders within the scope of their business operations. Thus natural persons who qualify as traders under the Law on Traders, as well as natural persons who operate a business as partners in a general partnership (Article 860 *et seq*. of the Civil Code)[72] and natural persons providing professional services on a freelance basis (*wolne zawody*) all meet the criteria of the self-employment status.[73] The freelance professions (*wolne zawody*) are not defined; rather, a person is classified as performing a freelance profession if doing so in person, on their own account, with full autonomy and without another person's supervision as to the essentials of their professional performance, usually with specialist knowledge, as evidenced by holding a relevant degree or diploma.[74] Whether or not a profession qualifies as a freelance profession is also heavily influenced by tradition.[75] There is, however, a legislative outline that serves to narrow down the scope of what can be considered a freelance profession. Article 4(1)(11) of the act of 20 November 1998 on registered lump sum taxation of certain incomes earned by natural persons,[76] for instance, indicates that a freelance profession within the meaning of this act means non-agricultural business activities

71 See, inter alia: Z. Hajn, *Elastyczność popytu na pracę*…, p. 79; Z. Kubot, [in:] H. Szurgacz (ed.), *Prawo pracy. Zarys wykładu*, Warszawa 2005, p. 81; Ł. Pisarczyk, *Różne formy zatrudnienia*…, p. 134; K. Lis, *Samozatrudnienie i inne formy minimalizacji kosztów pracy. Nowe perspektywy i zagrożenia*, Gdańsk 2004, p. 9.

72 See I. Boruta, *W sprawie przyszłości*…, p. 10; R. Drozdowski, P. Matczak, *Samozatrudnienie*, Warszawa 2004, pp. 10–11.

73 For instance: Z. Kubot, *Szczególne formy zatrudnienia i samozatrudnienia*…, pp. 17–18; Ł. Pisarczyk, *Różne formy zatrudnienia*…, p. 145; R. Drozdowski, P. Matczak, *Samozatrudnienie*…, pp. 5 and 11.

74 Cf. e.g.: W.J. Katner, *Prawo działalności gospodarczej. Komentarz. Orzecznictwo. Piśmiennictwo*, Warszawa 2003, pp. 69–70; E. Bieniek-Koronkiewicz, [in:] T. Mróz, M. Stec (eds.), *Prawo gospodarcze prywatne*…, p. 213.

75 See J. Jacyszyn, *Wykonywanie wolnych zawodów w Polsce*, Warszawa 2004.

76 Uniform text: Dziennik Ustaw of 2022, item 2540 as amended.

performed in person by translators, advocates (*adwokat*), notaries, legal advisers (*radca prawny*), auditors, accountants, insurance agents, complementary insurance agents, reinsurance brokers, insurance brokers, tax advisors, restructuring advisors, stockbrokers, investment advisors, investment company agents and patent attorneys, with the proviso that performing the profession in person means doing so without employing, be it on the basis of employment contracts or on the basis of contracts of mandate, contracts for specific work or other contracts of a similar nature, workers to perform activities that are essential to the profession. Furthermore, the act of 15 September 2000 – Code of Commercial Companies and Partnerships[77] uses the term 'freelance profession' in the context of defining partners who may form certain types of partnerships (*spółka partnerska,* typically translated as 'professional partnership'). According to Article 88 read in conjunction with Article 87(1) of the Code, only natural persons authorised to practice the following professions may become partners in a professional partnership: advocate; pharmacist; architect; physical therapist; construction engineer; chartered accountant; insurance broker; laboratory diagnostician; tax advisor; stockbroker; investment advisor; accountant; medical doctor; dentist; veterinary surgeon; notary; nurse; midwife; legal advisor; patent agent; property surveyor; sworn translator and interpreter.

While there are no major objections in the literature on the subject as to the fact that the self-employment status covers natural persons who are traders within the meaning of the Law on Traders, there is significant disagreement with regard to the additional conditions that a natural person must meet in order to qualify. The first contentious issue relates to the number of clients a self-employed worker may have. According to some scholars, in order for a natural person to qualify as self-employed, they must be providing services exclusively or mainly to one client.[78] According to Zdzisław Kubot, "«self-employment» is the performance of work (services) by natural persons operating a business or performing a profession under conditions of relatively permanent dependence on the client. Contracts concluded by the «self-employed» workers thus create a relationship of dependence of the labour (service) provider similar to that of an employee."[79] Z. Kubot argues that "from the point of view of the worker's legal status, this is independent (self-employed) work, yet from the point of view of contractual ties, it is dependent work."[80] In a similar vein, Irena Boruta claims that "often «self-employment» is connected

77 Uniform text: Dziennik Ustaw of 2024, item 18 as amended.

78 See Z. Kubot, [in:] *Prawo pracy*…, p. 81. A similar position is taken, for example, by: K. Lis, Samozatrudnienie i inne formy…, p. 9; J. Piątkowski, *Prawo stosunku pracy w teorii i praktyce*, Toruń 2006, p. 56; M. Skąpski, *Problem pojęcia i prawnej regulacji samozatrudnienia*, [in:] A. Sobczyk (ed.), *Stosunki zatrudnienia w dwudziestoleciu społecznej gospodarki rynkowej. Księga pamiątkowa z okazji jubileuszu 40-lecia pracy naukowej profesor Barbary Wagner*, Warszawa 2010, pp. 87 et seq.; T. Liszcz, *Prawo pracy*, Warszawa 2012, p. 18.

79 Z. Kubot, *Szczególne formy zatrudnienia i samozatrudnienia*…, pp. 17–18.

80 *Ibidem,* p. 18.

with the number of clients: it should either stand at one, or at any rate be small, so that it generates economic dependence."[81] Teresa Liszcz also argues that self-employment is a situation where a natural person operates a business by providing work (services) in person, on the basis of a civil law contract, to either one client or to a small number of clients, on whom the person is economically dependent.[82] On the other hand, according to Michał Skąpski, self-employment is not synonymous with any business operated by a natural person, but rather is a conceptual category which combines elements of such work with economic dependence on the client.[83] I cannot fully agree with this position. Nowhere in the Polish legal system is there a requirement that a self-employed person may only provide services to one client (or a small number thereof) under conditions of economic dependence. Furthermore, the labour law provisions designed to protect self-employed workers make no reference to economic dependence on the client, which I discuss in more detail in a further section of this chapter. For instance, health and safety protection at work is afforded to self-employed workers whose work is organised by the client, in particular when the work is performed in the client's facility or other place designated by the client (Article 304(1) and (3) of the Labour Code). Minimum wage protection applies to natural persons working in person on the basis of civil law contracts if the place and time of providing work (service) is determined by the client (Article 8d(1)(1) of the minimum wage act). Protection against discrimination extends to all self-employed natural persons who work on their own account, including those taking up and carrying out business activity on the basis of a civil law contract.[84] None of these regulations includes the requirement of economic dependence,[85] and individuals providing services to a number of different clients are fully eligible for the protection afforded by these regulations even if the work is carried out in the client's facility and the client determines where and when the work is performed. Notably, however, economic dependence is not a core element of the employment relationship either, and sometimes employees also work under conditions that entail no economic dependence on the employer (e.g. employees in high managerial positions, or those providing work for several employers).[86] I believe, therefore, that a self-employed person may very well provide services to either one or several (multiple) clients, on which they do not necessarily have to be

81 I. Boruta, *W sprawie przyszłości*…, p. 3.

82 T. Liszcz, *Prawo pracy*…, p. 18.

83 *Ibidem.*

84 Article 2(1) read in conjunction with Articles 4(2) and 8(1)(2) of the act of 3 December 2010 on the implementation of certain provisions of the European Union law on equal treatment.

85 This requirement is also absent from any provisions on the protection of self-employed workers in relation to maternity, parenthood, and collective rights.

86 See further in T. Duraj, *Zależność ekonomiczna jako kryterium identyfikacji stosunku pracy – analiza krytyczna*, "Praca i Zabezpieczenie Społeczne" 2013, no. 6, pp. 8 et seq.

economically dependent.[87] In order for the criterion of economic dependence to impact the definition of self-employment, the Polish legislator would have to clarify what it means; this criterion is interpreted differently in various legal systems and sometimes raises far-reaching doubts regarding its interpretation, both in scholarship and in practice. For example, the Spanish legislator, in Article 11 of the law 20/2007 of 11 July 2007 – Self-Employment Act (hereinafter: LETA),[88] stipulates that it applies to those self-employed workers who receive at least 75% of their income from one client. In German law, this income threshold is 50%.[89] On the other hand, economic dependence should be taken into account when determining the scope of protection to be guaranteed to the workers operating a business on their own account, which will be discussed in more detail in the chapter V[90] (unfortunately, the Polish legislator fails to take note of this fact as the law stands at present). In conclusion, I must agree with Simon Deakin, who distinguishes between two categories of self-employed workers, namely the dependent self-employed and the independent self-employed.[91]

The first contentious issue relates to whether the category of self-employed workers only includes natural persons who do not hire third parties to perform services for the client (and thus perform all of that work themselves, in person),[92] or whether that status may also be afforded to those natural persons who hire third parties in the course of their business operations and thus become an employer.[93]

87 Also e.g.: M. Bednarek, *Czas ucywilizować samozatrudnienie*, "Rzeczpospolita", 1 July 2004; B. Świąder, *Samozatrudnienie*, Gazeta Prawna.pl, 3–5 September 2004, p. 1.

88 Ley 20/2007, de 11 julio, del Estatuto del Trabajo Autónomo, Boletín Oficial del Estado of 12 July 2007, no. 166.

89 Opinion of the European Economic and Social Committee on 'New trends in self-employed work: the specific case of economically dependent self-employed work' of 29 April 2010, SOC/344- CESE 639/2010, pp. 7–8.

90 T. Duraj, *Prawny model samozatrudnienia w Polsce – perspektywa prawa zatrudnienia*. See also, inter alia: 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. 43 et seq.; K. Moras-Olaś, *Możliwe kierunki regulacji ochrony pracy samozatrudnionych ekonomicznie zależnych*, "Acta Universitatis Lodziensis. Folia Iuridica 2022, vol. 101, pp. 105 et seq.; 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.

91 S. Deakin, *The Many Futures of the Contract of Employment*, [in:] *Labour Law in an Era of Globalization*, Oxford University Press 2002, p. 191.

92 This view is favoured, for example, by M. Bednarek, *Czas ucywilizować samozatrudnienie*… See also: M. Bednarek, *Samozatrudnienie, czyli działalność we własnym firmie*, "Rzeczpospolita", 11 October 2004, p. F4.

93 This view is presented for instance by: Ł. Pisarczyk, *Różne formy zatrudnienia*…, p. 134; E. Kryńska, *Kontraktowanie pracy*, [in:] E. Kryńska (ed.), *Elastyczne formy zatrudnienia*…, pp. 111–112. It references the methodology used by the International Labour Organisation, which includes in the count the both employers with employees and those with own-account

In my opinion, the former is correct.[94] The notion that self-employment should be limited only to natural persons who perform work on their own, without hiring employees or using labour hired on the basis of civil law contracts, is rooted in the core essence of the concept: namely, provision of services performed in person.[95] Irena Boruta argues that natural persons who are self-employed should demonstrate "work performed in person" for the client.[96] This requirement applies both to natural persons who operate a business on the basis of an entry in the CEIDG, to partners in a general partnership, and to persons working the freelance professions. They should provide work (services) to clients in person, without hiring third parties, be it within an employment relationship or under a civil law contract. At most, the option should be considered that self-employed workers, when operating as sole traders, may use the assistance of members of their immediate family (i.e. those who qualify as "cooperating persons" under the act on the social insurance system[97]).

5. Legal protection of self-employed workers

5.1. The rationale behind granting protection to self-employed workers

Recently, both in Polish legislation and in the legislations of many European countries, there has been an observable tendency wherein certain rights that had been previously reserved exclusively for the employees are now being extended to workers

workers. See: Labour Force Statistics, Methodological Notes, International Labour Organisation, Geneva 2004.

94 This is precisely the approach adopted by the Statistics Poland. According to the methodology it uses, only the natural persons carrying out economic activity and natural persons who are partners in a general partnership (with no employees) are included in the count. The act on minimum wage extends minimum wage protection only to those natural persons who carry out economic activity without hiring employees or entering into contracts with subcontractors (Article 1(1b)(a)).

95 Cf. Z. Kubot, [in:] *Prawo pracy*…, p. 81.

96 I. Boruta, *W sprawie przyszłości*…, p. 3.

97 Pursuant to Article 8(11) of the act, the cooperating persons may include a spouse, children, children of the other spouse, adopted children, parents, stepparents, and adopted parents of the person engaged in non-agricultural business activity, if they share a household and cooperate in performing the business activity.

with civil law contracts,[98] including self-employed workers.[99] The reasons for this are threefold.[100] Firstly, there is the necessity of adapting the legal order in Poland to the standards arising from international and European Union law, which simply requires extending certain protections to persons performing paid work outside an employment relationship. This is because these regulations set out extensive guarantees for which every person providing work is eligible, irrespective of the legal basis on which that work performed – and this includes work performed by self-employed workers.[101] Both the international legal regime and European Union legislation have introduced protective norms that cover all working people (referred to with the umbrella term *'workers'* in English or *'travailleurs'* in French) in the areas of health and safety at work, non-discrimination and equal treatment, respect for the workers' dignity, remuneration, leisure, parental rights, and collective rights, including freedom of association.[102]

The second fundamental reason why the Polish legislator grants certain rights to self-employed workers is to ensure compliance with the Polish Constitution, which lists measures aimed at offering protection not only to employees (i.e. the workers who perform work within an employment relationship) but also to other citizens and working people, including those who provide work on the basis of civil law

98 The need to expand the scope of the protective provisions of labour law to persons performing work on the basis of civil law contracts has been discussed in labour law scholarship for years. See e.g.: Z. Salwa, *Przemiany prawa pracy początku stulecia a jego funkcja ochronna*, [in:] M. Matey-Tyrowicz, L. Nawacki, B. Wagner (eds.), *Prawo pracy a wyzwania XXI-go wieku. Księga jubileuszowa Profesora Tadeusza Zielińskiego*, Warszawa 2002, pp. 303–304; M. Seweryński, *Problemy rekodyfikacji prawa pracy*, [in:] M. Matey-Tyrowicz, L. Nawacki, B. Wagner (eds.), *Prawo pracy a wyzwania XXI-go wieku*…, pp. 323–324; Z. Hajn, *Glosa do wyr. SN z 16.12.1998 r.*, II UKN 394/98, OSP 2000, no. 12, item 177, p. 595; Z. Hajn, *Regulacja pozycji prawnej pracownika i pracodawcy a funkcje prawa pracy*, "Praca i Zabezpieczenie Społeczne" 2000, no. 10, pp. 5 and 11; T. Duraj, *Przyszłość cywilnoprawnych stosunków zatrudnienia*, [in:] "Acta Universitatis Lodziensis. Folia Iuridica" 2019, vol. 88: *Stosowanie umów cywilnoprawnych w świetle przepisów prawa pracy i ubezpieczeń społecznych*, ed. T. Duraj, pp. 9 et seq.

99 See further T. Duraj, *The Limits of Expansion*…, pp. 15–31; T. Duraj, *Funkcja ochronna prawa pracy*…, pp. 37 et seq.

100 Cf. A. Musiała, *Filozofia tzw. ochrony osób pracujących na zasadach cywilnoprawnych – głos w dyskusji podczas I Ogólnopolskiej Konferencji Naukowej z cyklu Nietypowe stosunki zatrudnienia pt. Stosowanie umów cywilnoprawnych w świetle przepisów prawa pracy i ubezpieczeń społecznych. Łódzko-poznański początek dyskusji*, "Acta Universitatis Lodziensis. Folia Iuridica" 2019, vol. 88: *Stosowanie umów cywilnoprawnych w świetle przepisów prawa pracy i ubezpieczeń społecznych*, T. Duraj (ed.), pp. 89 et seq.

101 See further T. Duraj, *Ochrona osób pracujących na własny rachunek w świetle aktów Organizacji Narodów Zjednoczonych i Międzynarodowej Organizacji Pracy – wnioski z projektu badawczego Narodowego Centrum Nauki no. 2018/29/B/HS5/02534*, "Acta Universitatis Lodziensis. Folia Iuridica" 2024, vol. 107: *The Importance of International and European Law in the Regulation of Labour Relations / Znaczenie prawa międzynarodowego i europejskiego w regulacji stosunków świadczenia pracy*, eds. Z. Hajn, M. Kurzynoga, pp. 159 et seq.

102 See further T. Barwaśny, *Self-Employment in the Light*…, pp. 29 et seq.

contracts, which in turn includes self-employed workers.[103] These measures pertain, for instance, to: the right to safe and healthy working conditions (Article 66(1)); the right to health care (Article 68(1)); the minimum wage (Article 65(4)); the right of the family to receive assistance from the state (Article 71); equality and non-discrimination (Article 32), in particular equality between men and women in family life and in the areas of education, employment and workplace promotion, equal remuneration for work of equal value, social welfare entitlements, having positions of power and holding office (Article 33), the protection of human dignity (Article 30), and the freedom of association in trade unions (Article 59(1)). In the context of the constitutional protection of self-employed workers, two important norms of more general nature are also noteworthy. Firstly, it is Article 2 of the Polish Constitution, according to which the Republic of Poland is a democratic state that is governed by the rule of law and that respects the principles of social justice. This creates a need to provide self-employed workers with statutory protective guarantees as a manifestation of social solidarity. Secondly, is it Article 24, which stipulates that labour enjoys protection in the Republic of Poland, and that the state has oversight with regard to the conditions of work. It is generally accepted that Article 24 does not give rise to individual rights.[104] However, it engenders a specific obligation on behalf of the state to enact legal norms protecting labour – any type of labour, which, again, includes the labour of self-employed workers.[105] The fact that the Constitution stipulates that labour is protected essentially means that the protection extends to every working person, as labour cannot be detached from the person performing it.[106] This elevated status of labour rests on two foundations. Firstly, work is seen as a source of human dignity,[107] since its purpose is to satisfy not only the basic human needs but also needs of a higher order, such as spiritual or cultural needs. Secondly, work also serves as the basis for the economy and thus is a source of social welfare.[108] Therefore, public authorities must protect labour, which is foundational for everyone's existence, in order to ensure the sustainability of employment as well as safe, just and appropriate (adequate) working conditions for all people. The

103 Cf. M. Gersdorf, *Między ochroną a efektywnością*…, pp. 2 et seq.

104 P. Tuleja, *Komentarz do art. 24 Konstytucji RP*, [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2023, LEX.

105 See, e.g. A. Sobczyk, *Prawo pracy w świetle Konstytucji RP*, vol. I: *Teoria publicznego i prywatnego indywidualnego prawa pracy*, Warszawa 2013, pp. 51 et seq. Cf. also: judgment of the Constitutional Court of 23 February 2010, P 20/09, LEX, no. 559164; judgment of the Supreme Court of 7 October 2004, II PK 29/04, OSNP 2005/7/97.

106 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. 279. Cf. J. Jończyk, *Ochrona pracy*, "Praca i Zabezpieczenie Społeczne" 2013, no. 3, pp. 2 et seq.

107 A. Dral, B. Bury, *Zasada ochrony pracy w Konstytucji RP*, "Przegląd Prawa Konstytucyjnego" 2014, no. 3, p. 236.

108 K. Polek-Duraj, *Humanizacja pracy w aspekcie jakości pracy i życia społeczeństwa*, "Studia i Materiały. Miscellanea Oeconomicae" 2010, no. 2, p. 237.

obligations of the state in the field of labour protection are a natural consequence of the adoption in Poland of the model of social market economy as the basis of the economic system (Article 20 of the Constitution), which presupposes the impact of both economic and social aspects of the functioning of the entire system of the state.[109] Philosophically, social market economy strives to find a balance between capital and labour. The state must intervene in the functioning of the economy in order to ensure that certain social needs are met. This includes needs related to labour protection, regardless of the basis on which this labour is being provided. These needs would not be met if the system were to operate purely to the basis of the market forces.[110] In this sense, the social market economy is rooted in the principle of social justice laid down in Article 2 of the Constitution of the Republic of Poland.[111] Both the principle of social justice and the principle of labour protection explicitly count among the most fundamental principles on which the Polish state is founded, which means that their status and significance within the Polish legal system are unquestionably high.

The third fundamental reason why the Polish legislator grants certain rights to self-employed workers is the rising scale of work performed by individual persons on their own account, yet under conditions similar to those of employees. This creates a need to provide these individuals with a similar (though not identical) standard of protection as enjoyed by employees, since very often these workers, despite not being formally subordinated, have strong and enduring organisational and legal bonds with the clients, based mainly on economic dependence of the latter. Self-employed workers who provide work under conditions of such dependence are at risk, because the client, using its unquestionable advantage, may unilaterally impose on them unfavourable contractual stipulations. In consequence, these workers should be offered protection with a specific scope, to shield them from this risk. It is important to note that employees (i.e. workers who perform work on the basis of employment contracts) enjoy a degree of statutory protection simply by virtue of operation of the law, yet workers with civil law contracts fall under the umbrella of the civil law regime, in which the principle of freedom of contract prevails. In result, the economically dominant entity (the client) enjoys a stronger negotiating position and has an almost unlimited capacity to unilaterally impose contractual provisions. Of course, with the rise in the self-employed worker's independence and financial autonomy, the need for statutory protection decreases.

109 Cf. T. Liszcz, *Praca i kapitał w Konstytucji Rzeczypospolitej Polskiej*, "Studia Iuridica Lublinensia" 2014, no. 22, pp. 259–260.

110 D.R. Kijowski, P.J. Suwaj, *Kryzys prawa administracyjnego?*, [in:] A. Doliwa, S. Prutis (eds.), *Wypieranie prawa administracyjnego przez prawo cywilne*, Warszawa 2012, LEX.

111 A. Ludera-Ruszel, *Samozatrudnienie ekonomicznie zależne*…, p. 49.

5.2. Areas of protection of self-employed workers

5.2.1. Protection of life and health

Health and safety are two key aspects of any human labour, regardless of the general legal regime and specific legal basis under which this labour performed. One of the tenets of the social teaching of the Catholic church, discussed widely, for instance, in the encyclical by John Paul II, *Laborem exercens*, is the necessity of creating dignified working conditions for all working people, including above all guaranteed rights to engage in labour in a manner that is safe and does not endanger human life and health.[112] A rhetorical question thus must be posed at this point: should legal protection in terms of health and safety also extend to self-employed workers? The answer clearly must be affirmative. Indeed, the need to safeguard the life and health of every human being is the universal value at the root of the introduction of health and safety regulations for self-employed workers; this protection should be afforded to every person, and especially to those who work. This is because in the process of providing labour, workers are exposed various risks and dangers – this, again, is true regardless of the legal ramifications that frame the relationship between the worker and the client. The Polish legislator takes this into account, providing for a wide scope of life and health protection extending to all persons who provide work, regardless of the basis on which this work is performed; self-employed workers are very much included within this scope.[113]

Legal protection of self-employed workers in terms of workplace health and safety was introduced into the Polish Labour Code in July 2007;[114] it was, in fact, the first area where the legislator saw the need to specifically include self-employed workers under the protective umbrella of the relevant legislation.[115] While the direction of change here must be assessed positively, it should nonetheless be noted that no new, separate norms were enacted that would take into account the specific nature of self-employed work. Instead, the relevant provisions of the Labour Code were simply extended, and now apply not only to employees but to self-employed workers as well. This approach raises a number of problems regarding the interpretation of the

112 T. Wyka, *W poszukiwaniu aksjologii prawa pracy – o roli encykliki "Laborem exercens" Jana Pawła II*, "Monitor Prawa Pracy" 2011, no. 9, pp. 456 et seq. Cf. also J. Majka, *Ewangelia pracy ludzkiej. Ewolucja od Leona XIII do Jana Pawła II*, [in:] *Praca nad pracą. Kongres pracy we Wrocławiu*, Wrocław 1996, p. 28.

113 Cf. T. Wyka, *Przyczyny i zakres stosowania przepisów bhp poza stosunkiem pracy*, [in:] K.W. Baran (ed.), *System prawa pracy*, vol. VII: *Zatrudnienie niepracownicze*, Warszawa 2015, LEX.

114 Amended by Article 95 of the act of 13 April 2007 on the State Labour Inspection (Dziennik Ustaw of 2007, no. 89, item 589) as of 1 July 2007.

115 S. Kowalski, *Obowiązek zapewnienia bezpiecznych warunków pracy przedsiębiorcom*, "Służba Pracownicza" 2009, no. 12, pp. 9 et seq.

law, both in scholarship and in practice,[116] because the law is currently inconsistent, and there are several areas where there are clear gaps in the scope of regulation.

The highest law of Poland, i.e. the Constitution, *expressis verbis* grants to every human being the universal and independent right to healthy and safe working conditions, regardless of the legal regime under which the person performs labours.[117] According to Article 66(1) of the Constitution, everyone has the right to safe and healthy working conditions;[118] a scope of applicability so broad that it most certainly covers self-employed workers.[119] This provision must be interpreted as ensuring freedom from working in unsafe, unhealthy conditions, across all sectors of the economy and all places where work is carried out[120]. Article 66(1), however, is not a self-sufficient basis for individual claims, since the Constitution makes reference in this respect of lower-level legislation, specifying that the manner in which this right can be exercised and the obligations of the entity for which the work is provided are determined by statute. This mechanism allows for a certain gradation of the constitutional right to safe and healthy working conditions, with limitation of the scope for certain categories of workers, as long as the essence of the right is upheld. This follows from Article 31(3) of the Constitution, which stipulates that the exercise of constitutional rights and freedoms may be limited, but only where it is necessary in a democratic state to ensure state security, to maintain public order, to protect the natural environment, to protect public health or morality, or to uphold the freedoms and rights of other persons. It is therefore permissible under Polish law to introduce a differentiation of the right to safe and healthy working conditions, but never in a manner that would engender labour discrimination. Article 32 of the Constitution provides that everyone is equal before the law and has the right to equal treatment by public authorities, including with regard to the protection of life and

116 See further M. Raczkowski, *Bezpieczne i higieniczne warunki*…, pp. 66–70; M. Mędrala, *Obowiązki ze sfery bhp*…, pp. 143–157; M. Mędrala, *Praca na własny rachunek a ochrona w zakresie BHP*, "Acta Universitatis Lodziensis. Folia Iuridica" 2022, vol. 101, pp. 133 et seq.; S. Kowalski, *Obowiązek zapewnienia bezpiecznych warunków*…, pp. 9 et seq.

117 See, for example: K.W. Baran, *Zasada zapewnienia pracownikom bezpiecznych i higienicznych warunków pracy*, [in:] K.W. Baran (ed.), *Zarys systemu prawa pracy*, vol. I: *Część ogólna prawa pracy*, Warszawa 2010, p. 654; T. Wyka, *Konstytucyjne prawo każdego*…, pp. 331 et seq.; T. Lewandowski, *Prawo człowieka do bezpiecznych i higienicznych warunków pracy*, "Wiedza Prawnicza" 2009, no. 3, p. 16; J. Jankowiak, *Prawo do bezpiecznych i higienicznych warunków pracy w konstytucji. Glosa do wyroku TK z dnia 24 października 2000 r., K 12/2000*, "Gdańskie Studia Prawnicze. Przegląd Orzecznictwa" 2008, no. 4, pp. 163 et seq.

118 Labour law scholarship generally adopts a broad understanding of the term 'occupational health and safety'. It includes legal, organisational, technical, medical, psychological and other measures aimed at eliminating or reducing to a minimum the negative impact of the working environment on the organism of the worker. See: G. Goździewicz, T. Zieliński, *Komentarz do art. 15 KP, teza 3*, [in:] L. Florek (ed.), *Kodeks pracy. Komentarz*, LEX, 2017.

119 Cf. L. Florek, *Zgodność przepisów prawa pracy z Konstytucją*, "Praca i Zabezpieczenie Społeczne" 1997, no. 11, p. 11.

120 Cf. A. Kijowski, J. Jankowiak, *Prawo pracownika do uchylenia się od niebezpieczeństwa*, "Państwo i Prawo" 2006, no. 10, pp. 60 et seq.

health in labour-related matters. No one – therefore also no self-employed worker – may be discriminated against in the social or economic arena for any reason, including in the area of work-related health and safety.

This constitutional guarantee of safe and healthy working conditions for self-employed workers is further reinforced by Article 24 of the Constitution, according to which all labour enjoys protection in the Republic of Poland, and the state has oversight with regard to the conditions of work.[121] The regulation clearly extends to the working conditions of self-employed workers,[122] including the protection of their life and health, which undoubtedly falls under the umbrella of the state's oversight, exercised specifically by the State Labour Inspection. Article 24 of the Constitution imposes an obligation on the state to create and enforce regulations protecting the life and health of workers, regardless of the legal regime under which they provide labour (including self-employed workers). Furthermore, their protection in the field of safe and healthy working conditions is also enshrined in Article 38 of the Constitution, which stipulates that everyone's life is protected, and in its Article 68, which stipulates that everyone's health is protected as well.[123] In the opinion of the Polish Constitutional Court, the subject matter specifically of Article 68(1) is not health in an abstract sense; rather, the regulation enshrines the entitlement of every person (again, of course, including self-employed workers) to enjoy the benefits of a system designed to prevent all diseases and disabilities – which includes the prevention of diseases and disabilities that may rise arising in the process of providing labour.[124] Sometimes, Article 30 of the Constitution is also viewed as a sources of guarantees of protection of life and health at work, because of its regulation that pertains to respecting and protecting the dignity of every human being.[125] The Polish Constitutional Court has ruled that protection of human dignity is impossible without sufficient safeguards for the protection of

121 A more thorough analysis of this regulation may be found in an earlier section of this chapter.

122 See B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009, p. 179; W. Sanetra, *Rola państwa i partnerów społecznych w kształtowaniu i stosowaniu prawa pracy*, *Referaty na międzynarodową konferencję naukową "Ochrona pracy. Uwarunkowania prawne, ekonomiczne i społeczne", Toruń, 23–24 września 1998*, vol. 1, Toruń 1998, p. 15.

123 W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, VII ed., Warszawa 2013, art. 68, LEX.

124 See judgment of the Constitutional Court of 23 March 1999, K 2/98, OTK 1999, no. 3, item 38.

125 Cf.: A. Zieliński, *Pojmowanie godności ludzkiej w świetle praw ekonomicznych i socjalnych*, [in:] A. Surówka (ed.), *Godność człowieka a prawa ekonomiczne i socjalne. Księga jubileuszowa wydana w piętnastą rocznicę ustanowienia Rzecznika Praw Obywatelskich*, Warszawa 2003, pp. 47 et seq.; R. Sobański, *Normatywność godności człowieka*, [in:] A. Surówka (ed.), *Godność człowieka a prawa ekonomiczne i socjalne. Księga jubileuszowa wydana w piętnastą rocznicę ustanowienia Rzecznika Praw Obywatelskich*, Warszawa 2003, pp. 20 et seq.; M.T. Romer, *Godność człowieka w prawie pracy i pomocy społecznej*, [in:] *Godność człowieka a prawa ekonomiczne i socjalne. Księga jubileuszowa wydana w piętnastą rocznicę ustanowienia Rzecznika Praw Obywatelskich*, Warszawa 2003, pp. 65 et seq.

human life.[126] This means that an inherent part of the right to dignity is ensuring that every worker, including self-employed workers, is sufficiently protected in terms of safe and healthy working conditions.

The constitutional guarantee of safe and healthy working conditions for self-employed workers is articulated in greater detail in statutory provisions, primarily those of the Labour Code.[127] Pursuant to its Article 304(1), the employer is obliged to ensure safe and healthy working conditions for persons who engage in business activity on their own account in the employer's workplace or in another place designated by the employer. This obligation also applies to traders who are not employers, if they in fact organise the work carried out by self-employed workers (Article 304(3) of the Labour Code). These provisions make a further reference to Article 207(2) of the Labour Code, which offers a non-exhaustive list of obligations of the employer in the area of protecting the life and health of employees. In result, clients that use the labour of self-employed workers must provide them with a standard of protection in the area of health and safety that is similar to that offered to employees (they are obliged to comply with the labour law regulations that serve to protect the life and health of workers). They must guarantee self-employed workers a high level of occupational health and safety at the workplace, eliminate that are harmful and onerous health conditions, promote a working environment built on good occupational health and safety practices with regard to self-employed workers, prevent accidents at work and occupational diseases, provide preventive health medical appointments, and offer access to compliance training on matters of health and safety at work. However, there is one important shortcoming in the regulations: they differentiate, without any good reason to do so, between the duties and responsibilities in the area of health and safety that are imposed on employers (i.e. businesses with employees) compared to and traders with no employees. An employer (as defined in Article 3 of the Labour Code) must apply the obligations set out in Article 207(2) of the Labour Code to self-employed workers "directly",[128] and its responsibility for ensuring safe and healthy working conditions is limited only to the workplace or another place of work designated by the employer. In contrast, a trader that is not an employer applies the obligations set out in Article 207(2) "respectively",[129] while its responsibility for ensuring safe and healthy working

126 Judgment of the Constitutional Court of 7 January 2004, K 14/03, OTK-A 2004, no. 1, item 1. Cf. also: judgment of the Constitutional Court of 12 December 2005, K 32/04, OTK-A 2005, no. 11, item 132.

127 T. Wyka, *Stosowanie przepisów bhp w niepracowniczym zatrudnieniu*, [in:] K.W. Baran (ed.), *System prawa pracy*, vol. VII, pp. 650 et seq.

128 In practice, this makes the employer's health and safety obligations towards self-employed workers on the employer's premises or in another place designated by the employer the same as that employer's obligations towards employees. So T. Wyka, *Bezpieczeństwo i ochrona zdrowia*…, p. 173.

129 In practice, this means that a business that is not an employer has a much greater flexibility in this respect; some of the health and safety obligations set out in Article 207(2) of the Labour

conditions is much broader: it is not limited to the workplace another place of work designated by the trader. Under Article 304(4), a non-employer must ensure safe and healthy working conditions for all self-employed workers whose work it organises, regardless of location.[130] However, self-employed workers who make an autonomous choice as to the place where they perform work (e.g. those who provide work from home or from another location of their choice) are excluded from health and safety protection at all – which raises justified doubts.[131] Moreover, the Polish legislator has completely ignored, in the context of responsibility for meeting occupational health and safety standards, the entities that are neither employers under Article 3 of the Labour Code nor traders, but that nonetheless may commission work from self-employed workers (e.g. institutions of the civic society such as associations and foundations, or public entities that carry out no business activity and employ no staff). Even if they hire the labour of self-employed workers, these entities are *de lege lata* free from any of the occupational health and safety obligations listed in the Labour Code.

Importantly, Under Article 304[1] of the Labour Code, persons operating a business on their own account, when they are present in the workplace or in another place designated by the employer or another client, to the extent specified by that employer or client, are obliged to meet the same obligations that are imposed on employees in terms of compliance with the provisions and principles of occupational health and safety under Article 211 of the Labour Code.[132] Consequently, as a general rule, these self-employed workers must be familiar with the provisions and principles of occupational health and safety, take part in relevant training, pass the relevant examinations, look after machines, devices, tools and equipment, maintain order and cleanliness in the workplace; use collective and individual protection equipment as designed; participate in all mandatory work-related medical examinations, comply with medical advice, and cooperate with the client in fulfilling the obligations in the area of occupational health and safety. Yet in practice, the scope of health and safety obligations imposed on a self-employed worker is decided by the employer or another client, which is a significant drawback of the approach selected by the Polish legislator. Clients are typically looking to reduce the costs of their operations.

Code may be applied directly, others with modifications taking into account the specifics of self-employment, and other do not have to be applied at all.

130 Cf. P. Prusinowski, *Komentarz do art. 304 KP, teza 6*, [in:] K.W. Baran (ed.), *Kodeks pracy. Komentarz*, vol. II, LEX, 2020.

131 In contrast, the Polish legislator ensures that remote workers have health and safety safeguards.

132 It is worth noting the inconsistency of these provisions. While Article 304(3) of the Labour Code exempts from the health and safety obligations the entities organising work for self-employed workers if these entities are neither an employer as defined in Article 3 of the Labour Code nor traders, Article 304[1] of the same Labour Code covers all self-employed workers who provide work for the entities organising that work; this also applies to entities that are exempt from the regulation of the above-cited Article 304(3).

Under the law as it stands, they are free to restrict the application of Article 211 of the Labour Code in the civil law contracts with self-employed workers, because parties have far-reaching freedom to determine which occupational health and safety obligations will apply in a given situation and which can be disregarded or modified. This allows the clients to circumvent occupational health and safety regulations and to drastically reduce the standard of protection for the life and health of self-employed workers. In my opinion, there is a regulatory gap that should be patched. In order to do so, the legislator – taking into account the specific nature of self-employment – should define *expressis verbis* the minimum health and safety obligations applicable to every self-employed worker.

Pursuant to Article 304^3 of the Labour Code read in conjunction with Article 208(1) of the Labour Code, self-employed workers performing work in a client's workplace or in another place designated by the client are obliged to cooperate and collaborate with one another in order to ensure an adequate level of occupational health and safety. With regard to employees, the legislator clearly indicates in Article $207(2)^1$ of the Labour Code that the costs of the occupational health and safety measures taken by the employer may not in any way be passed onto the employees. Yet there are no legal obstacles to these costs being passed onto self-employed workers, for instance by means of a civil law contract, even if these workers are economically dependent on one client and perform work in a facility belonging to that client (in the same fashion as employees).

Protective guarantees for self-employed workers pertaining to occupational health and safety are also scattered across other labour law enactments. The act of 27 June 1997 on occupational medicine services in the healthcare system[133] in its Article 5(3)(1) creates the option for self-employed workers (and persons who cooperate with them) to sign up for voluntary coverage by the preventive occupational medicine services in the healthcare system; this requires an application filed by the worker and is financed from the worker's own funds (Article 23(1)).[134] Furthermore, Article 10(2)(1) of the act of 13 April 2007 on the State Labour Inspection[135] explicitly states that the Inspection is in charge of ensuring safe and healthy working conditions for persons working on their own account at a place designated by a client (either an employer or trader that is not an employer).[136] If shortcomings in terms of observance of health and safety regulations towards self-employed workers are found, the Inspection may that these shortcoming be rectified within a specified period, or may even force the closure of the facility where the violation occurred. Furthermore, under Article 26(3) of the act of 23 May 1991 on trade unions, the

133 Uniform text: Dziennik Ustaw of 2022, item 437.

134 M. Kaczocha, *Służba medycyny pracy. Komentarz, art. 23*, LEX, 2014.

135 Uniform text: Dziennik Ustaw of 2019, item 1251, as amended.

136 See for example: A. Jasińska-Cichoń, *Ustawa o Państwowej Inspekcji Pracy. Komentarz*, Warszawa 2008, art. 10, LEX; S. Kryczka, *Podmioty podlegające kontroli PIP*, Warszawa 2020, LEX; K. Rączka, *Komentarz do art. 10*, [in:] M. Gersdorf, J. Jagielski, K. Rączka (eds.), *Ustawa o Państwowej Inspekcji Pracy. Komentarz*, Warszawa 2008, LEX.

remit of a trade union organisation in a facility includes, *inter alia*, oversight over the observance of the regulations and principles of occupational health and safety. Trade unions may also ask a client that hires labour from self-employed workers to carry out an occupational safety check if there is a threat to the life or health of self-employed workers (Article 29).[137] Moreover, own-account workers are subject to the protection regulated by the act of 30 October 2002 on social insurance coverage for workplace accidents and occupational diseases,[138] and mandatorily subject to this insurance. Pursuant to Article 3(3)(8) of this law, workplace accidents include any sudden event caused by external circumstances resulting in injury or death, which occurred during the period of accident insurance coverage in the course of performance of ordinary activities related to non-agricultural activity as defined in the provisions on the social insurance system.[139] Case law suggests that this includes typical activities related to the nature of the business activity in question. In the judgment of 14 January 2014, the court of appeal in Białystok held that an accident involving a person conducting business activity that occurred while the person was travelling to the premises of a client in order to carry out work under a contract with that client falls within the umbrella of this performance of ordinary activities related to the business in equation, and thus the accident is an accident in the course of performance of ordinary activities, as long as such activity normally involves travelling to the place where the activity is performed. Provision of construction services involves this type of travel, since the ordinary activities involved in this type of service are typically performed at the place of business or the place of residence of the client.[140] In a judgment of 28 August 2013, the Supreme Court ruled that an accident suffered by a self-employed person while travelling to the accommodation provided by the organiser of a business meeting after a celebration during which business matters were discussed also constitutes an accident occurring during the performance of ordinary activities related to the conduct of non-agricultural business activity.[141] Pursuant to Article 5(1)(8) of the same act, the circumstances and causes of such an accident, when it involves a person carrying out non-agricultural business activity (and/or those who cooperate with that person) are assessed by the Social Insurance Institution, even if the person involved in the accident provided work for a client and at the place designated by the client.[142] Importantly, self-employed workers are eligible for almost all of the benefits associated with workplace accidents

137 For more information, see further (section on the collective rights of self-employed workers).

138 Uniform text: Dziennik Ustaw of 2022, item 2189, as amended.

139 Cf. S. Samol, *Komentarz do art. 3*, [in:] D.E. Lach, K. Ślebzak, S. Samol (eds.), *Ustawa o ubezpieczeni*u społecznym z tytułu wypadków przy pracy i chorób zawodowych. Komentarz, Warszawa 2010, LEX.

140 III AUa 1568/13, LEX, no. 1415783.

141 UK 56/13, OSNP 2014, no. 5, item 77. Cf. also: judgment of the Supreme Court of 8 June 2010, II UK 407/09, OSNP 2011, no. 21–22, item 282, judgment of the Supreme Court of 20 September 2018, I UK 227/17, OSNP 2019, no. 4, item 52.

142 S. Samol, *Komentarz do art. 3*…, LEX.

and occupational diseases set out in Article 6(1) of the act, with the exception of the compensation benefit.

In conclusion, the legislation in Poland in the area of protection of life and health of self-employed workers at work is essentially in line with the standards of international and European Union law, guaranteeing these workers – at least in principle – a degree of protection similar to that of employees. However, the manner of regulation is problematic on a fundamental level. The Polish legislator, when delimiting the scope of health and safety obligations of both the worker and the client, relies on references to relevant provisions on employees (i.e. uses the method of expansion of labour law). This causes many problems with interpretation of the laws, imbuing the legal position of the self-employed workers with uncertainty in regard to the protection of their life and health at work. Neither the obligations of the client nor those of the self-employed workers are laid down in a clear manner. Parties to civil law contracts have considerable freedom in determining their relations, and may assign costs and liability for non-compliance with health and safety regulations essentially at will, which prevents effective enforcement by state authorities.[143] Moreover, the Polish law differentiates the scope of protection of life and health of self-employed workers depending on whether or not the client is an employer; this is hardly reasonable. Furthermore, the fact that regulations fall short of extending to all types of clients, and fail to account for clients that are neither employers nor traders, also deserves criticism. Another problem is that the law offers no protective guarantees in the area of health and safety to persons who cooperate with the self-employed worker (e.g. immediate family members in a shared household) – yet these persons should enjoy the same guarantees to the extent that they provide unpaid assistance in the process of provision of work by the self-employed worker.[144] Own-account workers (and persons who cooperate with them) also have no right to refrain from work if working conditions fail to meet the applicable occupational health and safety requirements and pose a direct threat to their health or life, or when their work causes danger to other persons. *De lege lata*, only employees have this right, and they retain the right to remuneration while exercising it (Article 210 of the Labour Code). There is also an absence of regulation pertaining to the liability of self-employed workers for breaches of health and safety obligations; the rules on employee liability do not apply. Own-account workers also do not count towards the total number of workers that triggers the obligation of the employer to establish a health and safety service at the workplace (Article 237^{11} of the Labour Code) and a health and safety commission, which is an advisory and consultative body at businesses with more than 250 employees (Article 237^{12} of the Labour Code). Furthermore,

143 See T. Duraj, *Stosowanie samozatrudnienia z naruszeniem przepisów BHP i ustawy o minimalnym wynagrodzeniu za pracę – wnioski z projektu NCN nr 2018/29/B/HS5/02534*, [in:] T. Duraj (ed.), *Stosowanie nietypowych form zatrudnienia z naruszeniem prawa pracy i prawa ubezpieczeń społecznych – diagnoza oraz perspektywy na przyszłość*, Łódź 2023, pp. 109 et seq.

144 *De lege lata,* it should be noted that Article 304(4) of the Labour Code offers life and health protection only to third parties who are not actually involved in the work process.

self-employed workers have no guaranteed right to participate in consultations on occupational safety and health, which are an important element of the process of ensuring an appropriate level of protection of life and health of all workers in a given workplace (Article 237^{11a} of the Labour Code).

5.2.2. Protection against discrimination and unequal treatment

In today's world, guarantees of non-discrimination and equal treatment are a cornerstone of any democratic state that is governed by the rule of law and that respects the principles of social justice. They have a considerable impact on social and economic development, as well as on the labour market. The Polish legislator recognizes this fact. Consequently, safeguards for self-employed workers in terms of non-discrimination and equal treatment were enshrined in the law, entering into force on 1 January 2011 by the power of the act of 3 December 2010 on the implementation of certain provisions of the European Union on equal treatment (Equality Law). This was one of the first areas rights of workers with civil law contracts (including self-employed workers) were recognized. However, the notes accompanying the act made it very clear that direct impetus for its enactment came from formal objections raised by the European Commission regarding Poland's inadequate or incomplete implementation of the provisions of the European Union directives; in fact, two applications had already been filed with the Court of Justice of the European Union a the time, which could have resulted in Poland being harshly fined.[145]

In principle, the legislation merits a positive assessment. It certainly contributed to raising the standards of protection in the area of non-discrimination and equal treatment for workers who are not employees. Unfortunately, however, the European Union regulations have not been implemented properly, and the solutions fail to sufficiently take into account the specific nature of work provided on the basis of civil law contracts, including work provided in person by sole traders. Consequently, in practice, the law fails to effectively protect this category of workers from discrimination and unequal treatment[146] – conclusion supported by statistics that demonstrate that in Poland only very few of cases of this type are being brought before the courts, and even fewer end with the award of compensation to the discriminated person on the basis of these provisions.[147]

The fundamental guarantees of non-discrimination and equal treatment for self-employed workers in Poland actually originate in the Constitution, which

145 Parliamentary paper of 16 September 2010, no. 3386, Sixth Sejm, http://orka.sejm.gov.pl/Druki6ka.nsf (accessed: 13.02.2024).

146 Cf. M. Barański, B. Mądrzycki, *Praca na własny rachunek a ochrona przed mobbingiem i dyskryminacją,* "Acta Universitatis Lodziensis. Folia Iuridica" 2022, vol. 101, pp. 153 et seq.

147 I. Wróblewska, *Przeciwdziałanie dyskryminacji na podstawie przepisów ustawy z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*, "Przegląd Konstytucyjny" 2020, no. 4, pp. 78 et seq.

articulates the principle of equal treatment as a fundamental and universal freedom and right of every human being.[148] According to Article 32(1) of the Constitution, everyone is equal before the law and has the right to be treated equally by the public authorities. In its judgment of 9 March 1988,[149] the Constitutional Court rules that the constitutional principle of equality before the law means that all subjects of the law who have the relevant quality in an equal degree must be treated equally.[150] This requires treatment that is fully equal, without differentiations in either direction – neither to discriminate nor to favour.[151] 32(2) of the Constitution builds further on the principle of equality before the law, in that it introduces a universal prohibition of discrimination: no one can be discriminated against in political, social, or economic life, for any reason.[152] This constitutional prohibition of discrimination is very broad, covering every person and every area of political, social, or economic life wherein the person may come into direct contact with the public authorities.[153] While the Constitution lists no grounds on which discrimination is prohibited, the phrasing "for any reason" means that the list is open rather than exhaustive. Moreover, the prohibition of discrimination is absolute: there is no circumstance in which the public authorities would be allowed to disregard it.[154]

148 B. Wagner, *Zasada równego traktowania i niedyskryminacji pracowników*, "Praca i Zabezpieczenie Społeczne" 2002, no. 3, p. 3.

149 Dziennik Ustaw 7/87, OTK 1988, no. 1, item 1.

150 Cf. L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. II, 2nd ed., Warszawa 2016, Article 32, LEX. In its resolution of 16 March 2000 (I KZP 56/99, LEX, no. 39500), the Supreme Court stated that the constitutional principle of equal treatment simply means 'equal treatment of citizens who are in the same legal situation'.

151 The principle of equal treatment does not consist in an absolute prohibition of differentiating the situation of certain persons, but in the correct choice of criteria for doing so. It is therefore permissible to treat differently persons who are in different factual and legal situations. Cf. also, inter alia: judgment of the Constitutional Court of 20 October 1998, K 7/98, OTK 1998, no. 6, item 96; judgment of the Constitutional Court of 17 May 1999, P 6/98, OTK 1999, no. 4, item 76.

152 Applying this principle to the employment law, discrimination is prohibited, understood as worse treatment of a worker (including a self-employed worker) unjustified by objective reasons, but instead due to features or characteristics unrelated to the work and concerning the worker personally, which are important from the social point of view (cf. A. Sobczyk (ed.), *Kodeks pracy. Komentarz*, Warszawa 2023, pp. 53 et seq.). In the judgment of 3 December 2009 (II PK 148/09, LEX, no. 1108511), the Supreme Court ruled that the principle of non-discrimination is a qualified form of unequal treatment of employees, and consists in an unacceptable differentiation of the legal situation in the sphere of employment according to negative and prohibited criteria. Therefore, it does not constitute discrimination to differentiate the rights of employees (or other workers) on the basis of criteria not considered discriminatory.

153 P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r.*, Warszawa 2000, p. 51.

154 See, e.g.: W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. VII (Komentarz do art. 32), Warszawa 2013, LEX; P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 2nd ed., Article 32, LEX, 2021; M. Kuba, *Regulacje krajowe, pkt 1.4*, [in:] Z. Góral (ed.), *Zakaz*

However, these constitutional norms have a shortcoming that is rather impactful from the perspective of the legal situation of self-employed workers. Namely, it is generally accepted in the scholarship that these norms apply primarily in the vertical dimension, i.e. in the relations between a person and the state.[155] Article 32 of the Constitution refers primarily to the state, which is obliged thereunder to be bound by the principles of equal treatment and non-discrimination when applying the law to individual persons with similar characteristics. This, in turn, put the obligation on the public authorities to operate in a correct, objective, and impartial manner, rather than differentiate their conduct in response to differences between individual persons.[156] Consequently, the public authorities must offer similar treatment to persons in similar situations. However, Article 32 has no direct applicability to horizontal relations, i.e. those between private entities (in this case, between self-employed workers and their clients).[157] The Board of the Legislative Council, in its opinion to the draft version of the act of 12 August 2008 on equal treatment, clearly spoke out against the inclusion of relations between private entities under the umbrella of the principle of equal treatment and non-discrimination.[158] Therefore, the adoption of the Equality Law should, in principle, be assessed positively. It expanded the scope of the protection against discrimination and unequal treatment, as well as the constitutional guarantees under Article 32, towards horizontal relations between private law entities, in this case to relations between workers who provide work on the basis of civil law contracts, including self-employed workers, and their clients.[159]

The protective coverage under the Equality Law is laudably broad and is fully in line with both international and European Union law standards as well as the Polish Constitution:[160] it extends to all natural persons, regardless of any of their characteristics, including whether or not they have legal capacity, and regardless of

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dyskryminacji w zatrudnieniu pracowniczym, Warszawa 2017, LEX. In the context of the principles of equal treatment and non-discrimination, Article 33 of the Polish Constitution, which introduces equality between women and men, also plays an important role. According to this norm, a woman and a man in the Republic of Poland have equal rights in family, political, social and economic life. In particular, this equality concerns: education, employment and promotion, the right to equal remuneration for work of equal value, to social security and to occupy positions, perform functions and obtain public dignities and distinctions.

155 Cf. I. Wróblewska, *Przeciwdziałanie dyskryminacji*…, pp. 79–80.

156 See W. Sadurski, *Równość wobec prawa*, "Państwo i Prawo" 1978, no. 8–9, p. 55.

157 Following S. Jarosz-Żukowska, *Problem horyzontalne stosowania norm konstytucyjnych dotyczących wolności i praw jednostki w świetle Konstytucji RP*, [in:] M. Jabłoński (ed.), *Wolności i prawa jednostki w Konstytucji RP*, vol. 1, Warszawa 2010, p. 207. Otherwise: M. Masternak-Kubiak, *Prawo do równego traktowania*, [in:] Banaszak, A. Preisner (eds.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa 2002, p. 136.

158 S. Jarosz-Zhukowska, *Problem horyzontalnego*…, p. 207.

159 Until the equality law came into force on 1 January 2011, the only group covered by the broad protective guarantees of non-discrimination and equal treatment were employees and job applicants to whom the Labour Code applies.

160 Cf. K. Walczak, *Zakaz dyskryminacji w stosunku do osób wykonujących pracę na podstawie atypowych form zatrudnienia*, "Monitor Prawa Pracy" 2012, no. 3, p. 120; M. Kułak, *Komentarz*

the basis on which they provide their work, with the exception of certain categories of employees to the extent regulated by the Labour Code (Article 2). This of course fully covers self-employed workers, including sole traders – a point further reinforced by Article 4(2) of the Equality Law, which explicitly states that it applies to the conditions of taking up and pursuing business, trade, or professional activities. This provision should be interpreted broadly, to cover any activity oriented towards earning money, be it on the basis of registration with the CEIDG, on the basis of participating in a general partnership, or in pursuit of freelance profession.[161]

However, the regulations that define the material scope of protection against discrimination and unequal treatment of self-employed workers are highly problematic. The purpose of the Equality Law is to prevent and counteract violations of the principle of equal treatment. These violations include specifically: direct discrimination; indirect discrimination; harassment; sexual harassment; less favourable treatment of a person resulting from either their rejection of harassment or sexual harassment or their submission to harassment or sexual harassment; encouraging a person to engage in any of these behaviours; commanding a person to engage in any of these behaviours (Article 3(5) in conjunction with Article 1(1)).[162] In contrast to the Labour Code, which has an open-ended list of prohibited grounds of discrimination, the Equality Law narrows these grounds down, with regard to self-employed workers, only to the characteristics specifically enumerated therein. Pursuant to Article 8(1)(2) of the Equality Law, with regard to the conditions for taking up and pursuing business, trade, or professional activity, unequal treatment of natural persons is prohibited on the basis of sex, race, ethnicity, nationality, religion, belief, worldview, disability, age, or sexual orientation. The fact that this list is exhaustive[163] is a significant shortcoming of the regulation, because in effect it significantly limits the scope of protection in this area. This is not only inconsistent with the Constitution, Article 32 of which prohibits discrimination "for any reason," but also with international law, where the lists of legally protected characteristics are open-ended. The issues was raised by the Commissioner for Human Rights – after the entry of the Equality

do art. 2, [in:] K. Kędziora, K. Śmiszek (eds.), *Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania. Komentarz*, Warszawa 2017, LEX.

161 M. Barzycka-Banaszczyk, *Dyskryminacja (nierówne traktowanie)*…, p. 9. As a side note, it is worth noting that the Equality Law also covers in its subjective scope legal persons and organisational units which are not legal persons and which are granted legal capacity by the legislator (Article (1)). However, since these entities do not have personal characteristics that may constitute grounds for discrimination, it should be assumed that their protection will always be linked to the natural persons constituting the legal person or organisational unit.

162 The Equality Law defines the terms direct discrimination, indirect discrimination, harassment, sexual harassment in Article 3.

163 The legislator has not chosen to use the phrase 'in particular' or any other term indicating an open-ended nature of these provisions in the Equality Law, following the example of the provisions of the Labour Code.

Law into force – before the Government Plenipotentiary for Equal Treatment.[164] The Commissioner for Human Rights argued that the Equality Law, by limiting the scope of protection only to violations of the principle of equal treatment on grounds listed therein, is incompatible with Article 32 read in conjunction with Article 2 of the Constitution,[165] as well as with international legal standards in general, and Article 14 of the European Convention on Human Rights in particular.

The review of the anti-discrimination legislation in Poland as it pertains to work demonstrated far-reaching inconsistencies and a lack of coherence. Crucially, both the provisions of the Labour Code on non-discrimination and equal treatment and the entirety of the Equality Law are the effect of implementing the same regulations of European Union law. Therefore, there are no reason that would justify any differentiation in the safeguards afforded to employees and self-employed workers. Ye the list exhaustive list of grounds on which discrimination against self-employed workers is prohibited means that these workers cannot effectively raise claims of unequal treatment in grounds of the formal arrangement in which they provide work. The Equality Law offers self-employed workers no basis for challenging practices that lead to unreasonable differences in the amount of remuneration they receive in result of the fact that they provide work on a different legal basis.[166] (Nonetheless, comparing the situation of the self-employed workers to employees on the grounds explicitly listed in Article 8 of the Equality Law is allowed and may serve as a basis for challenging discriminatory conduct.[167])

Protection of self-employed workers in the area of non-discrimination and equal treatment is further strengthened by the right to compensation. According to Article 13 of the Equality Law, anyone who has suffered a violation of the principle of equal treatment has the right to compensation; in these cases, provisions of the Civil Code apply. This reference generates significant problems in determining the legal nature of this compensation. In civil law, the purpose of compensation is to literally compensate for the damage in terms of property or funds; it is not intended to compensate for any hurt or suffering. Under Article 361(2) of the Civil Code, in the absence of a regulatory or contractual stipulation to a different effect, remedying damage means compensating the losses that the injured party suffered (*damnum emergens*) and

164 Speech of the Commissioner of Human Rights, 28 May 2012, RPO-687085-I/12/KW/MW. See: https://bip.brpo.gov.pl/sites/default/files/Do_Pelnomocnika_Rzadu_ds_Rownego_Traktowania_ws_wdrazania_przepisow_UE_w_zakresie_rownego_%20traktowania.pdf (accessed: 24.02.2024).

165 The consequence of this position was the Commissioner for Human Rights' application to the Constitutional Court to examine the compliance of these regulations with the Constitution of the Republic of Poland. Eventually, by order of the Constitutional Court of 11 October 2017 (K 17/16), the proceedings were discontinued due to the withdrawal of the motion by the Commissioner for Human Rights.

166 In practice, it is often the case that for the same work (performed under conditions of economic dependence on the client), the employee is paid more than the self-employed sole trader.

167 See K. Walczak, *Zakaz dyskryminacji*…, p. 121.

the benefits that they could have achieved if the damage had not occurred (*lucrum cessans*). Seeking compensation for non-pecuniary damage, i.e. for hurt or suffering, is limited in the civil law regime solely to instances where the legislator expressly allows it. Yet the Equality Law does not expressly provide for the right to claim this type of compensation if a breach of the principle of equal treatment with regard to a self-employed worker occurred. This is clearly misaligned with the essence of discrimination, which often causes non-pecuniary damage (hurt or suffering). Consequently, the literature on the subject tends towards a broad interpretation of the concept of compensation pursued under Article 13 of the Equality Law.[168] The case law also leans in this direction. The Regional Court in Warsaw in its judgment of 18 November 2015[169] ruled that compensation under Article 13 of the Equality Law is not awarded on the basis of a distinction between compensating for pecuniary and non-pecuniary damage, as Article 13(2) of the Act refers to the entirely of the Civil Code, i.e. both to the Civil Code's provisions on compensation for damage and to those that address hurt and suffering. Self-employed workers affected by discrimination are therefore entitled to compensation understood very broadly, with the inclusion of hurt and suffering. This was also noted in the Commissioner for Human Rights' address of 28 May 2012 to the Government Plenipotentiary for Equal Treatment. The Commissioner for Human Rights pointed out that the compensation referred to in Article 13 of the Equality Law should serve the same purpose (of mitigating hurt and suffering) as is the case under the provisions of the Labour Code. This interpretation is consistent with the standard of protection afforded to employees.

In contrast to Article 18^{3d} of the Labour Code, the Equality Law sets no bottom limit on the amount of compensation (under the Labour Code, the minimum threshold is a minimum monthly wage, determined on the basis of separate regulations). This means that the amount of compensation due to a self-employed person under Article 13 of this act is determined in accordance with the provisions of the Civil Code and is based on the principle of full compensation of the damage suffered (Article 361 of the Civil Code). It should be noted, however, that making monetary compensation for discrimination conditional on the fact of damage and the need for the injured party to prove it would be contrary to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in

168 See K. Kędziora, *Komentarz do art. 13*, [in:] K. Kędziora, K. Śmiszek (eds.), *Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej*…., LEX, para. 1. This interpretation is also confirmed by the jurisprudence of the Supreme Court, which, with regard to employment cases, broadly qualifies compensation under Article 18^{3d} of the Labour Code, also in terms of compensation for the harm suffered. See, e.g.: judgment of the Supreme Court of 3 April 2008, II PK 286/07, OSNP 2009, no. 15–16, item 202; judgment of the Supreme Court of 7 January 2009, III PK 43/08, LEX, no. 584928. Otherwise: judgment of the Supreme Court of 10 July 2014, II PK 256/13, LEX, no. 1515454.

169 V Ca 3611/14, LEX, no. 2147965. The court dealt with a case concerning discrimination on the basis of sexual orientation of a person who provided work under a civil law contract.

employment and occupation.[170] Its Article 17 sentence 2 stipulates that the sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate, and dissuasive.[171] The Court of Justice of the European Union in its judgment of 8 November 1990[172] referring to the European Union regulation that is relevant here ruled that if a member state opts for a sanction forming part of the rules on civil liability (as is the case in Poland), any infringement of the prohibition of discrimination suffices in itself to make the person guilty of it fully liable, and no regard may be had to the grounds of exemption envisaged by national law. It is generally accepted in the scholarly literature on the subject that, in determining the amount of compensation to be awarded to a self-employed worker for a breach of the principle of equal treatment, the same principles should apply that guide the determination of the amount with regard to compensation for discrimination in employment relationships.[173] Notably, in a judgment of 7 January 2009,[174] the Polish Supreme Court ruled that the compensation awarded pursuant to Article 18^{3d} of the Labour Code should be effective, proportionate, and dissuasive. Therefore, it must compensate for the damage suffered by the employee, should be proportionate to the employer's breach of the obligation to treat employees equally, and should serve as a deterrent. In determining its amount, the circumstances of both parties to the employment relationship should therefore be taken into account; specifically, the employee should be compensated for the hurt and suffering caused by the violation. The same guidelines should therefore also apply to claims for compensation brought by self-employed workers who are sole traders.

If the compensation awarded to a self-employed worker under Article 13 of the Equality Law is insufficient, there is no legal reason why the worker should not be able to pursue supplementary claims under the Civil Code; this is explicitly stated by Article 16 of the Equality Law, which stipulates that claims made on the basis of the Equality Law are no impediment to further claims made on the basis of other laws. This means that a self-employed worker can seek additional compensation both for torts (Article 415 *et seq.* of the Civil Code) and for breach of contract (Article 471 *et seq*. of the Civil Code), as well as for violation of personal rights as a result of discrimination (Article 24 of the Civil Code).[175] In addition, if the client sought to enforce contractual provisions that violate the principle of equal treatment within

170 OJ. EU. L. of 2000, no. 303, p. 16.

171 Cf. M. Górski, *Roszczenia niematerialne w postępowaniu o dyskryminację*, 2015, http://ptpa.org.pl/site/assets/files/publikacje/opinie/Opinia_Roza_roszczenianiematerialne_w_postepowanich_o_dyskryminacje.pdf (accessed: 16.07.2024).

172 C-177/88, LEX, no. 124917.

173 Cf. M. Barzycka-Banaszczyk, *Dyskryminacja (nierówne traktowanie)*…, p. 12.

174 III PK 43/08, OSNP 2010/13-14/160.

175 This is particularly important in view of the fact that non-material claims are not time-barred (Article 117 of the Civil Code), which makes it possible to assert them even after the expiry of the time limit indicated in the Equality Law.

the meaning of the Equality Law, these provisions become invalid on the basis of Article 58(1) of the Civil Code.

In terms of the effectiveness of legal protection of self-employed workers in the area of non-discrimination and equal treatment, another important provision is Article 14 of the Equality Law, which modifies – in favour of these workers – the allocation of the burden of proof, compared to the general principles set out in Article 6 of the Civil Code. Under Article 14, a person claiming a violation of the principle of equal treatment must only demonstrate that it is likely that such a violation occurred; the burden of proof is on the other party to offer decisive evidence that no infringement occurred (Article 14(2) and (3)). Thus, just as is the case in the Labour Code, the burden of proof is reversed in these cases: the self-employed worker person only has to point to the protected characteristic listed in the act that was allegedly violated. It is then up to the client to demonstrate that no violation has occurred. This creates a presumption: if the defendant fails to demonstrate that its conduct was guided by objective reasons, the conduct will be deemed to constitute a breach of the principle of equal treatment.[176] Any claims under the Equality Law or under the Civil Code relating to discrimination are to be pursued under the provisions of the act of 17 November 1964 – Code of Civil Procedure,[177] in civil courts.

Pursuant to Article 15 of the Equality Law, the limitation period for claims for breach of the principle of equal treatment is 3 years from the date the aggrieved party became aware of the breach, but no longer than 5 years from the occurrence of the event constituting the breach. This provision must be assessed negatively, because it is less favourable than the limitation period for claims arising out of torts, set out in Article 442^1 of the Civil Code. Under Article 442^1, these claims are barred 3 years after the date on which the aggrieved party became aware or, with due diligence, could have become aware of the damage and the party that should redress it; however, the period may not exceed 10 years after the date on which the event causing the damage occurred. This discrepancy is highly problematic in terms of compatibility of Article 15 of the Equality Law with Article 2 of the Polish Constitution (the principles of social justice).

Article 17 of the Equality Law creates another mechanism that reinforces the protection of self-employed workers against discrimination. It stipulates that the exercise of the rights resulting from a breach of the principle of equal treatment may cause neither unfavourable treatment nor any other negative consequences for the party choosing to exercise them. This extends to parties that have provided any form of support to the self-employed worker exercising their rights in this respect. Another aspects that must be assessed positively is the fact that responsibilities concerning the implementation of the principle of equal treatment with regard to

176 See further e.g.: A. Tyc, *Ciężar dowodu w prawie pracy. Studium na tle prawnoporównawczym*, Warszawa 2016, pp. 235 et seq.; M. Barzycka-Banaszczyk, *Dyskryminacja (nierówne traktowanie)*…, pp. 13–15.

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

self-employed workers rest with the Commissioner for Human Rights and with the Government Plenipotentiary for Equal Treatment (Article 18 of the Equality Law). The intent behind this regulation was to increase the effectiveness of the protection of these persons in the area of non-discrimination and equal treatment. Nonetheless, in practice, the effects of the Equality Law, as was already mentioned above, are rather underwhelming.

Another component of the legal protection afforded to self-employed workers consists in regulations on collective labour relations. Pursuant to Article 8(1)(3) of the Equality Law, unequal treatment of self-employed workers is prohibited the grounds of sex, race, ethnic origin, nationality, religion, belief, worldview, disability, age, or sexual orientation with regard to membership and engagement in trade unions, employers' organisations, and self-government organizations of trades and profession, and with regard to exercising the rights afforded to members of these organisations. The provision was essentially defunct until 1 January 2019, at which time the act of 5 July 2018 amending the Trade Unions Law and certain other acts came into force, expanding the freedom of association to self-employed workers operating as sole traders.[178] By virtue of the amendment, the Trade Unions Law of 23 May 1991 granted these workers the right form their own trade unions, to join existing unions, but to hold trade union office. Relatedly, Article 3(1) prohibited unequal treatment self-employed workers, in the area of labour, on the grounds of their membership in a trade union, their choice not to join a trade union, or the fact that they hold trade union office, in particular in the form of: refusal to establish or terminate a legal relationship, unfavourable determination of remuneration for work or of other terms and conditions under which work is provided, withholding opportunities for promotion, withholding other benefits related to work, unfavourable treatment in access to training designed to improve occupational skills, unless the client is able to demonstrate that the decision to do so was made on objectively valid grounds. Under Article 3(4) of the Trade Unions Law, clauses in civil law contracts under which self-employed workers perform work that violate the principle of equal treatment in employment 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 become are invalid. In their place, the relevant provisions of law apply and, in the absence of such provisions, the clauses are replaced with appropriate non-discriminatory clauses.

Clearly, approach taken by the legislator with regard to self-employed workers in the area of collective labour relations is quite different. Firstly, the scope of persons granted rights in this area is significantly narrower, which is reasonable, given the essential rationale behind freedom of association. Under Article 2(1) read in conjunction with Article 1^1 (1) of the Trade Unions Law, freedom of association applies only to those self-employed workers who provide work for remuneration as sole traders, without hiring others for this purpose, regardless of the legal basis

178 See further below.

on which they provide work, have rights and interests related to the performance of that work that can be represented and defended by a trade union. Secondly, the Polish legislator puts the situation of these self-employed workers in this context on a par with that of employees. According to Article 3(2) of the Trade Unions Law, in matters concerning claims for violation of the principle of equal treatment due to membership in a trade union or the decision not to join a trade union or holding a trade union office, provisions of Articles 18^{3d} and 18^{3e} of the Labour Code concerning employees[179] apply respectively to self-employed workers who enjoy freedom of association. Furthermore, the provisions of the Code of Civil Procedure on proceedings in labour law cases apply to proceedings in these cases, and consequently any disputes arising in this area – unlike cases arising under the Equality Law – are heard by labour courts, rather than civil courts.[180] This is a good illustration of the absence of c clear coherent approach to these issues in the Polish legal system.

To recapitulate: the fact that the Equality Law was enacted at all must be assessed positively. In doing so, the legislator raised the standards of protection of self-employed workers in the area of non-discrimination and equal treatment. Broadly speaking, the provisions of the Equality Law are in line with the standards of international law, European Union law, and the Polish Constitution. Unfortunately, on a more granular level, this is not the case across all areas within the scope of this regulation. The most problematic issues is that the list of protected grounds with regard to discrimination and unequal treatment of self-employed workers is exhaustive (rather than open-ended). This is incompatible with international agreements and with Article 32 of the Polish Constitution. It creates an unjustified difference in the relevant standards of protection available to self-employed workers in relation to employees, where the list of protected grounds is open-ended. Furthermore, at present, no protective guarantees against discrimination and unequal treatment exist for persons aspiring to take up work as self-employed workers[181] and to family members cooperating in the work of self-employed workers; the protective regulations fail to include them in their scope. Moreover, the regulations also fail to sufficiently take into account the nature of work provision by sold traders. These flaws and inadequacies mean that at present, the Equality Law does not, in practice, offer effective protection against discrimination and unequal treatment to persons who provide work on the basis of civil law contracts (including self-employed workers), which is reflected in relevant (unimpressive) statistics.

179 See further below.

180 See further T. Duraj, *Prawo koalicji osób pracujących zarobkowo na własny rachunek*…, pp. 67 et seq.

181 It is important to bear in mind that the provisions of the Labour Code protect not only employees, but also job applicants against discrimination and unequal treatment.

5.2.3. Protection against mobbing

Currently, no provisions in the Polish legal system apply directly to self-employed workers, offering them legal protection against mobbing at the workplace. Mobbing is a pathology; outside of legal scholarship it is defined as a situation wherein a person or persons engender an environment of psychological abuse and harassment directed at a particular person, consisting in isolating this person, denigrating them, or otherwise behaving poorly towards them, with the purpose of destroying this person's social relations, inside or outside or work, or pushing them to end their life.[182] Workplace mobbing has a destructive impact on the dignity of the affected worker as well as on their health and psycho-physical wellbeing. It also has a negative effect on the entire workplace. In practice, mobbing tends to affect primarily employees, due to the nature of the employment relationship, with its inherent dependence of the employee on the employer (Article 22(1) of the Labour Code), given the employer's authority to decide on the organisation of work and to specify the duties of an employee by means of instructions that the employee must obey. However, the same forms of abuse and harassment may also arise in civil law-based relations involving workers, including the B2B relationship between a self-employed worker and the client. Economically dependent self-employed workers are particularly at risk, because of the dominant position of the client, which the client may abuse.[183]

The problem of workplace abuse, in particular in the form of psychological harassment associated with mobbing, is referenced in numerous legal instruments, both at the international level and within the European Union. These instruments oblige the member states to enshrine the relevant norms (designed to counteract this problem) in their national legal systems.[184] Two legal instruments are of notable importance here. The first is ILO Convention No. 190 of 21 June 2019 concerning the elimination of violence and harassment in the world of work (the Violence and Harassment Convention, 2019), together with ILO Recommendation No. 206 of 21 June 2019 supplementing the Convention. The key purpose of these regulations is to offer measures designed to eradicate these pathologies from the work environment, because they are a grave threat to the dignity of workers, regardless of the legal basis on which they provide work (including self-employment). The second important document is the European Parliament Resolution of 20 September 2001 on harassment at the workplace,[185] which mentions mobbing specifically, defines it as psychological harassment at the workplace, and notes its serious adverse consequences.

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182 This is the argument made in J. Kowal, G. Pilarek, *Mobbing jako problem etyki w zarządzaniu*, "Etyka w Życiu Gospodarczym" 2011, no. 14(1), p. 228. See also M.T. Romer, M. Najda, *Mobbing w ujęciu psychologiczno-prawnym*, Warszawa 2010.

183 For more information see M. Gajda, *Przemoc w pracy. Środki ochrony prawnej i metody przeciwdziałania*, Warszawa 2022, pp. 36 et seq.

184 For more information see Gajda, *Przemoc w pracy…*, pp. 59 et seq.

185 Official Journal of the European Communities C 77 E/138 dated 28.03.2002.

While the Constitution of the Republic of Poland contains no direct reference to protection against mobbing, it nonetheless requires the Polish legislator to implement solutions designed to eliminate psychological violence at the workplace that violates the dignity of workers (including the mental health of workers); self-employed workers fall under this protective umbrella too. The obligation to prevent mobbing in any work-related relationship, including under conditions of self-employment, may be derived from Article 30 of the Constitution, according to which the inherent and inalienable human dignity is the source of all the rights and freedoms of every human being and citizen. This dignity is inviolable, and it is the duty of public authorities to respect and protect it. That same constitutional principle also serves as the basis for other universally applicable safeguards and guarantees: the right to liberty (Article 31 of the Constitution), the right to life (Article 38 of the Polish Constitution), the prohibition of torture and of inhuman and degrading treatment (Article 40 of the Constitution), the right to inviolability and personal liberty (Article 41 of the Constitution), the right to protection of honour and good name (Article 47 of the Constitution), the right to safe and hygienic working conditions (Article 66(1) of the Constitution), and the right to protection of health (Article 68 of the Constitution).[186] Given the very broad scope of these guarantees – and the fact that their aim is to protect dignity and other inherent, universal rights – these constitutional provisions particularly serve to protect those who, at the workplace, are most heavily at risk of having these rights violated. Therefore any worker, regardless of the legal basis on which work is provided, should enjoy protection against psychological harassment and abuse at the workplace, and therefore, protection against workplace mobbing.

However, the Polish legislator, going counter to the standards enshrined in international law and European Union law, and disregarding the above-listed provisions of the Polish Constitution, decided to implement, with provisions entering into force on 1 January 2004 (in the form of an amendment to the Labour Code[187]), a legal obligation to prevent and tackle workplace mobbing that only applies to workers with an employment contract. Under Article 94^3 of the Labour Code, the employer is obliged to counteract mobbing, which means actions or behaviour concerning an employee or directed against an employee, consisting in persistent and prolonged harassment or intimidation of an employee, causing the employee's appraisal of their workplace performance to be diminished, causing or intending to cause humiliation or ridicule of an employee, isolating the employee, or excluding the employee from the team of co-workers.[188] This interpretation has found support

186 D. Fleszer, *Godność i prywatność osoby w świetle Konstytucji Rzeczypospolitej Polskiej*, "Roczniki Administracji i Prawa" 2015, no. 1, pp. 19 et seq.

187 Act of 14 November 2003 amending the act – Labour Code and amending selected other acts, Dziennik Ustaw of 2003, no. 213, item 2081.

188 See also W. Cieślak, J. Stelina, *Mobbing (prześladowanie) – próba definicji i wybrane zagadnienia prawne*, "Palestra" 2003, no. 9–10, pp. 76 et seq.; H. Szewczyk, *Prawna ochrona przed mobbingiem w pracy*, "Kwartalnik Prawa Publicznego" 2006, no. 2, pp. 253 et seq.; M. Świątkowski,

in the case law. In its judgment dated 3 August 2011,[189] the Polish Supreme Court ruled that the legal obligation to prevent and tackle workplace mobbing is inherent to the employment relationship (as opposed to a civil-law based legal relationship) and is intended to protect not only the financial interests of the involved party but also that party's psychological and personal characteristics. Moreover, safeguards against mobbing in relation to workers who provide work outside of the employment relationship (including self-employed workers) are also missing from the Equality Act (discussed earlier). This reflects significant inconsistency on the part of the Polish legislator. Self-employed workers are protected against harassment and sexual harassment in the workplace, with a single unwanted incident on behalf of the client with the aim or effect of violating dignity being sufficient to trigger the protection. These workers should therefore definitely enjoy protection when it comes to mobbing, which consists in persistent and long-term abuse, harassment, or intimidation, and which may cause irreversible damage to health.[190]

In effect, in the current state of the law, self-employed workers may only defend themselves against psychological violence (and the resulting violation of dignity, damage to mental health, and other suffering) at the workplace solely on the basis of generally applicable provisions of the civil law (Articles 23 and 24 of the Civil Code). Pursuant to these provisions, a self-employed worker who has been the victim of mobbing may demand: that the unlawful conduct should stop; that steps be taken to remedy the effects of that conduct, in particular that the perpetrator of the mobbing make a declaration in a suitable form and with suitable content; that financial recompense be awarded for the harm suffered, or that a sum of money be paid for a designated socially-oriented purpose; that compensation be awarded, in most cases on the basis of tort liability.[191] The court of jurisdiction is the civil court (a regional court, Article 17(1) of the Code of Civil Procedure), which hears the complaint following the civil procedure set out in the Code of Civil Procedure. In practice, these cases are difficult to argue, tend to take years to examine, and usually bring little to no positive effect. The self-employed worker (i.e. the victim of mobbing) has to collect evidence to support the claim that their dignity was violated, or that they suffered other harm related to social or psychological aspects of social functioning.

In conclusion, as the law stands, self-employed workers enjoy no effective guarantees of protection against mobbing, which typically violates the dignity of worker, causes damage to health, and generates mental and physical suffering. This is in clear contravention of the norms of international law, European Union law, and the

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Mobbing i procedury antymobbingowe, "Przegląd Prawa Publicznego" 2021, no. 12, pp. 79 et seq.

189 I PK 35/11, OSNP 2012, no. 19–20, item 238.

190 See M. Gajda, *Wewnątrzzakładowa polityka antymobbingowa jako środek przeciwdziałający mobbingowi w miejscu pracy*, "Monitor Prawa Pracy" 2018, no. 2, p. 30.

191 For more information see T. Sokołowski, *Komentarz do art. 24 KC*, [in:] A. Kidyba (ed.), *Kodeks cywilny. Komentarz*, vol. I: *Część ogólna*, ed. II, LEX 2012.

provisions of the Polish Constitution, which guarantee the protection of dignity, health, and other personal characteristics of all persons, regardless of the basis on which these persons provide work. Therefore, there are no rational arguments, of either legal or axiological nature, why there should be a limit on the legal obligation to prevent and tackle mobbing at the workplace, and why only employees – in contracts to self-employed workers – should enjoy the relevant protection.

The legislator must act with urgency to implement mechanisms (modelled on Article 94^3 of the Labour Code that regulates the matter in relation to employees) to effectively prevent and tackle mobbing in all workplace environments, including in relation to self-employed workers, who are often fully economically dependent on the client with a dominant position in the legal relationship. The current situation, in which only the generally applicable provisions of the Civil Code may be used to by these workers as protective measures against mobbing, offers no true protection against harassment and abuse at the workplace. The statutory right to provide work in an environment free from stressors that have a destructive impact on health and wellbeing, and that lower the standards in the workplace, should be vested in all persons without exceptions.[192]

5.2.4. Protection of remuneration for work

Under the act of 22 July 2016 amending the minimum wage act and certain other acts, which has been in force since 1 January 2017, minimum wage protection was expanded to cover persons who providing services on the basis of a contract of mandate (Article 734 of the Civil Code), or a contract similar to a contract of mandate (Article 750 of the Civil Code), as well as to self-employed workers, if they provide work in person, without hiring employees or other workers who provide work on the basis of a contract of mandate. As of 1 July 2024, these workers are guaranteed a minimum hourly wage of PLN 28.10 gross. While in principle the direction of these changes must be assessed positively, the same is not true with regard to the rationale behind the amendment or the manner and the scope of this regulation, which are far from rational, systematically coherent, or even consistent.

Firstly, the rationale behind the decision to include self-employed workers under minimum hourly wage protections must be assessed negatively. This rationale, laid down in the notes attached to the bill, was to counteract the spread of non-employment forms of work under conditions generally characteristic of employment, in circumvention of the labour law, with the aim of cutting costs and maximising profits. The introduction a minimum hourly wage for self-employed workers, and the expansion of the scope of mechanisms protecting remuneration to also cover these workers (while it previously applied only to employees) was intended to achieve a positive change in the labour market by preventing the abuse of civil law contracts and preventing situations in which these workers would receive remuneration at

192 For more information see M. Gajda, *Przemoc w pracy*…, pp. 237 et seq.

a level much lower than employees.[193] In my opinion, the rationale is deeply flawed, and the objective has not been achieved at all. One the contrary, it might be reasonably argued that the Polish legislator has actually made it more difficult to eliminate bogus civil law employment (including bogus self-employment). Before the amendment was enacted, the distinction between work provided under a contract of mandate (or a contract similar to a mandate) and an employment relationships was the absence of an hourly method of determining the remuneration for work provided by a worker. An hourly calculation of remuneration is not enshrined in the provisions of the Civil Code, which leave the parties far-reaching freedom to negotiate the terms of payment for work or service.[194] Usually, before the amendment was enacted, remuneration of parties to contracts of mandate was either in the form of a lump sum payment or was commission-based, and its amount of remuneration reflected the amount of work, the complexity of it, the mandate, and the necessary skills and qualifications of the (self-employed) worker. The introduction of the minimum hourly wage for self-employed workers deprived the State Labour Inspection of an effective instrument of verifying whether civil law contracts were being used where in fact an employment relationship existed.[195] While the Inspection was given the right to monitor the amount of wages being paid to workers, and the right to address the problems and issues direct orders with regard to the payment of wages, this is hardly an effective instrument, due to the limited capacity of the Inspection.[196] A much stronger rationale for extending wage protection to self-employed workers is axiological in nature, and is immanently rooted in the fundamental purpose of the minimum wage, which is to ensure an adequate standard of living above the poverty line (i.e. to meet minimum standards for living with dignity) and to allow every worker to earn a sufficient amount of money to meet their legitimate living needs, regardless of the legal basis on which this worker provides work.

Both in international law and in the Polish Constitution, there is a solid basis for enshrining a minimum hourly wage for self-employed workers in the law.[197] Article 24

193 Parliamentary Paper, no. 600 of the Government Bill.

194 L. Ogiegło, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny*, vol. II: *Komentarz. Art. 450-1088. Przepisy wprowadzające*, 10th ed., Warszawa 2021, Legalis.

195 M. Barański, B. Mądrzycki, *Ustalanie liczby godzin wykonania umowy zlecenia lub nienazwanej umowy o świadczenie usług w celu zapewnienia minimalnej stawki godzinowej*, "Praca i Zabezpieczenie Społeczne" 2017, no. 3, pp. 23 et seq.

196 See, e.g. T. Duraj, *Stosowanie samozatrudnienia z naruszeniem przepisów BHP*…, pp. 109 et seq.; K. Walczak, *Wynagrodzenie minimalne w umów zlecenia i o świadczenie usług – zagadnienia doktrynalne i praktyczne, cz. 2*, "Monitor Prawa Pracy" 2016, no. 9, pp. 457–458.

197 A. Sobczyk, referring to the Constitution of the Republic of Poland in 2012, formulated a thesis that the Polish legislator is obliged to introduce minimum wage provisions also with regard to persons performing work on bases other than employment relationship. See further A. Sobczyk, *Wynagrodzenie minimalne zleceniobiorców*, "Praca i Zabezpieczenie Społeczne" 2012, no. 8, pp. 2 et seq. Cf. also E. Maniewska, *Zakres uniformizacji ochrony wynagrodzenia*…, pp. 29 et seq.; K. Bomba, *Wynagrodzenie z tytułu zatrudnienia*, [in:] Z. Góral, M.A. Mielczarek (eds.), *40 lat Kodeksu Pracy*, Warszawa 2015, LEX; T. Liszcz, *Praca i kapitał w Konstytucji*…,

of the Constitution stipulates that all work (i.e. not only work provided within an employment relationship) is protected in Poland, and that the state exercises supervision over the conditions of work. Furthermore, under Article 65(4) of the Constitution, a minimum level of remuneration for work, or the manner of setting this levels, is to be laid down by statutory regulations.[198] In one of its rulings, the Constitutional Court[199] noted that this refers not only to work provided within an employment relationship, but also to all paid work performed for the benefit of another entity, regardless of the formal relationship between this entity and the worker.[200] Inclusion of self-employed workers in the scope of the minimum wage protection further articulates social solidarity, as required by the Constitution, Article 2 of which stipulates that the Republic of Poland is a democratic state that is governed by the rule of law and that respects the principles of social justice. Also important is the constitutional principle of equal treatment, whereby all citizens are equal before the law and no one may be discriminated against for any reason (Article 32 of the Polish Constitution). In light of the reason and purpose behind the concept of the minimum wage, the formal aspects that govern the provision of are irrelevant. Whether a worker is an employee or a sole trader, their needs to provide for themselves and for their family and to be able to live with dignity are exactly the same. There is therefore no reason for any differentiation in the statutory minimum wage guarantees.

The legislator's decision with regard to the scope of the minimum wage protection must be assessed negatively,[201] because it lacks precision and is too broad. The amendment of 22 July 2016 expanded the minimum wage coverage to natural persons carrying out economic activity registered in the Republic of Poland or in a country that is not a member of the European Union or of the European Economic Area, with no employees, with no other workers hired on the basis of a contract of mandate (Article 734 et seq. of the Civil Code) or a contract for the provision of services to which the provisions on the contract of mandate apply (Article 750 of the Civil Code), who provide services to a business or to another entity.

This is insufficiently precise. The regulation references contracts of mandate and contracts for the provision of services to which the provisions on the contract of

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no. 22, p. 272; T. Liszcz, *Aksjologiczne podstawy prawa pracy*, [in:] K.W. Baran (ed.), *System prawa pracy*, vol. I: *Część ogólna*, Warszawa 2017, LEX; B. Godlewska-Bujok, *Definicja minimalnego wynagrodzenia – perspektywa historyczna i prawna*, [in:] K.W. Baran, M. Gersdorf, K. Rączka (ed.), *System prawa pracy*, vol. III: *Indywidualne prawo pracy. Część szczegółowa*, Warszawa 2021, LEX.

198 Cf. L. Garlicki, *Komentarz do art.65 Konstytucji RP*, [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. III, Warszawa 2003, pp. 4 et seq.

199 See the judgment of the TK of 23 February 2010, P 20/09, OTK-A 2010, no. 2, item 13, Dziennik Ustaw of 2010, no. 34, item 191; cf. also the judgment of the TK of 7 January 1997, K 7/9, OTK 1997, no. 1, item 1.

200 Similarly: A. Sobczyk, *Wynagrodzenie minimalne*…, pp. 3–4. Cf. also B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej*…, p. 340.

201 See further A. Tomanek, *Status osoby samozatrudnionej*…, pp. 13 et seq.

mandate apply. While the former type are regulated in detail in the provisions of Articles 734 et seq. of the Civil Code (and may only serve as a basis for services in the form of legal transactions, *czynności prawne*), the category of contracts for the provision of services to which the provisions on the contract of mandate is very broad and undefined; it is unclear in practice which contracts fall into this category.

Secondly, the minimum wage act, in laying down the condition of its applicability, stipulates that workers are only covered by its protection if the hire no other workers, either as employees or on the basis of a contract of mandate, for the purposes of carrying out the relevant work – in order to offer the minimum wage protection only to those self-employed workers who provide work in person, and thus whose situation is most similar to that of employees. Yet, as the law stands, there is no reason why self-employed workers who hire other workers would qualify for the protection, as long as they hire workers to provide work on the basis of contracts other than the contracts of mandate (so, for instance, on the basis of a contract to perform a specific task or an agency contract). Workers who rely on the assistance of third parties without concluding a separate contract with them also qualify, as do those who rely on the assistance of immediate family members who have the status of a person cooperating with them in carrying out their business. It is also not specified in the regulation whether the requirement of not hiring other workers applies to the entire period of economic activity of the worker, or to each type of services provided as part this economic activity – or, in contrast, whether the requirement must only be satisfied in relation to the services provided to the client who is obliged to pay the minimum wage. The latter interpretation appears to be correct.

Thirdly, the legislator has expanded the minimum wage protection to all self-employed workers, provided that the place and time of performing work is not determined by the person who performs the work (i.e. the self-employed worker), and the remuneration received for the work is not exclusively commission-based[202] (Article 8d(1)(1) of the minimum wage act). The first part in particular is vague and subject to arbitrary assessment. What is taken into account when the matter is assessed is not to simply the wording of the contract of mandate (service contract) that indicates who determines the place and time of work (services). Instead, the actual reality of the situation, as it plays out in practice, prevails. The State Labour Inspection is responsible for monitoring the payment of wages, but the instruments it has at its disposal are ineffective and do not allow for any objective verification. This leaves clients who hire self-employed workers plenty of room for manipulation and abuse. In practice, these clients tend to articulate the terms and conditions of contracts with self-employed workers in a manner that places them beyond the

202 Commission-based remuneration means remuneration which depends on: 1) the results obtained by the person accepting the commission or providing the services in the performance of the commission or the provision of services, or 2) the activity of the trader or another organisational unit for which the commission is performed or the services are provided – such as the number of contracts concluded, the value of contracts concluded, sales, turnover, orders obtained, services provided or receivables obtained (Article 8d(3)).

scope of applicability of the minimum wage act. This can be achieved very simply: as long as the contract of mandate (service contract) with a self-employed worker stipulates that the remuneration is payable as a lump sum, contingent on the results of the work provided, the minimum wage protections do not apply.[203] As an aside, it is worth noting – in a negative light – that the Polish legislator fails to include self-employed workers whose remuneration is commission-based under the minimum wage protection, which has no axiological basis and directly contravenes international law and the Polish Constitution. It is a differentiation between various categories of self-employed workers depending on the manner of calculation of their remuneration, with no real rationale beyond that. When employees are concerned, however, the minimum wage protection always applies, regardless of how their remuneration is calculated (time-based, commission-based, piecework-based).

Where the Polish legislator placed the limits of applicability of the minimum wage protection with regard to self-employed workers is axiologically difficult to justify. As the law stands, this protection is enjoyed both by the self-employed workers who are economically dependent on one client (they receive income only from only one source) and by those who provide services to many clients and are not economically dependent on one client. The continuity or intensity of the work performed for a given client is also irrelevant. Minimum wage protection covers the self-employed workers with long-term contracts with one client as well as workers who use short-term and even one-off contracts. This hardly reflects the purpose of statutory minimum wage protection, which is to ensure that workers are able to make a living and live with dignity. This should essentially limit the applicability of minimum wage protection only to the self-employed workers who are economically dependent on one client (or on a small number of clients) and for whom work for this client serves as the only (or main) source of income.

The statutorily guaranteed minimum hourly wage for self-employed workers is determined annually, by means of negotiations within the Social Dialogue Council, following the same principles as the minimum wage for employees. Under Article 8a of the minimum wage act, in the case of contracts of mandate and contracts made on similar terms as a contract od mandate, when work is provided by a self-employed worker, the remuneration should be determined in such a way that the amount of remuneration for each hour of work or service amounts at least to the minimum hourly wage. Where the contracts fails to meet this condition, the worker is entitled to remuneration calculated on the basis of the minimum hourly wage. If more than one person accepts a mandate or undertakes to provide services jointly, each of

203 See opinion of the Supreme Court of 7 July 2016 to the government draft bill on amendments to the Minimum Wage Act, BSA III-021-257/16, https://orka.sejm.gov.pl/Druki8ka.nsf/0/2B4B4692D149D147C1257FEE003BBAFD/%24File/600-002.pdf (accessed: 17.07.2024). The Supreme Court points out that "setting a lump sum on the basis of the expected time necessary to perform the activities provided for in the contract will not only not pose a practical problem, but will affect the workers in a situation where the amount in question is underestimated in relation to the actual working time".

those persons is entitled to at least the minimum hourly wage. This mechanism, in its essence, represents a direct and far-reaching interference with the principle of freedom of contract.[204] Pursuant to Article 353[1] of the Civil Code, parties to a civil law contract are free to arrange their legal relationship at their own discretion, as long as its content or purpose is not in contravention of the essential nature of the legal relationship, of the law, or of the principles of social co-existence. This interference of the Polish legislator with the freedom of contract raises serious concerns of a systematic nature, in particular since the Civil Code also articulates specifically the parties' freedom to determine remuneration for work provided on the basis of a contract of mandate (or a contract to provide services on terms and conditions similar to a mandate).

In order to further reinforce the minimum wage protections applicable to self-employed workers, the Polish legislator has also implemented additional mechanisms, both procedural and material, which – until the entry into force of the amendment of 22 July 2016 – had been available only to employees. The first of them is the prohibition of waiving the right to remuneration at the level of the minimum wage, and the prohibition of transferring this right to another person (Article 8a(4)). In result, any contract clauses that violate these prohibitions are invalid (Article 58 of the Civil Code). Secondly, the minimum wage act sets out certain minimum protective standards regarding the form and frequency of payment of the minimum wage: according to its Article 8a(5), payment of this remuneration to self-employed workers may only be made in the form of money.[205] Moreover, for contracts with a duration of more than a month, payment must be made at least once a month (Article 8a(6)). Therefore, Article 744 of the Civil Code, according to which remuneration is only payable upon completion of the work specified in the contract, unless the contract provides otherwise, does not apply here. Thirdly, the legislator has introduced certain procedures with respect to determining the amount of remuneration that is due to the worker. Under Article 8b of the minimum wage act, the parties have to specify in the contract of mandate (contract for the provision of services on terms and conditions similar to a mandate) how the number of hours of work will be calculated. If they fail to do so, the self-employed worker is to submit (in writing, electronically, or in another fixed form) information on the number of hours of work,

204 See K. Walczak, *Wynagrodzenie minimalne w umów zlecenia i o świadczenie usług – zagadnienia doktrynalne i praktyczne, cz. 1*, "Monitor Prawa Pracy" 2016, no. 8, p. 399.

205 This is more than in an employment relationship, where the legislator allows for partial fulfilment of remuneration in a form other than monetary, when it is provided for by statutory provisions of the labour law or a collective agreement (Article 86(2) of the Labour Code). Cf. M. Seweryński, *Minimalne wynagrodzenie za pracę – wybrane zagadnienia*, [in:] W. Sanetra (ed.), *Wynagrodzenie za pracę w warunkach społecznej gospodarki rynkowej i demokracji*, Warszawa 2003, p. 62. The exclusion in civil law contracts of the possibility to paying remuneration in kind constitutes an excessive interference in the principle of freedom of contract (Article 353[1] of the Civil Code) and in practice may be disadvantageous for both contractual parties. Cf. K. Walczak, *Wynagrodzenie minimalne…*, *cz. 1*…, p. 401.

before the payment deadline. Fourthly, the legislator has imposed an obligation on the entities that contract hired work, to keep records related to the calculation of the number of hours of work. These records must be kept for a period of three years after the date on which the payment of the remuneration became due (Article 8c of the minimum wage act). Fifthly, to boost the effectiveness of the minimum wage guarantees for self-employed workers, the State Labour Inspection was equipped with new powers (Article 10(1)(15)(b) of act on the State Labour Inspection). Labour inspectors were granted the right to carry out inspections without notice, at any time of the day or night, and if irregularities are found, they have the power to issues a note or an order for the payment of remuneration that correctly reflects the minimum wage. Moreover, entities who hire self-employed workers are now subject to criminal liability (*odpowiedzialność wykroczeniowa*). Under Article 8e of the minimum wage act, when a business, or a person or entity acting on behalf a business, or another organisational unit, pays remuneration to a self-employed worker at an hourly rate below the applicable minimum wage, this business or person or organisational unit subject to a fine in the amount ranging from PLN 1000 to PLN 30 000. Under Article 8f of the minimum wage act, proceedings in these cases are governed by the act of 24 August 2001 – Code of Proceedings in Cases of Petty Offences.[206]

Overall, the decision of the Polish legislator to expand minimum wage protection to self-employed workers must be assessed positively. The concept as such has very strong axiological foundations. There is no reason why minimum wage protection should differ between various categories of workers merely due to the legal basis on which they provide work. In view of the purpose of minimum wage regulations, which is to ensure that all workers have a liveable source of income, all workers should be treated equally, including self-employed workers. The situation prior to the amendment of 22 July 2016 – where for instance in the security sector, in which contracts similar to a mandate were prevalent, security guards were routinely paid wage of PLN 4 net per hour – was absolutely unacceptable.[207] Whether a worker is an employee or performs work on the basis of a civil law contract, their needs to provide for themselves and for their family and to be able to live with dignity are exactly the same; for this axiological perspective is strongly rooted both in international law and in the Polish Constitution.

Unfortunately, the general manner of minimum wage regulation in the Polish law fails to take into account the purpose and objective of the minimum wage as such. Given that the introduction of statutory guarantees regarding the amount and mode of payment of the minimum wage is a far-reaching interference with the civil law principle of freedom of contract (Article 353^1 KC), and furthermore, given that the crucial purpose of minimal wage protection is to ensure that workers are able to provide for their needs and live with dignity, the application of minimum wage

206 Uniform text: Dziennik Ustaw of 2022, no. 74, item 1124 as amended.

207 See J. Jasińska, P. Fik, *O zmianie ustawy o minimalnym wynagrodzeniu za pracę*, "Praca i Zabezpieczenie Społeczne" 2016, no. 9, p. 22.

standards should be limited only to self-employed workers who are economically dependent on one client (on a small number of clients) and for whom working for this client is the only (main) source of income. The decision not to include the requirement of economic dependence to differentiate the level of wage protection in non-employee work is a significant shortcoming, further aggravated by the fact this requirement is commonly used is this context in the legislations of several European countries. For example, the Spanish law concerning the status of self-employed workers (LETA) stipulates that an economically dependent self-employed worker is a self-employed who receives at least 75% of income from a single client.[208] In Germany, this income threshold is set at 50%[209]. In Italy, in contrast, economic dependence is determined not on the basis of an income threshold but rather a requirement of long-term co-operation.[210] Even the Polish Constitutional Court, when considering the compatibility of the minimum wage act with the Polish Constitution, in its judgment of 10 January 2005 allowed for the possibility of differentiating the degree of minimum wage protection between various categories of workers.[211] The Court held that "the constitutional regulation concerning the right to minimum remuneration creates an obligation for the legislator to implement the relevant legal norms, articulated in an appropriate form, while allowing the legislator complete freedom as to the determination of the principles on the basis of which this minimum remuneration is to be calculated and the criteria according to which the amount of this remuneration will be determined."[212]

The current law on minimum wage coverage for self-employed workers contravenes the axiological foundations of labour law and is misaligned with the fundamental purposes of minimum wage protection as a concept. In particular, there is no reason why minimum wage guarantees should apply to all self-employed workers, in disregard of the requirement of economic dependence on client. Furthermore, there is also no reason why self-employed workers who are sole traders and who operate on the basis of other civil law contracts, such as for instance contracts to perform a specific task or agency contracts (as well as other contracts listed in the Civil Code), and whose work under these contracts is their sole or main source of income, should not enjoy minimum wage protection that would help ensure they

208 See further A. Tyc, *Self-Employment in Spanish law*, "Acta Universitatis Lodziensis. Folia Iuridica" 2023, vol. 103, pp. 165 et seq.

209 See further R. Wank, *Self-Employment in Germany and Austria*, "Acta Universitatis Lodziensis. Folia Iuridica" 2023, vol. 103, pp. 121 et seq. Cf. also Opinion of the European Economic and Social Committee on New trends in self-employed work: the specific case of economically dependent self-employed work of 29 April 2010, SOC/344-CESE 639/2010, pp. 7–8.

210 See further A. Tyc, *Self-Employment in French and Italian law*, "Acta Universitatis Lodziensis. Folia Iuridica" 2023, vol. 103, pp. 185 et seq. Cf. also D. Morante, *The future of "dependent self-employed workers" in Italy*, www.linkedin.com/pulse/future-dependent-self-employed-workers-italy-morante-daniela (accessed: 12.06.2021).

211 K 31/03, OTK-A 2005, no. 1, item 1.

212 Cf. also M. Nowak, *Prawo do godziwego wynagrodzenia w konstytucjach państw europejskich*, "Praca i Zabezpieczenie Społeczne" 2002, no. 5, pp. 11 et seq.

receive sufficient remuneration to meet their needs. The same holds true for self-employed workers whose remuneration is purely commission-based; they should not be *a priori* excluded from the scope of minimum wage protection.

Another problem is imprecision. In consequence, the regulations are easily circumvented, in particular with regard to the determination of the number of hours that serves as the basis for calculating remuneration. Unfortunately, the requirements on record-keeping leave ample room for misrepresenting the numbers, to the disadvantage of the workers. The State Labour Inspection has no instruments at its disposal that would allow it to effectively verify the accuracy of the records in this respect, even when the type and nature of the tasks performed clearly suggests that the records were falsified.[213] The inspectors are only allowed to verify whether the record is formally kept in accordance with the relevant regulations, on the basis of documents submitted to it by the contracting entity. The former Chief Labour Inspector Roman Giedrojć, in his comments to the draft amendment to the minimum wage act, pointed out that there are no guidelines on the methods of recording the time work, and the State Labour Inspection has no legal authority to serve as the body that would settle disputes arising from contracts of mandate and contracts for services, including concerns around the accuracy of these records.[214] The Polish legislator has also not equipped the State Labour Inspection with instruments that would allow it to effectively monitor the accuracy of payment of remuneration to self-employed workers.

As of 1 January 2019, self-employed workers are also covered by regulations that protect their wages against excessive deductions (garnishment). Article 833(2)[1] of the Code of Civil Procedure, which was added into the Code on the basis of the act of 22 March 2018 on court enforcement officers,[215] the provisions of Article 87 and Article 87[1] of the Labour Code limiting deductions (garnishments) and on amounts protected against deductions now apply, *mutatis mutandis*, to all recurring payments that serve to provide a living or that constitute the only source of income of the debtor who is a natural person.[216] In effect, a self-employed worker's remuneration is only protected against garnishments if two conditions are met jointly. Firstly, the payment must be recurring,[217] and secondly, it must serve to

213 For example, 20 hours may be written into a service contract for a specific project (e.g. a complex computer programme) to be carried out by a self-employed person, even though the actual time spent on the project will be significantly more (e.g. 70 hours). In this way, the parties are free to understate the amount of remuneration due and the remaining amount will be paid to the self-employed in an undeclared manner, to the benefit of both the self-employed and the entity commissioning the work.

214 J. Jasińska, P. Fik, *O zmianie ustawy*…, p. 22. cf. also K. Walczak, *Wynagrodzenie minimalne*…, *cz. 2*, pp. 457–458.

215 Uniform text: Dziennik Ustaw of 2023, item 1691 as amended.

216 Cf. M. Skibińska, *Dokonywanie potrąceń z umów zleceń*, LEX, 2019.

217 A self-employed person providing services on the basis of a contract to complete a specific task, which by its nature is not repetitive, has no protection against deductions; even the entire remuneration maybe deducted by way of enforcement.

provide a living or constitute the only source of income. The burden of proving the latter rests with the self-employed worker, who must file a declaration to this effect with the court enforcement officer. If the client (i.e. the party that makes the payments to the worker) is unaware that these conditions are met, it has no way to implement the protective regulations. The manner of application of the provisions of the Labour Code to self-employed workers – i.e. the operation of these regulations *mutatis mutandis* – raises significant problems in practice. Should the threshold be determined in reference to the minimum wage applicable to employees, or the minimum hourly wage multiplied by the number of hours work the worker provided in a given month? There is a discrepancy between the public authorities' positions on the issue. According to the Ministry of Justice, the amount protected against garnishments if the worker provides work on the basis of a contract of mandate is equal to the amount of the minimum remuneration payable to employees.[218] In contrast, according to the Ministry of Family, Labour, and Social Policy, on the other hand, the amount protected against garnishments is calculated by applying the minimum hourly wage of the specific worker. I believe the latter is correct; however, the issue needs to be regulated separately with regard to self-employed workers in a manner that takes into account the specifics of their situation, including how they are usually paid, which is different compared to employees.

An aspect that must be assessed negatively is that self-employed workers are not protected in the event of insolvency of the client. With regard to employees, protection is available under the act of 13 July 2006 on the protection of employee claims in the event of the employer's insolvency.[219] The act pertains not only to employees; under its Article 10, natural persons hired on the basis of a piecework employment contract, contract of mandate, and contract of agency – as long as they are subject to the mandatory pension and disability insurance specifically on account of being party to these contracts – are entitled to receive money from the Guaranteed Employee Payments Fund.[220] This excludes self-employed workers, because – while they are subject to the mandatory pension and disability insurance – they are not subject to it on account of being party to the civil law contracts listed in the act;[221] instead, they are subject to the mandatory pension and disability insurance on the basis of their status as sole traders. Consequently, in the event of insolvency

218 See position of the Ministry of Justice of 18 October 2018, MPPiU 12/348.

219 Uniform text: Dziennik Ustaw of 2023, item 1087.

220 See further 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.

221 As an aside, it should be noted that it is now mandatory for individuals providing work under an agency contract to be sole traders. This means that agents are only subject to insurance by virtue of their non-agricultural business activity and not in connection with the performance of an agency contract. Therefore, *de lege lata* singling them out in the catalogue of persons entitled to protection in the event of the employer's insolvency is rather pointless. See M. Latos-Miłkowska, *ibidem*, p. 40.

of the client, the self-employed workers are only able to pursue their claims under the general rules of civil law (or alternatively by participating in bankruptcy and restructuring procedures). I believe this is hardly the best approach to the problem; self-employed workers very often work under conditions of economic dependence on the client, very much like employees, and where this is true, they should have access to payments from the Guaranteed Employee Payments Fund, given that their earnings provide their only (main) source of income. Importantly, self-employed workers mandatorily pay pension and disability insurance contributions, a fraction of which is earmarked for the Guaranteed Employee Payments Fund. These workers should therefore enjoy protection in the event of insolvency of the client (given that generally the Polish legislator affords them minimum wage protection at a level similar to employees).

Looking at the issue of various remuneration-related protections in the broadest perspective, there is also the issue of welfare and wellbeing protection of self-employed workers. The act of 4 March 1994 on the employer's welfare and wellbeing benefits fund[222] established a mechanism whereby an employer (within the meaning of Article 3 of the Labour Code) with a minimum of 50 full-time employees (or an equivalent) as at 1 January of a given year, to provide funding towards satisfying the needs of employees (former employees) and their families in the areas of daily life, social engagements, and cultural participation. Article 2(5) of the act allows the creation of special bylaws that might include workers who are not employees to enjoy the benefits funded by the employer in this manner. Consequently, under the current regulations, there is no reason why self-employed workers would be unable to enjoy these welfare and wellbeing benefits, as long as they provide work for an employer that is obliged by law to establish a welfare and wellbeing benefits fund. If that is the case, the bylaws must specify whether the benefits granted to the self-employed workers in this manner constitute the worker's income, and if so, how this income is to be taxed.[223] The drawback is that the decision to expand this welfare and wellbeing protection to self-employed workers is left solely to the discretion of client, even if work is performed under conditions of economic dependence on that client. In any case, self-employed workers who provide work for clients that are not employers within the meaning of Article 3 of the Labour Code are not eligible for this welfare and wellbeing protection at all, as the act of 4 March 1994 simply does not apply. Thus, as the law stands, welfare and wellbeing protection is not guaranteed on equal terms to all workers, which is particularly evident when self-employed workers provide work to only one client under conditions of economic dependence similar to the employees.

222 Uniform text: Dziennik Ustaw of 2024, item 288.

223 See *Benefity na B2B – czy przyznawać i jak rozliczać świadczenia dla samozatrudnionych?*, https://www.mybenefit.pl/blog/benefity/benefity-na-b2b-jak-przyznawac-i-rozliczac-swiadczenia (accessed: 12.02.2024).

5.2.5. Protection of motherhood and parenthood

Law amending the Labour Code of 24 July 2015 from 2 January 2016 created legal mechanisms that extend certain parenthood-related rights to self-employed workers, as well as to other workers providing work on the basis of civil law, as long as they are paying the sickness and maternity benefit insurance contributions into the social security system. Specifically, the insured woman (the child's mother) and the other insured person (either the child's father or another immediate family member) have the right to receive a maternity benefit for a period corresponding in duration to the period of maternity leave and parental leave (and, for fathers, also of paternity leave). Overall, the idea of extending motherhood and parenthood protection to self-employed workers must be assessed positively. It aligns Polish labour legislation with the standards arising from international law and European Union law,[224] as well as constitutional norms, and is warranted given the rising scale of self-employment, which is increasingly taking the place of the typical employment relationship. Unfortunately, however, the manner of regulation regarding the protection of self-employed workers with regard to parenthood leaves much to be desired, raising far-reaching doubts and controversies in labour law scholarship.[225]

Protection of parenthood (and of the family in general) enshrined in the Constitution of the Republic of Poland is very broad, extending well beyond the area of labour relations. There is no distinction in the Constitution, either with regard to parents (depending on how they provide work), or with regard to children (depending on how their parents provide work). Article 18 of the Constitution stipulates that marriage is a union between a man and a woman, and that family, motherhood, and parenthood are under the protection and guardianship of the Republic of Poland.[226] Article 68 of the Constitution provides that every citizen has the right to have their health protected, and that the public authorities have a particular obligation to offer healthcare services to children and to pregnant women. Article 71 reads: "The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances – particularly those with many children or a single parent – shall have the right to

224 See further T. Barwaśny, *Self-Employment in the Light…*, pp. 29 et seq.

225 See, for example: R. Babińska-Górecka, Rights related to parenthood…, pp. 127 et seq.; M. Mędrala, *Uprawnienia rodzicielskie niepracowników*…, pp. 24 et seq.; M. Latos-Miłkowska, *Ochrona rodzicielstwa*…, pp. 71 et seq. Cf. also P. Więcław, *Uprawnienia związane z rodzicielstwem przysługujące osobom prowadzącym własną działalność gospodarczą*, "Monitor Prawa Pracy" 2018, no. 1, pp. 20 et seq.

226 P. Tuleja, *Komentarz do art. 18*, [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, LEX. Cf. also M. Dobrowolski, *Status prawny rodziny w świetle nowej Konstytucji RP*, "Przegląd Sejmowy" 1999, no. 4, p. 25. In judgment of 13 April 2011 (SK 33/09, LEX, no. 824166), the Constitutional Court, analysing Article 18 of the Constitution of the Republic of Poland, indicated that the protection of maternity refers both to the period before and after the birth of a child, and the scope of protection in this area may be differentiated with regard to each of these periods.

special assistance from public authorities."[227] Furthermore, every child, irrespective of the employment situation of their parents, is guaranteed (under Article 72 of Constitution) the protection of their rights, and thus also the right to be cared for by a parent.[228] The Constitution therefore clearly indicates that in statutory law, protection of parenthood should not be limited to parents who are employees (or their children), but consequently that it should also cover workers with civil law contracts, including sole traders.[229] This view is wholly supported by Article 24 of the Constitution, according to which all labour enjoys protection in the Republic of Poland, and the state has oversight with regard to the conditions of work.

Should the scope of parental rights and entitlements guaranteed to self-employed workers be identical to that guaranteed to employees under labour law? The Constitution allows for differentiating the level of protection, if this justification arises out of objective circumstances (because, under Article 32 of the Constitution, everyone is equal before the law and has the right to equal treatment by public authorities). The legal basis on which a worker provides work most definitely cannot be describe as an objective reasons for such differentiation. In a free-market economy, given the proliferation of atypical legal frameworks for providing work, including self-employment, self-employed workers often provide work (services) under conditions similar to those of employees, in particular when they are economically dependent on one client. Moreover, it is not uncommon for one parent to be in an employment relationship while the other is a self-employed sole trader. Therefore, affording parenthood-related rights to sole traders and other self-employed workers is intended to protect the child and, in particular, the child's to uninterrupted care from parents and close family members, regardless of the legal basis on which they provide work. There is no good reason, in view of these arguments, not to ensure that self-employed workers have rights such as: receiving a financial benefit, being expected to take a break from work, and having certainty that the above will not be the reason for termination of their contract. The rationale behind these rights is to enable parents to establish an emotional bond with their new-born child and to create optimal conditions to ensure that the child receives a good standard of care, and that the mother is also looked after, both leading up to, during, and after childbirth. The laws regulating parental rights have also two other important dimensions: a public dimension and a social one, because their aim is also to protect the family as the fundamental unit of society – again, regardless of the basis on which the parents provide work. Expanding the scope of parenthood-related protection to cover self-employed workers is a component part of the state's commitment to

227 Cf. the TK judgment of 9 July 2012, P 59/11, LEX, no. 1170258.

228 See further A. Sobczyk, *Prawo dziecka do opieki rodziców jako uzasadnienie dla urlop i zasiłku macierzyńskiego*, "Praca i Zabezpieczenie Społeczne" 2015, no. 9, pp. 11 et seq.

229 According to M. Gersdorf, in the light of the constitutional regulations, the need for ordinary legislation to provide protection to persons employed under civil law contracts does not raise any doubts. See M. Gersdorf, *Między ochroną a efektywnością*…, p. 3.

enact policies that help families, which mitigates the negative demographic trends in the inevitably ageing Polish society.[230]

Given this public and social nature of the provisions regulating the protection of parenthood, and taking into consideration the reasons why time off work and financial benefits related to childbirth exist in the first place, the current Polish protections with regard to the life and health of mothers (regardless of the legal basis on which they provide work) in the period surrounding childbirth must be assessed as insufficient. The guarantees available to various groups of mothers are differentiated on grounds of the legal basis on which the parents provide work. Unfortunately, the Polish legislator fails to ensure a similar standard of care and similar access to financial support to newly born children of employees and newly born children of self-employed workers.

Overall, there is a degree of recognition, on behalf of the legislator, of the need to offer to self-employed workers certain parental rights that were previously reserved exclusively for employees – and this, in itself, must be assessed positively. By virtue of the act of 24 July 2015 amending the Labour Code, the legislator eliminated from the legal system the notion that parenthood-related rights (in particular the right to the payment of the maternity benefit) may only be shared between parents with a similar status, i.e. either as employees or as self-employed workers. Moreover, the legislator has extended this protection to parties other than the mother and the father, namely to other members of the immediate family), who are now also eligible for certain parenthood-related right, even if they are not employees. The act of 24 July 2015 introduced new terms (reflecting new conceptual categories) into the Labour Code. Article 175[1] of the Labour Code now contains the following definitions: the insured person – mother of a child, the insured person – father of a child, the insured person – another member of the immediate family. The legislator defines these statuses by reference to social insurance regulations, which is highly problematic.[231] The insured person – mother/father of a child is to be understood (respectively) as a parent who is not an employee, who is covered by social insurance

230 Data from the Statistics Poland shows that the share of older people in Poland's population is steadily increasing. At the end of 2021, the number of people aged 60 and over reached 9.7 million and increased by 0.2% compared to the previous year. The percentage of elderly people in the Polish population reached 25.7%. No significant changes guaranteeing demographic stability in Poland are to be expected in the near future. According to the estimates of the Statistics Poland, the number of people aged 60 and over is expected to increase to 10.8 million in 2030 and to reach 13.7 million in 2050. Older people will account for approximately 40% of Poland's total population. See *Sytuacja osób starszych w Polsce w 2021 r.*, Statistics Poland, Warsaw, Białystok 2022, https://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/6002/2/4/1/sytuacja_osob_starszych_w_polsce_w_2021_r.pdf (accessed: 24.02.2024).

231 See, for example: M. Mędrala, *Uprawnienia rodzicielskie niepracowników*…, pp. 24 et seq.; J. Czerniak-Swędzioł, *Zakres uprawnień rodzicielskich członka najbliższej rodziny w świetle przepisów prawa pracy i ubezpieczeń społecznych*, [in:] J. Czerniak-Swędzioł (ed.), *Uprawnienie pracowników związane z rodzicielstwem*…, pp. 26 et seq.

in the event of sickness and maternity, as defined in the act of 13 October 1998 on the social insurance system. The insured person – another member of the immediate family is to be understood as a person who is not an employee, other than the insured – father of the child, who is a member of the immediate family referred to in Article 29(5) of the act of 25 June 1999 on cash benefits to be drawn from social insurance in case of sickness and maternity.[232] The problem is that Article 29(5) neither contains a definition of this term nor specifies which persons count as members of the immediate family. This is a significant problem that creates room for infringements.[233] In my opinion, in view of the objectives of the norms related to the protection of parenthood (i.e. ensuring effective and efficient care for the child and creating optimal material and financial conditions therefor), kinship should not be the limiting requirement.[234] Therefore, the meaning of "members of the immediate family" cannot be equated with the notion of "members of the employee's family" referred to in article 93 of the Labour Code,[235] which refers to members of the employee's family, other than the spouse, who meet the conditions required to draw a survivor's pension pursuant to the provisions of the act of 17 December 1998 on pensions and disability benefits from the Social Insurance Fund.[236] The category of insured persons – other members of the immediate family, as used in Article 175^1 (4) of the Labour Code, must include, by reference to Article 93 of the Labour Code: the concerned person's own children, children of the concerned person's spouse, adopted children, siblings, as well as parents, including step-parents and adoptive parents. In the absence of a definition in the labour law,[237] I believe it is necessary to allow here for the application, pursuant to Article 300 of the Labour Code, of the

232 Uniform text: Dziennik Ustaw of 2023, item 2780.

233 Cf. e.g.: M. Mędrala, *Uprawnienia rodzicielskie dla członków najbliższej rodziny pracownika*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2016, vol. 23, pp. 83–87; J. Czerniak-Swędzioł, *Ewolucja urlopu rodzicielskiego*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2016, vol. 23, pp. 53–54; B. Bury, *Zmiany w przepisach dotyczących urlopów rodzicielskich po ostatniej nowelizacji Kodeksu pracy*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2016, vol. 23, pp. 66–67. According to K. Kulig, this is inconsistent with the constitutional principle of the rule of law, [in:] *Członek najbliższej rodziny jako osoba nabywająca uprawnienie związane z rodzicielstwem*, "Monitor Prawa Pracy" 2016, no. 3, p. 138. pp. 66–67; J. Czerniak-Swędzioł, *Ewolucja urlopu rodzicielskiego*…, pp. 53–54.

234 In view of the purpose of the legal regulations related to the protection of parenthood indicated here, I am not entirely convinced by the restrictive understanding of the term 'member of the immediate family', which sometimes in labour law scholarship is takes to refer only to the child's family as the directly protected subject. So J. Czerniak-Swędzioł, [in:] *Zakres uprawnień rodzicielskich członka najbliższej rodziny*…, p. 31. In my opinion, it should be assumed that a broader understanding of the term – a member of the immediate family of the child's parents – is meant here.

235 So M. Włodarczyk, [in:] K.W. Baran (ed.), *Kodeks pracy. Komentarz*…, pp. 1115–1116.

236 Uniform text: Dziennik Ustaw of 2023, item 1251 as amended.

237 The legislator, only for the purposes of the new entitlement of employees to the leave introduced into the Labour Code on 26 April 2023 (Article 1(22) of the Act of 9 March 2023 amending the Labour Code Act and certain other acts, Dziennik Ustaw of 2023, item 641), assumed that

provisions of the Civil Code, which in Article 446(3) uses the term "member of the closest family member."[238] The Supreme Court, in its judgment of 13 April 2005, ruled that kinship is not the exclusive basis for interpreting this term.[239] Adopting a broad interpretation of the term, the Supreme Court accepted that the definition of family is: the smallest social group, linked by a sense of closeness and community, both personal and material, not necessarily arising out of kinship. Consequently, the term also encompasses persons who are not related by blood but who live in a shared household, cohabitation, or *de facto* cohabitation, in particular on the basis of being informal (unmarried) life partners.[240] This constitutes a recognition of the notion of the family based on emotional ties between its members.[241]

Self-employed workers are eligible for certain parental rights if they are subject to sickness insurance. Pursuant to Article 11(2) in conjunction with Article 6(1)(5) of the act of 13 October 1998 on the social insurance system, natural persons carrying out non-agricultural [business – T.D.] activity together with co-workers, as persons covered by compulsory pension and disability insurance, are subject, at their request, to voluntary sickness insurance.[242] Only the regular payment of the relevant contributions guarantees the insured person – mother of the child and the insured person – father of the child or another member of the immediate family the right to a maternity benefit for the period corresponding to the period of maternity leave and parental leave (in the situation of fathers – also paternity leave).[243]

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a son, daughter, mother, father or spouse is considered a family member for whose care the employee is entitled to this leave (Article 173^1(2) of the Labour Code).

238 Critical comments on the concept of 'member of the immediate family' are made, inter alia, by J. Czerniak-Swędzioł, [in:] *Zakres uprawnień rodzicielskich członka najbliższej rodziny*…, pp. 28 et seq.

239 IV CK 648/04, OSNC 2006, no. 3, item 54.

240 Cf. judgment of the Supreme Court of 18 November 1961, 2 CR 325/61, OSNCP 1963, no. 2, item 32.

241 Similarly B. Godlewska-Bujok, *Uprawnienia związane z rodzicielstwem – nowa odsłona*, "Praca i Zabezpieczenie Społeczne" 2015, no. 9, p. 18.

242 Cf. T. Duraj, *Prawna perspektywa pracy*…, pp. 39–41; B.M. Ćwiertniak, [in:] K.W. Baran (ed.), *Prawo pracy i ubezpieczeń społecznych*, Warszawa 2015, pp. 160–161; L. Mitrus, *Prawo do zasiłku macierzyńskiego po zmianach*, [in:] J. Czerniak-Swędzioł (ed.), *Uprawnienia pracowników związane z rodzicielstwem w świetle przepisów prawa pracy i ubezpieczeń społecznych*, Warszawa 2016, LEX.

243 Self-employed workers (optionally: mother, father, de facto guardian of the child) who do not pay into the voluntary sickness insurance (and therefore do not receive maternity benefit) are entitled in Poland to a parental benefit of PLN 1,000 per month net, from the day of childbirth for a period of 52 weeks – in the case of giving birth to one child in one birth, 65 weeks – in the case of giving birth to two, 67 weeks – in the case of giving birth to three, 69 weeks – in the case of giving birth to four and 71 weeks – in the case of giving birth to five or more children in one birth. This benefit is due regardless of income and is paid pursuant to Article 17c of the Act of 28 November 2003 on family benefits, Uniform text: Dziennik Ustaw of 2024, item 323. In addition, parents are entitled to a child-rearing benefit of PLN 800 per month net for each child up to the age of 18, regardless of income. This benefit is available to self-employed workers, irrespective of whether they pay into the voluntary sickness insurance,

This means that the legislator has – correctly, in my opinion – left it up to the self-employed workers to decide how to secure their livelihoods against the risks of temporary inability to work or inability to work for reasons of parenting.[244] In this respect, the situation of self-employed workers who opt into sickness insurance is similar to that of employees, who are covered by this insurance compulsorily. Both groups are eligible for the maternity benefit, which is justified by the fact that in both cases the probability of the event of childbirth and its consequences are comparable. Self-employed sole traders are not only free to choose whether to be covered by sickness insurance, but also to decide when to pay the voluntary contributions to this insurance. Coverage begins on the date indicated in the application to join the insurance plan, but no earlier than on the date on which the application is submitted. This can occur at any time during the sole trader's operations. Most often, however, in practice, the decision to opt into sickness insurance coverage depends on the plans of the self-employed person's in terms of staring to growing their family; there is no 'waiting period' before the insurance kicks in, and the acquisition of the right to the maternity benefit starts on the first day of contributions. However, the length of the period of being subject to sickness insurance now has a significant impact on the amount of the benefit, which depends on the declared benefit assessment basis. This must be assessed positively, as the self-employed worker can indirectly determine the amount of contributions; the higher these contributions, the higher the assessment basis for determining the maternity benefit will be.[245] However, if a self-employed worker is subject to social insurance for less than 12 months and the amount of contributions paid by this worker exceeds the statutory minimum, the worker will initially receive a benefit in the minimum amount, which will be increased by 1/12 for each month of contributions paid prior to becoming eligible for the benefit. On other words, the condition for receiving the maternity benefit in the full amount corresponding to the increased contributions is being subject to sickness insurance for at least 12 months. This too should be assessed positively, because it helps prevent abuse which was widespread previously (when payment

according to the rules set out in the Act of 11 February 2016 on state aid in the upbringing of children, Uniform text: Dziennik Ustaw of 2024, item 421.

244 Cf.: I. Jędrasik-Jankowska, *Niektóre regulacje prawne ubezpieczenia chorobowego, rentowego i wypadkowego a konstytucyjna zasada równości i sprawiedliwości*, "Annales Universitatis Mariae Curie-Skłodowska" 2015, part. LXII, vol. 2, pp. 81 et seq.; K. Antonów, *Położenie socjalne osób pozostających w gospodarczoprawnych stosunkach zatrudnienia, 19.3*, [in:] K.W. Baran (ed.), *System prawa pracy*, vol. VII, LEX.

245 However, the legislator sets maximum limits in this respect. Pursuant to Article 20(3) of the Act on the social insurance system, the basis for the assessment of contributions for sickness insurance for persons who are voluntarily subject to sickness insurance may not exceed, on a monthly basis, 250% of the projected average salary announced by the Minister competent for social security matters in the Official Journal of the Republic of Poland "Monitor Polski" by the end of the previous calendar year. In 2024, the maximum amount of the contribution base for voluntary sickness insurance is PLN 19 560.00 per month (i.e. PLN 234 720.00 per year).

of only one sickness insurance contribution was sufficient for eligibility for the maternity benefit in the declared maximum amount).[246]

The situation is slightly different if the self-employed worker is simultaneously an employee and earns at least the amount of the minimum wage. In this case, the payment of social insurance contributions is voluntary; only the health insurance contributions are mandatory. This means that a self-employed worker is not, on the basis of their status as a sole trader, be subject to sickness insurance (contributions on this basis can only be paid into the compulsory pension insurance), and the employment relationship is the sole basis for acquiring the right to maternity benefit. In its judgment of 3 October 2008, the Supreme Court ruled unequivocally that being subject to compulsory sickness insurance on account of an employment relationship and acquiring the right to maternity benefit in this manner precludes simultaneously being subject to voluntary sickness insurance as a sole trader and thereby acquiring the right to a second maternity benefit.[247] However, if a sole trader additionally works on the basis of a part-time employment contract, and their income on this basis does not exceed the amount of the minimum wage, they are obligatorily subject to insurance both on the basis of the employment contract and on the basis of their status as a sole trader. In such a situation, the worker may decide to pay the contributions to the voluntary sickness insurance in a higher amount, which will result in eligibility for the maternity benefit from both of these sources.

Pursuant to Article 29(1) of the act on cash benefits to be drawn from social insurance in case of sickness and maternity, the only condition for a woman (mother-to-be) who is self-employed and at the same time covered by sickness insurance on this account to acquire the right to maternity benefit is the birth of a child.[248] The self-employed woman is entitled to this benefit for the period corresponding to the period of maternity leave and parental leave, which are established by the provisions of the Labour Code (Article 29a(1) of the act on cash benefits). The legislator, in accordance with Article 29(3) of the act on cash benefits, allows the insured woman (the mother) to waive her right to receive the maternity benefit only after a period of at least 14 weeks after childbirth. Importantly, the law as it stands requires no other conditions to be met for acquiring the right to this benefit.[249] In particular,

246 In the resolution of 29 November 2023 (III UZP 3/23, LEX, no. 3648265), which was given the force of legal principle, the Supreme Court stated that the pension authority, in the case of starting non-agricultural activity by an insured person, without denying the title of being subject to social insurance, is entitled to verify the basis for the assessment of social insurance contributions in a situation where, in the initial period of conducting this activity, the insured person declares a basis for the assessment of social insurance contributions, the amount of which is not reflected in income.

247 II UK 32/08, OSNP 2010, no. 3–4, item 51.

248 Due to the limited scope of the study, the topic of adoption and foster care is not discussed here.

249 In order to obtain a maternity benefit, an insured self-employed mother submits an application for payment of the benefit to the ZUS organisational unit competent for her registered

the insured mother does not have to stop working in order to provide care for the child in person. It is up to the woman to decide whether she prefers to continue operating as a sole trader and earn an income, or whether she prefers to suspend the sole trader status. If the mother chooses not to suspend the status during the period in which she receives the maternity benefit, the obligation to pay pension insurance contributions ceases, or more precisely transfers to the State Treasury via the insurance institution (ZUS).[250] This is, in my opinion, insufficient from the point of view of the constitutional guarantees of the protection of work, family, and parenthood. Firstly, it contradicts the insurance-based nature of the maternity benefit, since the essence of this benefit is to secure funds to be received by the insured person as a result of the risk of loss of earning capacity in connection with the birth of a child. In this case, the insured mother, while continuing to operate as a sole trader, does not lose her previous source of income, and therefore the nature of the benefit she receives (under sickness insurance) changes. This is because the maternity benefit here is intended to compensate for the increased cost of living of the family due to the birth of the child, and not for the loss of earning capacity. Secondly, the absence of a statutory requirement for the insured mother to stop work in order to provide care to her child in person during the period of receiving the benefit, at least in the first 8 weeks after the birth, in my opinion violates the constitutional guarantee of protecting the health of women and children in the period surrounding birth, when the woman's body needs to recuperate and the child needs direct and continuous contact with the mother. This is all the more surprising and inconsistent since, where the woman is an employee, it is mandatory for her to stop working for the employer after giving birth for the obligatory part of maternity leave (14 weeks after giving birth – Article 180(5) of the Labour Code). Other self-employed workers (the insured person – father of the child or another member of the immediate family) must stop working in order to receive the maternity benefit, even though they can take care of the child only in somewhat later stages of the child's life, when the child no longer needs such intense care as in the first weeks of life. Thirdly, unlike in the case of employment relationships, the Polish legislator fails to provide any additional guarantees that would actually ensure that the self-employed worker is able to care for the child immediately after its birth. This violates both the constitutional right to special assistance from public authorities (Article 71(2) of the Constitution) of every mother (regardless of the legal basis on which she provides work) in the period surrounding a child's birth and the constitutional right of every child (regardless of the legal basis on which its parents provides work) to receive care and assistance from public authorities (Article 72(2) of the Constitution). In contrast to a mother who is an employee, a mother who is a sole trader is guaranteed neither a break

office, together with an abbreviated copy of the child's birth certificate and a certificate confirming payment of sickness insurance contributions.

250 On the side of the self-employed mother, during the period of maternity benefit, only the obligation to pay the health insurance contribution for the business remains.

in providing services immediately following the birth of her child (the so-called maternity break) nor protection against termination of the civil law contract on the basis of which she provides the services, even if she is economically dependent on one client, with a long-term relationship and with her income from this clint constituting her main source of income. Childbirth does not have the effect of suspending the obligation to perform the services stipulated in the contract (even during the days immediately following the birth), and the client may require the performance of the services under the contract at any time, and if the worker fails to provide them, this gives the client the right to terminate the contract. Under Article 746(1) of the Civil Code, which applies *mutatis mutandis* to this type of contract, the client may terminate it at any time. However, the client should reimburse the worker (in this case, the insured person – mother of the child, who is a sole trader) for the expenses that the latter has made in order to perform the services, in the case of a paid work, the client is obliged to pay a part of the remuneration that corresponds to the work already performed. Furthermore, the right to terminate a contract for important reasons cannot be waived in advance. Consequently, the decision of a self-employed insured mother to stop providing services during the period in which she receives the maternity benefit, and to take care of her newborn child in person, is associated with a high risk of losing clients and upending her business, and may cause her to incur strict liability for non-performance of her contractual obligations.[251] A self-employed person who is a sole trader cannot hire third parties to provide work instead of the original worker; this would be contrary to the essence of self-employment, an inherent part of which is the provision of services (work) in person by that specific sole trader, using their own know-how, qualifications, skills and experience to do so.[252] The legal regulations discussed above – concerning the parental right of self-employed, insured mothers as compared to women who are employees – violate the constitutional principle of equality before the law, as the state fails to provide self-employed women with comparable standards of health protection and care for children immediately after their birth.[253] A woman who is an employee status has an absolute right to maternity leave, which she cannot waive (Article 180 of the Labour Code), and while she is on maternity leave, the employer may neither terminate nor dissolve the employment contract (Article 177 of the Labour Code). After the end of the leave, the employee has the right to return to her previous position or, if this is not possible, to a position equivalent to the one occupied before the start of the leave (corresponding to the employee's skills and qualifications) on terms and conditions no less favourable than those that would

251 In this case, the possibility for the self-employed mother to benefit from a childcare break requires the consent of the contracting entity, which does not have to grant it, forcing the mother to comply with the contract.

252 According to I. Boruta, self-employed individuals should always show 'personal activity' in performing work for the contracting entity, [in:] I. Boruta, *W sprawie przyszłości*…, p. 3.

253 Similarly: M. Mędrala, *Uprawnienia rodzicielskie niepracowników*…, pp. 24 et seq.; R. Babińska-Górecka, *Uprawnienia związane z rodzicielstwem*…, pp. 127 et seq.

apply if the employee had not taken been on leave (Article 186[4] of the Labour Code). Such protection, or even a limited version thereof, is not available to mothers who operate as sole traders. Furthermore, their children do not enjoy a constitutional right to parental care at a level similar to the children of employees.

The same charge of unconstitutionality extends in my opinion, also to the provisions governing the parental entitlements of insured fathers and other members of the immediate family who operate as sole traders. As a rule, they have no separate grounds for eligibility for maternity allowance for the period corresponding to the period of maternity leave and parental leave stipulated in the Labour Code. There is merely an exhaustive list of situations when they may receive the benefit, after the insured mother has used up her period of drawing the benefit for which she was eligible.[254] In the absence of special circumstances preventing the mother from taking care of the new-born child in person, the self-employed worker who is the child's father may only receive the maternity benefit after a minimum of 14 weeks after childbirth, if the insured mother chooses not to receive it further (Article 29(3) of the act on cash benefits to be drawn from social insurance in case of sickness and maternity). Other members of the immediate family are not even granted this right; they may "take over" the right to the maternity benefit only in special cases. This inflexible approach is problematic for two main reasons. Firstly, the absolute ineligibility of the father to take over the maternity benefit before the lapse of 14 weeks of childbirth must be assessed negatively. The right of the mother (irrespective of the legal basis on which she provides work) to waive her right to this benefit and to transfer the benefit to the father of the child should be guaranteed already after 8 weeks;[255] from that moment on, the parents should freely decide on the manner of dividing the parental entitlements between them.[256] If the mother is not an employee, and in particular if she is a sole trader, she is fully within her rights if she chooses to continue working immediately after childbirth. Therefore, the absence of the option for the insured father to enjoy the maternity benefit before the expiry of 14 weeks is difficult to understand. Secondly, a drawback of the above regulation is the lack of possibility for other insured members of the immediate family to "take over" the eligibility for the maternity benefit from the insured mother, except in special circumstances preventing her from taking care of the child in person; this is particularly unreasonable if the father is not covered by sickness insurance or is not interested in providing care for the child.

254 A special regulation applies only to parental leave. Pursuant to Article 29a(3) of the act on benefits, maternity benefit for the period corresponding to the period of parental leave may be used at the same time by the insured parents of the child (including self-employed workers). In such a case, however, the total period of maternity benefit may not exceed the parental leave period set out in the Labour Code.

255 This is the period of the postpartum break, when the woman's body needs to recuperate and the baby needs direct and continuous contact with the mother.

256 As an aside, this observation also applies to parents who are employees, who enjoy not only the right to maternity allowance but also maternity leave.

Another problematic issue is the right to maternity benefit for the insured – father of the child and other members of the immediate family who are self-employed, in the event of special circumstances preventing the insured mother from taking care of the new-born child in person. The options listed in the legislation are as follows: the insured mother is legally declared to be incapable of living independently; the insured mother is in hospital or another healthcare facility due to a health condition that prevents her from taking care of the child in person; the insured mother has abandoned the child. In these cases, neither the self-employed (insured as a sole trader) father and another member of the immediate family have a separate, indirect right to draw the maternity benefit. Furthermore, the condition still must be met that the insured mother must have previously drawn the benefit for at least 8 weeks. If she does not, the insured father and another member of the immediate family are automatically ineligible for the maternity benefit. They become eligible for it only if the mother dies (regardless of whether or not she was covered by sickness and maternity insurance), abandons the child, or is unable to take care of the child in person, as long as she is not covered by sickness insurance or does not have the title to be covered by such insurance and legally declared to be incapable of living independently. In these cases, the father and the other member of the immediate family, if they are a sole trader, may apply for the maternity benefit immediately after the occurrence of the above events, for the period falling after the date of their occurrence. Very problematically, there is no option for the father or another family member to acquire the right to the maternity benefit at the moment when the insured mother abandons her child or when serious health issues arise that prevent her from taking care of the child in person. This leads to the unacceptable situation of exposing the child to being left for a period of 8 weeks without care and without the funds that are guaranteed by the state.[257] Interestingly, where the above circumstances arise with regard to a mother who is not covered by social insurance, the father and another member of the immediate family (as long as they themselves are insured) are eligible for the maternity benefit as soon as these events occur. The Polish legislator thus differentiates between the situation of the father and other members of the immediate family, as well as the child itself, depending on whether the child's mother was paying into the maternity insurance system or not. The absence of an independent right to the maternity benefit of the father or another member of the immediate family who is sole traders is also problematic.[258] Making the payment of the maternity benefit conditional on the mother receiving it for the period specified in the law (a minimum of 14 or 8 weeks), and in certain circumstances also on her waiver of the benefit,[259] may realistically result in effectively

257 Cf. M. Mędrala, *Uprawnienia rodzicielskie niepracowników*…, pp. 24 et seq.

258 Cf. A. Przybyłowicz, *Regulacja prawna zasiłku macierzyńskiego po dniu 1 stycznia 2016 r.*, [in:] J. Czerniak-Swędzioł (ed.), *Uprawnienia pracowników związane z rodzicielstwem*…, pp. 132–133.

259 This is particularly questionable in the case of an insured mother with a certificate of incapacity for independent living (Article 29(5) of the Benefits Act).

eliminating their access to the benefit, even though they may have been for years participating in the shared risk and paying voluntary contributions to the sickness insurance fund (from which this benefit is financed). This is difficult to accept on both logical and axiological grounds. Similarly, the regulation concerning mothers who give birth during a period when they are not covered by sickness insurance or have no title to be covered by this insurance is problematic too. There is no good rationale for the current regulations preventing the insured father (and possibly another member of the immediate family) from exercising his right to maternity benefit in cases other than: death of the mother, abandonment of the child and inability of the mother to live independently and therefore her inability to take care of the child in person (Article 29(9)). By virtue of this same article, the insured father (and possibly another member of the immediate family), in circumstances other than the events listed therein, despite paying social insurance contributions as sole traders, are not eligible for the benefit, purely because the child's mother does not have her own title to this insurance.[260] Yet another problem is the absence – in the regulations concerning the insured father and other members of the immediate family who are sole traders – of clear guidelines on who should have priority in claiming the benefit in case of competing claims.[261] In particular, the father is not guaranteed priority over other members of the immediate family.[262] This may lead to contentious situations, especially in cases where the parents of the new-born child are in conflict with each other (e.g. separation or divorce).

Another problematic issue related to the right to maternity benefit of the insured father and other members of the immediate family who are sole traders is an additional requirement for the eligibility of this benefit, namely the requirement that they have to stop working in order to provide care for the child in person. *Prima facie,* the requirement may appear to have both legal and axiological justification. From the general point of view of the purpose of insurance, the maternity benefit is primarily intended ensure that the insured person has sufficient funds in the event of loss of earning capacity due to the birth of a child, so the requirement may appear to fit well with this notion. Secondly, if the insured father or another member of the immediate family stops working, this ensures that the child can receive effective care provided

260 Arkadiusz Sobczyk is of the opinion that in such a case, if the father of the child is covered by sickness insurance, maternity benefit should be granted to the uninsured mother of the child, [in:] A. Sobczyk, *Prawo dziecka do opieki rodziców*…, p. 15. According to R. Babińska-Górecka, such a solution is unacceptable from the point of view of social insurance construction, as it would lead to a complete blurring of the notion of community of risk, [in:] R. Babińska-Górecka, *Ewolucja funkcji zasiłku macierzyńskiego (uwagi na tle ostatnich zmian przesłanek nabycia prawa do zasiłku macierzyńskiego przez ubezpieczonego ojca dziecka)*, "Praca i Zabezpieczenie Społeczne" 2015, no. 11, p. 15.

261 Cf. J. Czerniak-Swędzioł, *Zakres uprawnień rodzicielskich członka najbliższej rodziny*…, p. 35.

262 According to A. Sobczyk, the principle of the father's priority over other members of the immediate family seems perfectly natural, although, in my opinion, it will not always be fully evident in practice. See A. Sobczyk, [in:] A. Sobczyk (ed.), *Kodeks pracy. Komentarz*, Warszawa 2015, p. 744.

by that person. However, the existence of this requirement is a violation of the constitutional principle of equality before the law. There is no identical requirement for the mother who is a sole trader, despite the fact that she has legal priority to receive maternity benefit immediately after giving birth. This is surprising insofar as, in the first weeks of life, the child needs care from the mother the most (if only because of breastfeeding), not to mention the postpartum period and the physical recuperation needs of the mother. Nevertheless, there are no legal contraindications for the insured mother to return to work immediately after the birth of her child, providing work on the basis of civil law contracts as a sole trader. Moreover, insured adoptive parents (of any gender) who adopt or foster a child can, at their discretion, draw the maternity benefit without having to stop working. There is no similar requirement for employees on maternity, parental, paternity or child-raising leave either. Admittedly, an employee on maternity leave with an employer – where the employee earns at least the minimum wage – cannot work there for the duration of the leave (although this is not completely self-evident), but there are no legal obstacles to that employee performing work during that time on the basis of a contract for a specific assignment or a contract for the provision of services, possibly as a sole trader.[263] Such an interpretation follows both from the provisions of the Labour Code, which does not prohibit or limit in any way the right of employees taking maternity leave and drawing the maternity benefit to earn an income,[264] and from the insurance regulations, which resolve the possible concurrence of competing titles of pension and disability insurance. Pursuant to Article 9(1c) of the act on the social insurance system, persons who have a title to compulsory insurance on account of drawing maternity benefit and at the same time provide work on the basis of civil law contracts or carry out non-agricultural [business – T.D.] activity are subject to compulsory insurance on account of drawing the maternity benefit.[265] This freedom to take up work while on leave to take care of a child in person goes even further (for employees) in the case of parental and child-raising leave. According to Article 182^{1e} (1) of the Labour Code, an employee may combine the use of parental leave with work for the employer granting this leave up by working part time, for up to a maximum of what constitutes half of the regular full-time hours; parental leave is then granted for the remaining part of the working time. Under Article 186^{2} of the Labour Code, that during parental leave, an employee has the right to work for with their previous employer or another employer or in another manner, if this is possible to continue offering care in person to the child. Only if it is established that the employee has permanently ceased to provide such care, the employer summons the employee to report to work on the date indicated by

263 Similarly, M. Mędrala, *Uprawnienia rodzicielskie niepracowników*…, pp. 24 et seq.

264 In contrast, Piotr Sekulski is of the opinion that taking up employment in any form during maternity leave is in clear contradiction with the purpose of that leave and is therefore inadmissible. See P. Sekulski, *Dopuszczalność zatrudnienia w okresie wykorzystania urlopów związane z rodzicielstwem*, [in:] J. Czerniak-Swędzioł (ed.), *Uprawnienia pracowników związane z rodzicielstwem*…, pp. 139–140.

265 See also Article 9(1d) of the Social Security Act.

the employer, but no later than within 30 days of the date of obtaining such information and no earlier than after 3 days of the date of the summons. Therefore, the statutory obligation for the insured father or another member of the immediate family who is a sole trader to stop work in order to provide care for the child in person for the period of maternity benefit grossly violates the principle of equal treatment and is discriminatory against them in relation to the insured mother and in relation to employees on parental leave. It constitutes an excessive interference with the principle of freedom of work and the constitutional principle of freedom of economic activity and, to make matters even worse, is inadequate to its intended purpose. The provisions of the Labour Code demonstrate that the Polish legislator is accepting of an approach that combines work (as well as studying and receiving occupational training) with childcare, within reasonable limits, as long as it does not preclude the possibility of exercising care for the child in person. Meanwhile, the insured father or another member of the immediate family, if they are sole traders, must stop working for the period of receiving the maternity benefit, which means that they are obliged to either completely shut down their business or suspend it.[266] Pursuant to Article 22 of the Traders Law, an sole trader who does not employ workers may suspend business operations under the rules set out in this Law, including situations where the sole trader is a partner in a general partnership.[267] In the case of natural persons working on their own account on the basis of an entry in the CEIGD, the suspension may be made for an indefinite or specified period of time, but not shorter than 30 days. While the business is suspended, the sole trader may neither operate the business nor earn an income from it. This means that the insured father or another member of the immediate family, if they wish to draw the maternity benefit, are obliged to stop providing any services as part of their business.[268] Even the option of hiring third parties does not come into play here, as the essence of self-employment is the nature of the services provided by the sole trader in person, using their own know-how, qualifications, skills, and experience. The requirement to stop working in order to provide care for a child in person unfortunately goes even further, as the insured father or another member of the immediate family cannot carry out any income-generating activity (including activity unrelated to the business) on the basis of civil law contracts. The legislator completely fails to account for the fact that it is possible (as in the case of employees) to combine work with taking care of a child in person; it is a matter of specifics of the work (provision of services in the home) and its intensity, which can be reduced for the duration of the benefit, without infringing on the scope of care provided to the child. The strictness of the requirement under consideration is further

266 Cf. I. Jędrasik-Jankowska, *Ubezpieczenia społeczne. Ubezpieczenia chorobowe. Ubezpieczenia wypadkowe*, vol. 3, Warszawa 2003, pp. 52 et seq.

267 Pursuant to Article 22(5) of the Entrepreneurs' Law, in the case of carrying out business activities in a general partnership, the suspension of business activities is effective provided that it is suspended by all partners.

268 Cf. A. Sobczyk, *Komentarz do art. 180*, [in:] A. Sobczyk (ed.), *Kodeks pracy. Komentarz*, Warszawa 2015, thesis C.1.

reinforced by the fact that the legislator does not grant the insured father or another member of the immediate family any protection against the termination of the civil law on the basis of which they provide work, even if the self-employed worker is economically dependent on one client over a longer time and with the contract being the only or main source of income. In consequence, by choosing to draw the maternity benefit, they the risk of losing their clients and losing their business, as well as exposing themselves to strict liability for non-performance of their contractual obligations. This understandably generates far-reaching reluctance of fathers or other members of the immediate family who are self-employed to draw the maternity benefit, in effect making this entitlement in Poland illusory. Paradoxically, this leads to a situation in which the regulation on parental rights ceases to fulfil the main purpose that was the rationale behind its introduction. As the law stands, the Polish legislator does not ensure effective and efficient care of the child immediately after birth, fails to support the sharing of parental rights between parents (with the support of the closest family members), and fails to create optimal material and financial conditions the care of children. The restriction is downright harmful, as it makes it impossible or considerably more difficult for the insured father or another member of the immediate family to establish a strong emotional bond with the new-born child, and deprives some mothers of the option of an early return to work.

An additional problem with the requirement for insured fathers or other members of the immediate family to stop working in order to provide care for the child in person is the absence of sanctions for failure to comply, and the absence of a genuinely effective verification mechanism. Pursuant to the provisions of the ordinance of the Minister of Family and Social Policy of 8 May 2023 on applications concerning the exercise of the rights of employees related to parenthood and the documents attached to such applications,[269] the application for the maternity consists in a declaration of the insured father of the child or the insured other member of the immediate family stating that they stopped working in order to take care of the child for the period corresponding to the period that remains until the end of the maternity or parental leave. While the fact of deregistration or suspension of business operations is verifiable, there is no certainty that the insured father or another member of the immediate family will not work outside that business, on the basis of civil law contracts. In view of the rationale behind the requirement, in the event of a breach of the requirement to stop working in order to provide care for the child in person – if the occurrence of this breach can be established – the Social Insurance Institution (ZUS) should revoke the right to the maternity benefit. However, the legislator fails to specify what happens subsequently with regard to the right to this benefit. Is there is a possibility for it to be drawn again by the child's mother? Can another member of the immediate family step up and claim the benefit? If the mother is an employee, can she automatically regain the right to a further part of the maternity or parental leave? Will this not expose the child to a situation of insufficient care

269 Uniform text: Dziennik Ustaw of 2023, item 937.

and the shortage of financial resources (that are intended to ensure that the care is provided to the child)? The Polish legislator does not offer any clear answers to these questions, which must be assessed negatively.[270]

To conclude this part of the study, one more parenthood-related right for self-employed sole traders should be discussed. It came into force on 30 April 2018 in connection with the introduction of the Law on Traders.[271] It is the counterpart of the right to child-raising leave, which only employees are entitled to (regardless of the basis of their employment relationship).[272] Pursuant to Article 36aa of the act on Social Insurance System, a person who takes care in person of their own child, their spouse's child, or an adopted child, who has been operating a business for a period of at least 6 months, may suspend the business[273] for a period of up to 3 years in order to take care of the child in person, but no longer than until the end of the calendar year in which the child turns 6, and in the case of a child who, due to the state of health confirmed by a certificate of disability or certificate of the extent of disability, requires care provided in person by the sole trader, for a period of up to 6 years, but no longer than until the child reaches the age of 18. This right may be exercised in one continuous stretch of time or in no more than 5 sections. The condition of operating a business for a period of at least 6 months is deemed to be met if the self-employed worker was continuously subject to pension and disability pension insurance on that account, immediately before the day of commencement of taking care of the child in person, and paid contributions to those insurance funds. In this case, for the statutorily indicated period of this care, the self-employed worker will have their compulsory pension insurance contributions financed by the State Treasury. This rights is vested in one parent, provided that the other parent is not covered by pension insurance on this account. The parents can decide which of them will exercise this right. However, if one parent is on child-raising leave (and is an employee) and the other is a sole trader, the legislator gives priority to the person on child-raising leave.

This review of Polish legislation on the parenthood-related rights of self-employed workers who are sole traders hardly inspires optimism. It is undoubtedly encouraging that the legislator is increasingly taking note of the need to extend these rights to sole traders and other categories of self-employed workers. However, it seems that the scope of parental protection offered to self-employed workers who regularly pay voluntary sickness and maternity insurance contributions is insufficient. In my opinion, the level of protection offered to these workers should not be exactly identical to that guaranteed, under labour law, employees, who should enjoy the broadest scope of parenthood-related rights. However, this does not justify such

270 Cf. M. Mędrala, *Uprawnienia rodzicielskie niepracowników*…, pp. 24 et seq.

271 Article 50 item 12 of the Act of 6 March 2018. Introductory provisions of the Act – Entrepreneurs' Law and other acts on business activity, Dziennik Ustaw of 2018, item 650.

272 Cf. M. Latos-Miłkowska, *Ochrona rodzicielstwa*…, p. 79.

273 The rules set out in Articles 22 et seq. of the of the Act – Entrepreneurs' Law.

large differences currently enshrined in the law, which violate the constitutional principle of equality before the law. In result, the current legislative status fails to live up to the rationale behind the introduction of the regulations currently in force. The legislator is currently failing to ensure effective and efficient care for children immediately after birth, and provides no framework for full sharing of rights between parents (with the support of immediate family members), while also failing to create optimal material and financial conditions for the care of children. To further aggravate the problem, the legislation is also insufficient in terms of protecting the life and health of both self-employed mothers and of their children, prior to and immediately after childbirth.[274] The state fails to ensure that the children of employees and the children of self-employed workers enjoy a comparable standard of care and financial safeguards in their early years. This is incompatible both with the norms of international law and European Union law and clearly violates the provisions of the Polish Constitution. The legislator fails take into account the criterion of economic dependence when introducing parenthood-related protections.[275] which is a serious drawback of the current regulation. Taking this factor into account would lead to extending broader guarantees to self-employed workers on a long-term civil law contract (e.g. at least 6 months), if the contract constitutes their main source of income, on grounds that the situation of these contractors is substantially similar to that of employees.

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274 The Polish legislator *de lega lata* does not guarantee practically any protection to pregnant women who are gainfully self-employed, even if they perform work for a contracting entity 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. Pregnant employees benefit from a number of guarantees with regard to the protection of their life and health. They concern, in particular: the prohibition of employment in prohibited work (Article 176 of the Labour Code) as defined in the Regulation of the Council of Ministers of 3 April 2017 on the list of arduous, hazardous or harmful works for the health of pregnant women and women breastfeeding a child (Dziennik Ustaw of 2017, pos. 796); the obligation to transfer the employee to other work or, if this is not possible, to release her for the time necessary from the obligation to provide work with retention of the right to remuneration (art. 179 KP); the prohibition of overtime and night work; the prohibition of posting outside the permanent workplace; the prohibition of the use of the interrupted working time system (art. 178 of the Labour Code); prohibition of employment of more than 8 hours per day regardless of the working time system used with retention of the right to remuneration (art. 148 of the Labour Code); paid leave for medical examination during pregnancy (art. 185 of the Labour Code). Pregnant women working under the conditions of self-employment do not have the above-mentioned guarantees in terms of the protection of life and health, with the exception of the prohibition of employment in prohibited work, as the regulation quoted here applies to all pregnant women regardless of the legal basis for the provision of work. See further M. Ambroziewicz, *Ochrona pracy kobiet. Komentarz praktyczny*, LEX.

275 Unfortunately, this drawback also applies to other protective regulations dedicated to the self-employed. See further T. Duraj, *Funkcja ochronna prawa pracy*…, pp. 43 et seq.

5.2.6. Protection in terms of the right to rest

The right to rest, considered in its broadest sense, includes the right to paid annual leave and the right to days off, as well as restrictions on the maximum working time and guarantees of daily and weekly periods of rest.[276] Under international regulations, the right to rest is guaranteed to every person performing work regardless of the legal basis therefor.[277] In Polish law, controversially, this right is granted primarily to employees: no such right is granted to self-employed workers neither by the Polish Constitution nor by statutory law. As the law stands, self-employed workers do not have the right to rest, neither *sensu largo* nor *sensu stricto*. This state of affairs is a consequence of the fact that the Constitution limits the scope of the right to rest only to employees;[278] this follows *expressis verbis* from Article 66(2): "An employee shall have the right to statutorily specified days free from work as well as annual paid holidays; the maximum permissible hours of work shall be specified by statute."[279] The narrow interpretation of this provision is based in a literal reading of Article 66 in its entirety.[280] While section 1 "everyone" the right to safe and healthy working conditions, in section 2 the work "employee" is used to define the scope of the right to rest. The principle of rationality of the legislator thus suggests that the legislator wanted to differentiate between the scope of the two rights granted by Article 66 of the Constitution.[281] I believe that there is currently no legal basis for expanding the constitutional right to rest to cover all workers, regardless of the basis

276 Z. Góral, *O kodeksowym katalogu zasad indywidualnego prawa pracy*, Warszawa 2011, p. 179.

277 See further T. Barwaśny, *Self-Employment in the Light*…, pp. 29 et seq. Cf. also 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.

278 J. Oniszczuk, *Konstytucyjne źródła prawa pracy*, [in:] K.W. Baran (ed.), *System prawa pracy*, vol. I, p. 759.

279 The constitutional right to rest is among economic, social and cultural freedoms and rights, which is an argument in favour of viewing it as a human right. Cf.: A. Zwolińska, *Prawo do odpoczynku a zatrudnienie cywilnoprawne*, "Praca i Zabezpieczenie Społeczne" 2019, no. 1, p. 59; M. Nowak, *Regulacja odpoczynku w konstytucyjnym porządku prawnym państw europejskich, 3.3*, [in:] M. Nowak, *Urlop wypoczynkowy jako instrument realizacji prawa pracownika do odpoczynku*, Łódź 2018, LEX.

280 A far-reaching inconsistency of the Polish legislator can be seen here. On the one hand, self-employed workers are guaranteed protection in terms of safe and healthy working conditions, as mentioned above (Articles 24 and 66(1) of the Polish Constitution and the Labour Code). On the other hand, the legislator does not see the need to provide these workers with the right to rest, which is immanently connected with their protection of life and health in the working environment.

281 Cf. T. Liszcz, *Prawna ochrona niepracowniczego zatrudnienia na podstawie umowy według Kodeksu pracy*, [in:] A. Patulski, K. Walczak (eds.), *Jedność w różnorodności. Studia z zakresu prawa pracy. Pamiątkowa Księga pamiątkowa dedykowana Profesorowi Wojciechowi Muszalskiego*, Warszawa 2009, p. 180.

on which they provide work.[282] I am not persuaded by the arguments that reference the (highly debatable) concept of a "constitutional employee", a concept that arguably includes not only workers employed on the basis of an employment contract but also workers who do so on a different legal basis.[283] To be fair, this concept was also adopted by the Constitutional Court in relation to freedom of association in trade unions (Article 59(1) of the Polish Constitution). In the judgment of 2 June 2015[284] the Court rules that the status of an "employee" as a constitutional subject with regard to the freedom of association should be assessed by means of three essential criteria: performing work; having a legal relationship (regardless of its type) with the entity for which the work is performed; having work-related interests that can be protected collectively. However, this judgment is not directly applicable to the constitutional right to rest, since Article 59(1) of the Polish Constitution vests the freedom of association in trade unions in everyone – and not only in employees within the meaning of the Labour Code, as in the case of the right to rest. I fully agree with Andrzej Marian Świątkowski who argues that there is no need to create a separate definition of this concept on the basis of the Polish Constitution, as there can only be one legal definition of the term "employee" in the Polish legal system.[285]

In result of the wording used in the Constitution, it must be concluded that the legislator as a rule does not provide any protective guarantees with regard to self-employed workers, neither in terms of paid annual leave and days off, nor in

282 Cf. B. Bury, *Dylematy na tle prawa do wypoczynku w zatrudnieniu niepracowniczym typu cywilnoprawnego*, [in:] A. Kosut, W. Perdeus (eds.), *Przemiany prawa pracy: od kodyfikacji do współczesności. Księga jubileuszowa dedykowana Profesor Teresie Liszcz*, Lublin 2015, p. 386. The restriction of the constitutional right to rest only to employees is also advocated by: B. Banaszak, M. Jabłoński, *Komentarz do art. 66*, [in:] J. Boć (ed.), *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r.*, Wrocław 1998, p. 124; L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*…, vol. 3, p. 5; J. Oniszczuk, *Konstytucyjne źródła prawa pracy*…, p. 759. According to M. Bartoszewicz, adopting that everyone employed in any legal form and for any period of time has the right to annual paid leave would lead to a too far-reaching restriction of the freedom of economic activity, [in:] M. Bartoszewicz, *Komentarz do art. 66 Konstytucji RP*, [in:] M. Haczkowska (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2014, LEX.

283 A broad view of the employee in constitutional terms beyond the definition in the Labour Code is advocated by, among others: A. Sobczyk, *Prawo pracy w świetle Konstytucji RP*…, pp. 195 et seq.; A. Krzywoń, *Konstytucyjne prawo pracownika do wypoczynku*, [in:] A. Krzywoń, *Konstytucyjna ochrona pracy i praw pracowniczych*, Warszawa 2017, LEX; A. Wiącek-Burmańczuk, *Konstytucyjne prawo do wypoczynku*, "Przegląd Sejmowy" 2017, no. 5 (142), p. 111. Cf. also A. Musiała, *Kim jest "pracownik" w ujęciu przepisów Konstytucji?*, "Monitor Prawa Pracy" 2017, no. 4, pp. 173 et seq.

284 K 1/13, OTK-A 2015, no. 6, item 80, Dziennik Ustaw of 2015, item 791. Cf. also judgment of the TK of 2 December 2008, K 37/07, LEX, no. 465366.

285 A.M. Świątkowski, *Konstytucyjna koncepcja pracownika*, "Monitor Prawa Pracy" 2016, no. 1, pp. 8 et seq.

the terms of maximum working time limits and daily and weekly rest periods.[286] However, regulations aimed at protecting public safety may constitute an exception. Drivers, for example, irrespective of the legal basis on which they provide work (including also under conditions of self-employment), enjoy protection with regard to the right to rest. This protection is guaranteed to drivers who are sole traders working in person under the act of 16 April 2004 on the working time of drivers.[287] This act introduces the definition of working time of drivers who are sole traders and who perform transport services in person (Article 26b).[288] It also lays down the maximum weekly working time for these drivers (Article 26c)[289] as well as the obligation to keep records of working time (Article 26d). Overall however, self-employed workers have to rely on guarantees with regard to the right to rest that they negotiate for themselves in a civil law contract – the achievability of which depends on their negotiating position vis-à-vis the client, and only by agreement of both parties to the legal relationship.[290] The principle of freedom of contract applies here, with its stipulation that the parties are free arrange their legal relationship as they wish, as long as its content or purpose does not contradict the nature of the relationship, the law, or the principles of social co-existence (Article 353^1 of the Civil Code). There is, naturally, a strong risk that the client, using its dominant negotiating position, may impose on the self-employed worker an obligation to perform work continuously without the right to rest (especially when the services are performed under conditions of economic dependence on that clients). In that is the case, the hard threshold of the worker's working time is be the obligation of the client to ensure safe and healthy working conditions that cause no direct threat to the worker's life and health. The obligations (expressed in a civil law contract) of full and unlimited availability of the self-employed worker must therefore be viewed in the perspective of possible violations of the law, of the principles of social co-existence, and of Article 387 of the Civil Code, which stipulates that a contract

286 Cf. A. Wiącek, *Prawo pracownika do wypoczynku a regulacja prawna czasu pracy*, Lublin 2015, p. 47.

287 Uniform text: Dziennik Ustaw of 2024, item 220.

288 The working time of drivers who are sole traders is the time from the beginning to the end of their work, during which they remain at their work stations, being at the disposal of the entity for which they provide the road transport service and perform the activities referred to in the law. In addition, their working time includes the time when they are on standby for work, in particular while waiting for loading or unloading, the anticipated duration of which is not known to the driver before departure or before the start of the period concerned.

289 The weekly working time of driver who are sole traders may not exceed an average of 48 hours in an adopted reference period not exceeding 4 months. It may be extended to 60 hours if the average weekly working time does not exceed 48 hours in an adopted settlement period not exceeding 4 months.

290 Z. Kubot, *Urlop wypoczynkowy w zatrudnieniu niepracowniczym typu cywilnoprawnego*, "Praca i Zabezpieczenie Społeczne" 2002, no. 9, pp. 29 et seq.; A. Malinowski, *Urlopy pracownicze. Komentarz*, Warszawa 2010, p. 41.

is not valid if the performance of it is impossible (*impossibilium nulla obligatio est*). However, these are hardly sufficient guarantees as regards the protection of the right to rest of self-employed workers. Specific legislative steps must be taken in this area to ensure compliance with international standards.

5.2.7. Collective rights

5.2.7.1. Rationale and scope of the protection in terms of eligible workers

The tendency to extend protective guarantees to self-employed workers is clearly exemplified by the shifts in changes in Polish collective labour law: on 1 January 2019, the act of 5 July 2018 amending the act on trade unions and selected other acts entered into force, extending the freedom of association[291] to persons performing paid work outside of an employment relationship, and therefore also to sole traders who hire no other persons to perform work (services).[292] This is a direct result of the Constitutional Court's judgment of 2 June 2015, in which Article 2(1) of the act on trade unions was found to be incompatible with Article 59(1) in conjunction with Article 12 of the Polish Constitution,[293] as well as with the international agreements binding Poland, in that it restricted the freedom to form and join trade unions of categories of workers not specifically listed therein.[294]

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291 Ż. Grygiel-Kaleta, *Wolność zrzeszania się w związkach zawodowych*, Warszawa 2015, pp. 42 et seq.

292 Labour law scholarship has for many years advocated the need for a broad coverage of the scope of the freedom of association far beyond employees. See, for example: Z. Hajn, *Prawo zrzeszania się w związkach zawodowych – prawo pracowników, czy ludzi pracy?*, [in:] A. Wypych-Żywicka, M. Tomaszewska, J. Stelina (eds.), *Zbiorowe prawo pracy w XXI wieku*, Gdańsk 2010, pp. 182–183; B. Cudowski, *Prawo do zrzeszania się, prowadzenia rokowań i sporów zbiorowych w Polsce a europejskie prawo pracy*, [in:] W. Sanetra (ed.), *Europeizacja polskiego prawa pracy*, Warszawa 2004, p. 49; K.W. Baran, *O potrzebie nowelizacji prawa związkowego*, "Monitor Prawa Pracy" 2013, no. 11, p. 568; J. Unterschutz, *Wybrane problemy ograniczenia swobody koalicji w świetle prawa międzynarodowego i Konstytucji RP*, "Praca i Zabezpieczenie Społeczne" 2013, no. 10, pp. 21 et seq.; E. Podgórska-Rakiel, *Konieczność nowelizacji prawa polskiego w kwestii wolności związkowych z perspektywy Międzynarodowej Organizacji Pracy*, "Monitor Prawa Pracy" 2014, no. 10, pp. 510 et seq. On the concept and scope of trade union freedom, see: L. Florek, *Pojęcie i zakres wolności związkowej*, [in:] A. Wypych Żywicka, M. Tomaszewska, J. Steliny (eds.), *Zbiorowe prawo pracy w XXI wieku*, Gdańsk 2010, pp. 69 et seq.

293 A. Musiała, *Glosa do wyroku TK z dnia 2 czerwca 2015 r.*, K 1/13, LEX, 2015; P. Grzebyk, *Wolność zrzeszania się w związki zawodowe a zatrudnienie cywilnoprawne. Glosa do wyroku Trybunału Konstytucyjnego z 2.06.2015 r.*, "Przegląd Sejmowy" 2016, no. 11, pp. 199 et seq.; J. Unterschutz, *Podmiotowy zakres swobody koalicji – uwagi na marginesie wyroku TK w sprawie K 1/13*, "Monitor Prawa Pracy" 2016, no. 3, pp. 131–132; P. Kapusta, *Glosa do wyroku TK z dnia 2 czerwca 2015 r., K 1/13*, "Przegląd Sejmowy" 2016, no. 5(136), pp. 127 et seq.

294 Cf. T. Duraj, *Prawo koalicji osób pracujących na własny rachunek…*, pp. 129 et seq.

Expanding the scope of freedom of association to self-employed workers a breakthrough in the field of collective labour relations in Poland.[295] The amendment is crucial, as it gives the self-employed workers an instrument of boosting protections individual and collective. On the one hand, self-employed workers may seek greater protection in the individual dimension, in particular with regard to remuneration, working time, annual and parenthood-related leave, as well as other paid breaks from work, or seek protection against contract termination. On the other hand, union membership opens the way for these workers to seek guarantees and privileges in the field of collective labour law inherently linked to the freedom of association, including: protection against discrimination on the grounds of union membership or lack thereof (Article 3 the act on trade unions); the right to bargain with a view to concluding a collective agreement (Article 21 the act on trade unions); the right to bargain with a view to resolving collective disputes, and the right to organise strikes and other forms of protest within the limits set out in the act of 23 May 1991 on the resolution of collective disputes. Self-employed workers who hold trade union office may also exercise rights that the Polish legislator specifically associates with these roles, in particular: protection against termination of a civil law contract that is the legal basis of services provided by these workers (Article 32 the act on trade unions); protection against discrimination (Article 3 the act on trade unions); right to paid exemption from work for the time necessary to perform *ad hoc* trade union functions (Articles 25 and 31 the act on trade unions); paid exemptions from the obligation to provide work for the period of the term of office in the management board of the trade union (Article 31 the act on trade unions). This strengthening of the protection of self-employed workers is quite momentous, given that as a rule, they provide work (services) under conditions similar to those of employees, especially when they are economically dependent on one client. In principle, the direction of the changes made to trade union law must be assessed positively. Certainly the amendment opens a new chapter in the history of the regulation of collective labour relations in Poland, providing unequivocal grounds for the claim that Poland how has collective labour law.[296] Unfortunately, an in-depth review of the specific regulations, the reliance on references to the relevant provisions regulating the situation

295 See: P. Grzebyk, *Granice podmiotowe wolności koalicji – kolejna próba zdefiniowania w prawie "osoby wykonującej pracę zarobkową". Uwagi na marginesie projektu nowelizacji ustawy o związkach zawodowych z września 2017 roku*, [in:] J. Stelina, J. Szmit (eds.), *Zbiorowe prawo zatrudnienia*…, pp. 105 et seq.; P. Grzebyk, *"Osoby wykonujące pracę zarobkową" a wolność koalicji. Uwagi na marginesie projektu zmieniającego ustawę o związkach zawodowych z 22 marca 2016 r.*, "Praca i Zabezpieczenie Społeczne" 2016, no. 5, pp. 5–6; M. Szypniewski, *Tworzenie i wstępowanie do związku zawodowego*, LEX, 2019. Cf. K.W. Baran, *Refleksje o zakresie prawa koalicji w projekcie nowelizacji ustawy o związkach zawodowych*, "Monitor Prawa Pracy" 2016, no. 6, pp. 286 et seq.

296 According to K.W. Baran, the changes introduced into trade union law are significant enough to justify the use of the term "collective employment law" instead of "collective labour law". See K.W. Baran, *O zakresie prawa koalicji*…, p. 4.

of employees, the absence of differentiation of the scope of collective protection of self-employed workers, as well as the model of trade union representation based on client-specific trade union organisations (which fails to take into account the specific situation of self-employed workers) reveals much that must be assessed negatively, and suggests that trade union law in Poland requires further modification.

In addition to international standards, which require very broad applicability of the freedom of association including workers who are not employees and self-employed workers,[297] this direction of change is also clearly rooted in the provisions of the Polish Constitution, which posits a broad understanding of the freedom of association. Article 58(1) of the Constitution grants freedom of association to everyone,[298] while Article 59 stipulates that this freedom is guaranteed, and its scope may be subject only to such statutory restrictions that are permitted by international agreements binding the Republic of Poland. Consequently, freedom of association (and its attendant protections) extend to all workers who are granted this freedom under international agreements ratified by Poland, to the extent established by those agreements, regardless of the basis on which these workers provide work. Freedom of association is afforded to anyone who provides work and has economic or social interests directly related to work which require trade union protection. With this in mind, the Constitutional Court's landmark ruling of 2 June 2015 *expressis verbis* included self-employed sole traders in the category of workers who must be granted freedom of association and its attendant protections. In addition, an important argument in favour of granting self-employed workers certain collective rights is the need to provide these workers with a standard of protection similar to employees insofar as they provide work (services) under conditions similar to those of employees, especially when they are economically dependent on one client. These workers are not covered *ex lege* by the protective provisions of labour law, and the civil law principle of freedom of contract (Article 353^1 of the Civil Code) combined with the typically meagre negotiating power of these workers very often leads in practice to the imposition of unfavourable contractual terms by the client.

In view of the arguments presented above, and in particular in view of the ruling of the Constitutional Court of 2 June 2015 declaring the provisions of the act on trade unions unconstitutional as regards the scope of persons covered by the freedom of association, the legislator decided to extend this right, as well as its attendant protections, to workers who perform paid work but are not employees. Pursuant to Article 2(1) in conjunction with Article 1^1(1) of the act on trade unions, the right to form and join trade unions is granted to persons performing paid work

297 See further T. Barwaśny, *Self-Employment in the Light*…, pp. 29 et seq.

298 Cf. M. Florczak-Wątor, *Komentarz do art. 58 Konstytucji*, [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, LEX. It should be noted that in Article 12 of the Constitution of the Republic of Poland, the legislator formulates the principle of union pluralism. According to this provision, the Republic of Poland ensures the freedom to form and operate trade unions. See further P. Tuleja, *Komentarz do art. 12 Konstytucji*, [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, LEX.

on a basis other than an employment relationship, regardless of the legal basis on which they preform this work, if they do not hire other persons to perform this work, and they have rights and interests related to the work that can be represented and defended by a trade union.[299] There requirements are, in principle, met by self-employed workers who are sole traders, if that they provide work in person and do not hire other persons to perform it.[300] Firstly, these workers offer their services for profit, in order to generate an income. Secondly, they perform work (services) for their clients usually on the basis of a civil law contract for the provision of services within the meaning of Article 750 of the Civil Code (a B2B contract), less frequently under an agency contract or a contract for specific work. Thirdly, they may have rights and interests related to the work they provide, which may benefit from collective protection – because their legal situation and their relations with clients are governed by the provisions of the Civil Code, rather than by the protective provisions of labour law. This last component of the definition is vague and imprecise, and consequently raises far-reaching doubts in practice. In the labour law scholarship, the argument has been made about the inherent difficulty of verifying whether this requirement is met. Everyone who provides work (services) usually has an interest of what type or another related to the economic conditions of the work, be it an interest related to the practical aspects thereof, the social aspects, etc.[301] Moreover, this requirement may easily be circumvented by a skilful approach to articulating the objectives of a trade union. As the law stands, there are also no instruments that would allow for an effective verification of whether a particular group of workers forming a trade union in fact has rights and interests related to the performance of work that can be represented and defended by a trade union, nor is there an authority that could be in charge of such verification. Neither the employer (where the trade union is being established) nor the court (when asked to register the trade union) has the capacity or authority to do so. There is no doubt

299 The consequence of the extension of the subjective scope of the coalition law was the adoption in the act on trade unions of a broad definition of the term "employer" going far beyond the definition set out in Article 3 of the Labour Code. Pursuant to Article 11(2) of the act on trade unions, it should be understood as an employer within the meaning of Article 3 of the Labour Code, as well as a natural person, a legal person or an organisational unit which is not a legal person, to which the law grants legal capacity and to which the provisions on legal persons apply respectively, if they employ a person performing paid work other than an employee. Cf.: A. Tomanek, *Wątpliwości wokół nowej definicji pracodawcy w prawie związkowym*, "Praca i Zabezpieczenie Społeczne" 2019, no. 3, pp. 19 et seq.; K.W. Baran, *O pojęciu pracodawcy w zbiorowym prawie pracy – uwagi* de lege lata *i* de lege ferenda, "Monitor Prawa Pracy" 2018, no. 3, pp. 7 et seq.

300 This does not exclude the possibility for self-employed persons to use the assistance of immediate family members, as long as this is in accordance with the provisions of the contract which forms the basis for the provision of services by the sole trader. Similarly, P. Grzebyk, Ł. Pisarczyk, *Krajobraz po reformie*…, p. 86.

301 Cf. e.g. J. Stelina, *Zbiorowe prawo zatrudnienia – podstawowe założenia teoretyczne*, [in:] J. Stelina, J. Szmit (eds.), *Zbiorowe prawo zatrudnienia*…, p. 26.

that freedom of association and its attendant protections can only be exercised by those self-employed workers who have a client, and who provide certain services to this client, and can seek collective representation of rights and interests with regard to this client. Self-employed workers who are sole traders generally have trade-related, economic, and social interests tied to the services they provide, which need to be protected collectively with the active support of trade unions. Trade union membership gives them an opportunity to improve their legal standing by e.g. introducing minimum standards of protection to which they are not entitled by law alone. However, granting sole traders the right to join trade unions raises important questions about market mechanisms, fair competition, and the principle of economic freedom. Trade unions, as associations of a special nature and as a vital element of the constitutional system of the state, have law-making powers defined by law (since they participate in collective bargaining). Their fundamental purpose is to represent and defend the rights and interests, both trade-related and social, of working people (Article 1(1) of the act on trade unions). Should the consolidation of self-employed workers only serve to protect their economic, tax, or copyright related interests, this an objective may be successfully pursued by another type of organisation. This was also noted by the Constitutional Court in the part of the ruling of 2 June 2015 in which the reasoning behind the ruling was explained. The Court noted therein that self-employed workers should be guaranteed the freedom of association – however, it is incumbent on the legislator to distinguish, within the larger category of self-employed workers, between those whose status is similar to that of employees and who must therefore be able to form and join trade unions, and those who should be classified as entrepreneurs (business operators rather than workers of a status similar to employees). The latter should enjoy not the freedom to form and join trade unions, but rather the freedom of association in business organisations. In my opinion, the requirement (stipulated in the act on trade unions) of having rights and interests related to work that can be represented and defended by a trade union does not adequately serve this purpose.

Importantly, the right of self-employed workers to form and join trade unions is not conditional on the requirement of uninterrupted provision of work (services) for a legally defined period of time for the benefit of the entity in which the trade union organisation operates. Such a restriction would be clearly in contravention of the norms of international law as well as the Polish Constitution.[302] It should

302 It is only when determining the size of a facility trade union organisation that this requirement is taken into account. Pursuant to Article 25^1(1)(2) of the act on trade unions, the rights of a facility trade union organisation are vested in an organisation with at least 10 members who are persons performing paid work other than employees and who have provided work for at least 6 months for an employer covered by the activities of that organisation. The idea is to ensure the stable size of the trade union organisation under conditions of civil law contract-based work. According to K.W. Baran, earlier periods of work cannot be counted towards the indicated period unless they follow directly after each other, [in:] *Z problematyki liczebności zakładowej organizacji związkowej*, "Monitor Prawa Pracy" 2019, no. 5, p. 9.

therefore be assumed that even those self-employed workers who only occasionally perform services for various clients have the freedom of association and the attendant protections, which they will be able to exercise if they come to the conclusion that it is important to take action to safeguard their trade-related or social rights and interests related to the work they perform.

The right of self-employed workers to form and join trade unions is self-contained and autonomous. As of 1 January 2019, these workers may join already existing trade union organisations the members of which are employees (so-called mixed unions) or form their own trade union organisations bringing together only self-employed sole traders or other workers who provide work on the basis of civil law contracts.[303] In the latter case, the bylaws of the trade union should specify the membership criteria. However, the legal basis on which a given person provides work certainly cannot serve as a membership requirement; at most, the requirements may pertain to the nature of the work performed in the absence of subordination and at the risk and on the account of the person providing certain services.

A problematic aspect of the new regulations on trade unions – and one that may lead to an absence of interest in trade union membership on behalf of self-employed workers – is that the act on trade unions upholds the model of a trade union organisation that gives preference in terms of representation and defence of the rights and interests of workers to a facility-based trade union organisation.[304] This is greatly inconsistent with the notion f self-employed work: the model is only a good fit for employee relations, where workers provide voluntarily subordinated work for the benefit of one employer. Yet workers who provide work on the basis of civil law contracts (sole traders in particular) typically lack a strong relationship with one specific client; as a rule, they provide services to several clients. This should serve as a reason for re-formulation and reconstruction of the current model of trade union representation, which now favour facility-based trade union organisations, towards giving a statutory boost to trade union structures that go beyond one client facility and in doing so, take much better account of the specificities of self-employed work in general, and sole traders' work in particular. As things stand, five years after the shift in trade union law, there has been very little interest on unionising among self-employed workers. Even in sectors where civil law-based work is prevalent (e.g. healthcare), so far there has been no perceptible effort towards the formation of non-employee trade unions, and it is rare for non-employees to the join existing unions. It took nearly two years after the amendment for the first nationwide trade

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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.

303 For example, this is possible in healthcare settings where there is strong trade union representation and many doctors or other health professionals provide medical services under civil law contracts, including as sole traders.

304 Similarly, M. Latos-Miłkowska, *Praca na własny rachunek a ochrona w zakresie zbiorowego prawa pracy*, "Acta Universitatis Lodziensis. Folia Iuridica" 2022, vol. 101, p. 196.

union of self-employed workers to be registered (called "wBREw", registered on 10 September 2021).[305] While wBREw has built organisational structures across the country, in my opinion it has so far not played any significant role in terms of to protecting the rights and interests of this self-employed workers.

5.2.7.2. Scope of protection of collective rights

5.2.7.2.1. Freedom of association: general benefits

The decision of the Polish legislator to extend the freedom of association to self-employed workers gives the workers in this category a useful instrument that could go towards improving their legal situation in general, and the conditions under which they provide work in particular. This must be assessed positively. Following the amendment of the act on trade unions, in accordance with Article 7 of the act on trade unions, trade unions represent all workers within the meaning of the act, regardless of their trade union affiliation, with regard to their collective rights and interests. In contrast, in individual matters concerning the performance of work, trade union organisations only represent, as a rule, the rights and interests of their members. A trade union may act in defence of the rights and interests of a non-member vis-à-vis the client only at the request of the relevant affected person.

Granting self-employed workers the right to form and join trade unions boosts the effectiveness of compliance control with regard to the entity organising the work of these workers (in particular with regard to compliance with regulations governing the conditions of work). Pursuant to Article 8 the act on trade unions, under the rules provided for in that act and also in other legislation, trade unions monitor compliance with the provisions concerning the interests of the self-employed workers as well as the interests of their families. These powers of trade unions are best seen in the area of occupational health and safety. Facility-based trade union organisation monitor the observance of the regulations and principles of occupational health and safety in the workplace (Article 26(3) of the act on trade unions). If there is a reason to believe that there is a threat to the life or health of persons performing work outside of the employment relationship (including self-employed workers) in the workplace or in the place designated by the client, the facility-based trade union organisation may ask the employer to carry out the relevant tests, at the same time notifying the competent district labour inspector. The client must notify the facility-based trade union organisation of its position within 14 days of receipt of the request. If testing is carried out, the client must immediately, no later than within 7 days of receiving the results of the testing, make these results available to any facility-based trade union organisation operating on its premises, together with information on how and when any hazards identified in the testing will be removed (Article 29(1) of the act on trade unions).

305 https://wbrew.org/

Following the amendment of the act on trade unions, trade union organisations representing self-employed workers are also obliged, under Article 4, to defend the dignity, rights and interests of these workers, material and moral, collective and individual. Under Article 5, the self-employed workers have the right, via trade unions, to represent the interests of workers who are not employees in the international arena.

5.2.7.2.2. Protection against discrimination on grounds of trade union membership or non-membership

In order to boost the effectiveness of the freedom of association of self-employed workers, the legislator has expanded the scope of protection against discrimination to cover these workers. Article 3(1) prohibits unequal treatment self-employed workers, in the area of labour, on the grounds of their membership in a trade union, their choice not to join a trade union, or the fact that they hold trade union office, in particular in the form of: refusal to establish or terminate a legal relationship, unfavourable determination of remuneration for work or of other terms and conditions under which work is provided, withholding opportunities for promotion, withholding other benefits related to work, unfavourable treatment in access to training designed to improve occupational skills, unless the client is able to demonstrate that the decision to do so was made on objectively valid grounds. In civil law contracts under which self-employed workers perform work, clauses that violate the principle of equal treatment on grounds of trade union membership (or non-membership) are invalid. In place of such clauses, the relevant legal provisions governing the legal relationship between the workers and the clients apply, and in the absence of such provisions, the contract clauses are replaced by equivalent but non-discriminatory clauses (Article 3(4) of the act on trade unions). This, again, is a significant interference with the principle of freedom of contract (Article 353^1 of the Civil Code). However, in this case it must be assessed as fully justified.

However, the manner of regulation of the scope of claims available to self-employed workers in cases of violation of principle of equal treatment on the grounds of membership (or non-membership) in a trade union is not as successful. Under Article 3(2) of the act on trade unions, Articles 18^{3d} and 18^{3e} of the Labour Code apply *mutatis mutandis*. This manner of regulation raises many problems of interpretation in practice, making the legal situation of self-employed workers unclear and uncertain in this area. In particular, application of the provision of Article 18^{3d} of the Labour Code is problematic. Article 18^{3d} guarantees the right to compensation in an amount not lower than the minimum wage, established on the basis of separate regulations. However, this regulation fails to take into account the typical ways in which payments are made for services provided on the basis of civil law contracts. Should the amount of compensation in this situation use the minimum wage for employees as a benchmark, or should it be calculated against the minimum wage applicable to civil law contracts for the provision of services? What regulations apply to workers who provide services on the basis of a contract for a specific assignment,

which is not covered by the minimum wage protection at all? The mechanism of referring to the relevant provisions regulating on employees must be assessed negatively. I believe that separate regulations should be created (modelled on the provisions of the labour law) that would reflect the specific conditions under which self-employed workers provide services to the client.

The decision to include proceedings in cases concerning the violation of the principle of equal treatment on grounds of trade union membership or non-membership within the jurisdiction of labour courts. Under Article 3(3) of the acts on trade unions, the provisions of the Code of Civil Proceedings on proceedings in labour matters (Article 476(1)(2) of the Code of Civil Proceedings) apply mutatis mutandis to such proceedings respect to workers who are not employees. These are therefore labour law matters within the meaning of Article 476(1) of the Code of Civil Proceedings, and the procedural situation of self-employed workers is therefore identical to that of employees who are pursuing discrimination claims before the labour court.[306] Jurisdiction to hear these cases rests with the labour courts, which will undoubtedly facilitate the procedure for self-employed workers, as this option is definitely more favourable than having to tackle proceedings before the civil courts. This is the only area where the Polish legislator has given the labour court jurisdiction in disputes between self-employed workers and their clients. In other situations, the civil courts have jurisdiction. This is potentially problematic, in particular with regard to self-employed workers who are economically dependent on the client, i.e. those in a situation similar to the situation of employees.

Naturally, in matters involving a violation of the principle of equal treatment on grounds of trade union membership or non-membership, the principle of a reversed burden of proof applies (which is also the case for employees). The self-employed worker only needs to make a reasonable claim that there has been a violation, whereas the client must demonstrate that the decisions were objectively motivated (Article 3(1) of the trade unions act).

5.2.7.2.3. Protection under collective agreements

The option of collective agreements and solely for workers who are not employees, sole traders, is another key change introduced by the Polish legislator.[307] Until 1 January 2019, such workers were only able to benefit from collective agreements that had previously been concluded for employees of the entity organising their work. According to the previous wording of Article 239(2) of the Labour Code, workers providing work on a legal basis other than the employment relationship could be

306 See K.W. Baran, I. Florczak, *Kognicja sądów w sprawach zatrudnienia osób wykonujących pracy zarobkowych na podstawie innej niż stosunek pracy*, "Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji" 2021, no. 124, pp. 23 et seq.

307 According to M. Latos-Miłkowska, it is unlikely in practice that collective agreements will be concluded exclusively for self-employed workers. See M. Latos-Miłkowska, *Praca na własny rachunek*…, p. 198.

covered by such collective agreements. The amendment to the act on trade unions has opened up the possibility for self-employed workers and for their trade unions to engage in collective bargaining and to conclude collective agreements that set certain minimum protective standards for all self-employed workers covered by the agreement. This is important in that no such statutory guarantees exist. Due to the principle of freedom of contract in civil law (Article 353^1 of the Civil Code) and the poor negotiating position of self-employed workers, very often in practice the clint unilaterally imposes unfavourable contractual conditions, and the equality of the parties to the contract is merely illusory. The amendment to the act on trade unions therefore provides the self-employed workers with an excellent opportunity to boots their protection on an individual level, especially in terms of**:** remuneration and other benefits, life and health protection, working time and work organisation, annual and parenthood-related leave and other paid breaks from work, or protection against contract termination. The amendment gives self-employed workers an ability to exert genuine influence on labour law in force at the facility of the client with whom they are linked by a civil law contract for the provision of services (B2B contract).[308]

The fundamental shortcoming of these regulations is that they are introduced with regard to non-employees through the mechanism of *mutatis mutandis* application of regulations concerning employees (the method of expansion of labour law). Under Article 21(3) of the act on trade unions, the provisions of section 11 of the Labour Code apply *mutatis mutandis* to persons other than employees who provide work for money, to their employers (clients), and to organisations of these persons. Just as it is with regard to discrimination, this is highly problematic in terms of interpretation. The legislator, while referring to the *mutatis mutandis* application of the above-specified provisions of the Labour Code, failed to make a similar reference to Article 18 of the Labour Code, which defines the relationship between the clauses of the contract that serves as the basis for the provision of work and the collective agreement. According to this regulation, contractual clauses may not be less favourable than the collective agreement, which introduces minimum standards in terms of privileges and rights. Such clauses are by operation of law invalid, and the relevant clauses from the collective agreement apply instead. The absence of a similar mechanism undermines the purpose of collective agreements for self-employed workers, as it is questionable whether the parties to a civil law contract (B2B contract) are bound by the more favourable clauses of the collective agreement. Taking into account the legal nature of collective bargaining agreements and their basic functions, this should very much be the case; there should also be a prohibition on contractual clauses that waive the more favourable provisions of the

308 The practice so far shows that the parties to collective agreements have little interest in including self-employed workers in the provisions of the agreements. See Ł. Pisarczyk, J. Rumian, K. Wieczorek, *Zakładowe układy zbiorowe – nadzieja na dialog społeczny?*, "Praca i Zabezpieczenie Społeczne" 2021, no. 6, pp. 3 et seq.

collective agreements. A civil law contract, to the extent that it waives the application of these regulations, will be *ex lege* invalid under Article 58(1) of the Civil Code.[309]

Collective agreements for self-employed workers raise important questions from the point of view of market mechanisms, fair competition, and the principle of economic freedom. Such concerns have arisen, for example, in *FNV Kunsten Informatie en Media*, where the CJEU ruled with regard to provisions of a collective agreement setting minimum rates for self-employed service providers in one of the trade unions party to the collective agreement.[310]

5.2.7.2.4. Protection in the area of collective disputes

The amendment to the act on trade unions also created certain rights for self-employed workers to participate in the resolution of collective labour disputes. Until 1 January 2019, sole traders had the possibility to engage in industrial action only to the exclusion of trade unions, in the procedure and under the rules set out by the norms of general law, in particular by the act of 24 July 2015 – Law on Assemblies.[311] The amendment granted sole traders – via through trade unions – the right to enter into an industrial dispute with the client in order to protect their collective rights and interests on the same basis as employees. According to Article 6 of the act on collective dispute resolution, the provisions thereof which refer to employees *apply mutatis* mutandis to workers other than employees in gainful employment.[312] In result, self-employed workers have the right (through trade union organisations) to articulate demands aimed at safeguarding their collective interests, to engage in collective disputes resolution procedures provided for by law, and to participate in the decision to organise a strike and to take an active part in it. Under Article 1 of the act on collective dispute resolution, collective disputes may concern working

309 Similarly, P. Grzebyk, Ł. Pisarczyk, *Krajobraz po reformie*…, p. 94.

310 Judgment of the CJEU of 4 December 2014, C-413/13, FNV Kunsten Informatie en Media p. Staat der Nederlanden, ECLI:EU:C:2014:2411. This problem was also recognised by the European Commission, which in 2022 adopted guidelines on the Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C 374/02, OJ EU. C. 2022, no. 374, p. 2). According to this document, solo self-employed persons are considered to be in a situation similar to employees and therefore their collective agreements do not violate Article 101 TFEU, regardless of whether they meet the criteria to be considered in bogus self-employment. This is particularly the case for those self-employed persons who provide services exclusively or mainly to a single contractor, presumably in a situation of economic dependence on that contractor. In the European Commission's view, this is the case when the self-employed worker receives, on average, at least 50% of his or her total remuneration income from a single contractor, over a period of either one or two years.

311 Uniform text: Dziennik Ustaw of 2022, item 1389.

312 Cf. A. Tomanek, *The Right to Strike and Other Forms of Protest of Persons Performing Gainful Employment Under Civil Law*, "Acta Universitatis Lodziensis. Folia Iuridica" 2021, vol. 95, pp. 71 et seq.

conditions, wages, social benefits, and trade union rights and freedoms of self-employed workers.[313] In particular, collective disputes may focus on safe and healthy working conditions or coverage by the client's welfare and wellbeing benefits fund.[314]

Against the background of the current legislation, however, it is unclear whether self-employed workers have all the rights guaranteed to employees with regard to the collective dispute resolution or only to some of them,[315] and what is their liability for participating in an illegal strike.[316] The application of provisions reserved for employees *mutatis mutandis* (i.e. the method of expansion of labour law) does not resolve these issues and, importantly, fails to take into account the nature of self-employed work. If the rights of self-employed workers were to be exactly on a par with those of employees, this would be rather problematic from the perspective of international standards. Representatives of the International Labour Organisation who assisted the Polish legislator when enacting the amendment to the act on trade unions did not think it necessary to make the rights of self-employed workers equal to those of employees in terms of resolving collective labour disputes; they only argued that self-employed workers should be granted the possibility to engage in certain forms of industrial action carried out in a collective manner.[317]

According to Monika Latos-Miłkowska, self-employed workers' right to strike is relatively poorly protected in Poland, which means that it may prove to be illusory in practice. This is mainly due to the fact that there are currently no provisions which would effectively protect self-employed workers against termination of a B2B contract following their participation in a strike. Moreover, for the duration of a strike, the client where the strike is organised can easily find a replacement.[318]

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313 On the concept of collective dispute, see further: Z. Hajn, *Zbiorowe prawo pracy. Zarys systemu*, Warszawa 2013, pp. 181 et seq.

314 M. Latos-Miłkowska, *Reprezentowanie praw i interesów osób świadczących pracę na innej podstawie niż stosunek pracy w sporze zbiorowym*, [in:] J. Stelina, J. Szmit (eds.), *Zbiorowe prawo zatrudnienia*…, pp. 180 et seq.

315 For example, the question of the participation of the self-employed in a strike referendum arises. According to Article 20(1) of the Collective Labour Agreement, a company strike is called by a trade union organisation after obtaining the consent of a majority of the voting employees, if at least 50% of the employees of the workplace participated in the vote. A reasonable doubt therefore arises as to whether all self-employed workers who provide work for the entity where the strike is organised should be included in the statutory referendum thresholds, even if the contract linking them is only of a short-term and incidental nature. In this case, the requirement of at least 6 months of work for the contracting entity known from Article 25^1 UZZ does not apply.

316 Cf. M. Kurzynoga, *Odpowiedzialność prawna za strajk i inne formy pracowniczego protestu*, Warszawa 2018.

317 See E. Podgórska-Rakiel, *Konieczność nowelizacji*…, p. 510. Cf. also P. Grzebyk, *Od rządów siły do rządów prawa. Polski model prawa do strajku na tle standardów unijnego i międzynarodowego prawa pracy*, Warszawa 2019, pp. 153 et seq.

318 The situation is different with regard to employees participating in a legal strike. Indeed, Article 8(2) of the Act of 9 July 2003 on the employment of temporary workers (Uniform text: Dziennik Ustaw of 2023, item 1110), which stipulates that a temporary worker may not be entrusted to

5.2.7.2.5. Protection of self-employed workers who are trade union officials

The expanded scope of freedom of association means that self-employed workers are now able to swerve as officials in the structures of trade union organisations (both at the level of a single facility and at supra-facility level), which allows them to participate in decision-making concerning the functioning of these trade union organisations.[319] As trade union office holders, self-employed workers can enjoy the privileges that the legislator attaches to this status.[320] In particular, the act on trade unions guarantees them protection against termination of civil law contracts constituting the legal basis for the services they provide (Article 32 of the act on trade unions), as well as the right to paid breaks from work, both of a regular and ad hoc nature, in order to engage in activities resulting from their trade union function (Articles 25 and 31 of the act on trade unions).[321] Another important guarantee (under Article 3 of the act on trade unions) is the protection against unequal treatment due to the status of a trade union office holder.[322] These provisions grant

perform work for a user employer at a workplace where an employee of the user employer is employed, during the period of participation of that employee in a strike, does not apply to self-employed persons. See M. Latos-Miłkowska, *Praca na własny rachunek*…, pp. 200–201.

319 See further T. Duraj, *Powers of trade union activists*…, pp. 83 et seq.

320 The explanatory memorandum of the 2018 draft amendment points out that the primary purpose of the protection of a trade union activist is to guarantee his or her independence in the exercise of his or her functions. There is therefore no basis for making this protection dependent on the existence of a certain type of legal bond between the wage-earner and the employer. Such a dependence would lead to a differentiation of legal guarantees for a certain category of people performing, in essence, the same social function and exposed to the same acts of retaliation or repression on the part of the employing entity (parliamentary print of the 8th parliamentary term no 1933). Cf. A. Dral, *Konfliktogenność funkcji społecznych i obywatelskich jako przesłanka szczególnej ochrony trwałości stosunku pracy*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 1997/1998, ed. A. Świątkowski, pp. 285 et seq.

321 See further P. Grzebyk, Ł. Pisarczyk, *Krajobraz po reformie*…, pp. 90–92.

322 I believe that granting self-employed trade union officials the right to equal treatment in employment and, in this respect, extending to them the same protection as is afforded employees was, overall, a good choice. The mere fact of performing a trade union function and representing the rights and interests of workers, given the high risk of conflict with the client, justifies protection against discrimination, irrespective of the type of legal relationship the worker has with that client. This is fully in line with international standards, which are included in ILO Convention, no. 135 of 23 June 1971 Convention concerning protection and facilities to be afforded to workers' representatives in the undertaking (Dziennik Ustaw of 1977, no 39, item 178). According to Article 1 of this instrument, "[w]orkers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements". Cf. e.g.: M. Kurzynoga, *Ochrona przedstawicieli pracowników i przysługujące im ułatwienia*, [in:] K.W. Baran (ed.), *System prawa pracy*, vol. IX: *Międzynarodowe publiczne prawo pracy. Standardy globalne*, Warszawa 2019, pp. 1091 et seq. E. Podgórska-Rakiel, *Rekomendacje MOP dotyczące wolności koalicji związkowej i ochrony działaczy*, "Monitor Prawa Pracy" 2013, no. 2.

self-employed workers a standard of protection similar (almost identical) to that enjoyed by employees active in trade union bodies. In my opinion, this constitutes an excessive and unjustified interference of the Polish legislator in the fundamental principle of freedom of contract. This regulation generally does not take into account the specific nature of self-employed work, where the workers rarely have a strong legal bond with the client, compared to employees.[323] As a side note, it is also worth noting that for years labour law scholarship has criticised the excessive level of protection and privileges that the Polish legislator guarantees to trade union officials.[324] It definitely exceeds international standards, which is best seen in the degree of protection against termination of employment of trade union officials.[325]

The differences between the regulations are the starkest where it concerns the protection against contract termination of trade union officials who are self-employed.[326] The mechanism of this protection itself is similar to the protection guaranteed to employees. Pursuant to Article 32 of the act on trade unions, without the consent of the management board of a facility trade union organisation, the client may not terminate or dissolve the legal relationship with its member indicated by a resolution of the trade union's management board, or with another worker who is a member of a facility trade union organisation authorised to represent the organisation vis-à-vis the client, and may not unilaterally change the terms and conditions of their contract to the detriment of the worker, except in the case of insolvency or winding-up of the client, or if this is allowed by separate provisions. The protection is granted for a period of time determined by a resolution of the management board, and after its expiry additionally for a period of time corresponding to half of that period, but no longer than one year after its expiry. The same protection is guaranteed to a self-employed worker who is a trade union office holder outside a facility trade

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For a broader analysis of Article 3 of the Cact on trade unions, see the section on the protection of the self-employed workers against discrimination on the grounds of union membership or non-membership. The same norms apply in this respect.

323 The civil law contracts linking the self-employed workers to the client are most usually weak (either party can terminate the contract at any time), the payment of remuneration is contingent on performance, and the self-employed workers in many cases provides her services to several clients, rather than just one.

324 See, for example: W. *Sanetra*, *Dylematy ochrony działaczy związkowych przed zwolnień z pracy*, "Praca i Zabezpieczenie Społeczne" 1993, no. 3; Z. Salwa, *Szczególna ochrona stosunku pracy działaczy związkowych*, "Praca i Zabezpieczenie Społeczne" 1997, no. 5; A. Sobczyk, *Zakładowy i niezakładowy związek zawodowy a problem demokracji zakładowej*, [in:] Z. Hajn, M. Kurzynoga (eds.), *Demokracja w zakładzie pracy. Zagadnienia prawne,* Warszawa 2017, p. 178.

325 See further M. Kurzynoga, *Ochrona stosunku zatrudnienia działaczy związkowych po nowelizacji ustawy związkowej z dnia 5 lipca 2018 r. w świetle standardów międzynarodowego prawa pracy*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2020, vol. 27, part 3, pp. 176 et seq.

326 See further K.W. Baran, *Ochrona trwałości stosunku prawnego działaczy związkowych w zakładowych organizacji związkowych. Chapter 1*, [in:] K.W. Baran (ed.), *Status prawny działaczy związkowych i innych przedstawicieli zatrudnionych*, Warszawa 2021, LEX.

union organisation, if the worker enjoys exemption from the obligation to provide work in the client's facility. This protection is granted during the period of exemption and for one year after the expiry of that period.

A novelty is that there are now statutory deadlines (14 or 7 working days) within which the trade union may take a position on the issue of granting consent (or refusing to grant consent) to the termination of the legal relationship with a self-employed trade union official, or to the unilateral modification of the contract by the client. The lapse of these periods is to be interpreted as consent of the management board of the facility trade union organisation. This regulation thus introduces a legal fiction that applies to all trade union officials, regardless of their basis of employment. This is a very important solution which significantly reduces the uncertainty regarding the protection against contract termination of all trade union officials, including self-employed workers who hold trade union office.[327] With regard to non-employees, the existing rules have been upheld when it comes to determining the number of protected trade union officials (calculated using the parity and progressive method) and making this number dependent on how representative of the workforce the trade union is.[328]

Clearly, the Polish legislator decided to replicate the employee-based construction of special protection against termination of the employment relationship of trade union officials with regard to self-employed workers, both at the facility and supra-facility level. This is the first legal regulation in Poland (not counting homeworkers[329]) that interferes so deeply with the principle of freedom of contract applicable under civil law (Article 353^1 of the Civil Code). At least several arguments can be listed against granting such an excessively privileged status to self-employed trade unionists. Firstly, the rights extended to these persons by the Polish legislator have for years been controversial, and with good reason: legal scholarship sees them as excessively protecting trade union officials employed on the basis of an employment contract, going over and above the standards resulting from international regulations.[330] Admittedly, Article 6 of ILO Recommendation No 143 indicates the

327 See further K.W. Baran, *O ochronie trwałości stosunku zatrudnienia związkowców na poziomie zakładowym – uwagi* de lege ferenda, "Monitor Prawa Pracy" 2018, no. 4, pp. 6 et seq.

328 See further A. Dral, *Ochrona trwałości stosunku pracy działaczy związkowych w świetle noweli ustawy o związkach zawodowych*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2018, vol. 25, part 3, pp. 254 et seq. Cf. also M. Latos-Miłkowska, *Ustalanie zakresu podmiotowego ochrony udzielanej działaczom związkowym*, "Praca i Zabezpieczenie Społeczne" 2017, no. 9, pp. 19 et seq. Maintaining the progressive method, while broadening the scope of the right of association, may in the future lead to an increase in the number of protected trade union official (as the number of trade union organisations increases). Consequently, this will result in a greater burden on the part of the client, which may have an impact on the negative perception of trade unions, which already in Poland are hardly seen favourably by business owners.

329 See Regulation of the Council of Ministers of 31 December 1975 on employment rights of persons performing outlay work, Dziennik Ustaw of 1976, no. 3, item 19, as amended. Cf. T. Wyka, *Sytuacja prawna osób wykonujących pracy nakładczą*, Łódź 1986.

330 See further M. Kurzynoga, *Ochrona stosunku zatrudnienia*…, pp. 178 et seq.

need to obtain the consent of a competent entity for the dismissal of a trade union official, but it refers to the consent of an independent entity, rather than the trade union's management board. Moreover, the protection of trade union officials is now not limited only to cases related to the exercise of trade union functions, and the management board of a trade union organisation may refuse to consent to a unilateral change or termination of the employment relationship in any case, even when there is a flagrant violation by the official of fundamental duties arising from the employment relationship that have no connection with trade union activity (this often happens in practice, e.g. drinking alcohol at the workplace). In such a situation, the employing entity may assert its rights only through the courts, using the legal notion of abuse of a right, which is used by the trade union official in a manner contrary to the social and economic purpose or principles of social co-existence (Article 8 of the Labour Code).[331] Secondly, the application to self-employed trade unionists of the mechanism of obtaining the consent of the trade union board to terminate a civil law contract does not at all take into account the specific nature of self-employed work, where the workers typically do not have as strong legal a bond with the client as employees usually do. This is too far-reaching an interference with the rights and obligations of the parties to contracts regulated by the Civil Code. In my view, the Polish legislator cannot limit the client's right to terminate a B2B contract with a self-employed trade union official in the event of a gross breach of its clauses not related to the worker's role in the trade union structures. This is completely contrary to the nature of civil law contracts. A sufficient mechanism for the protection of such a trade union official, taking fully into account the specific nature of self-employment, would be to guarantee this worker a high compensation in the event of termination of the civil law contract in connection with serving as an official in trade union bodies. Thirdly, even if the Polish legislator decided to require the consent of the trade union organisation's management board to terminate a civil law contract with a self-employed trade union official, this should not apply to all trade union officials but rather only to those who are economically dependent on the client.

On the other hand, the limited scope of claims that a self-employed trade union official may pursue against the client in the event of termination of a civil law contract without the prior consent of the trade union organisation's management board must be assessed positively. The legislator opted here against the right of restitution of the legal relationship (such is the effect of the court's recognition of a claim for reinstatement). This would not only be contrary to the nature of civil law contracts, but would also be rather illusory in a market economy.[332] According to Article 32(1^3) of the act on trade unions, in case of violation of the protection of trade union officials, a self-employed worker is entitled, irrespective of the amount of damage suffered, to

331 While Article 8 of the Civil Code applies to trade union officials who are employees, Article 5 of the Civil Code applies to self-employed ones.

332 K.W. Baran, *O ochronie trwałości*…, p. 9.

compensation in an amount equal to 6 months' remuneration to which this person was entitled in the last period of employment, and if this person's remuneration is not paid on a monthly basis – in an amount equal to 6 times the average monthly remuneration in the national economy in the previous year.[333] When determining the amount of this remuneration, the average monthly remuneration from the period of 6 months preceding the date of termination, termination or unilateral change of the legal relationship is taken into account, and if the self-employed worker has provided work for a period of less than 6 months – the average monthly remuneration for that entire period. The amount of money to which a self-employed trade union official is entitled is therefore not only compensatory in nature, but also constitutes a penalty imposed on the client violated the rules of the trade union official's protection against contract termination. This amount is a minimum, and therefore may exceed the extent of the damage suffered by the trade unionist.[334] Thus, the Polish legislator (unlike in the regulations reviewed hereinabove) has in fact taken into account the specific nature of self-employed work provided by sole traders; this must be assessed positively. In addition, a self-employed trade union official may claim, using simply the general principles of civil law, compensation or damages exceeding the amount of the amount granted by these regulations, using both tort and contractual liability regimes.[335]

Termination by the client of a civil law contract with a self-employed trade union official, or a unilateral change of its clauses in breach of Article 32 of the act on trade unions, does not result in the absolute invalidity of that action. The Polish legislator, replicating here the same mechanism as exists with relation to an employment relationship, recognises the action effective but defective. The self-employed worker may file a claim with the court for payment of compensation in the amount equal to 6 months' remuneration. Problematically, there is no provision in this respect explicitly giving self-employed workers who are trade union officials the right to pursue this claim in a labour court. This would guarantee these workers (as is the case with employees) the privileged position in labour law proceedings, leading to faster and more effective enforcement of claims. As the law stands, there is no reason to agree with the claim, sometimes made in labour law scholarship,[336] to the effect that labour courts do in fact have jurisdiction, and that these matters qualify as matters to which, by virtue of separate provisions, the provisions of labour law apply (Article 476(1)(2) of the Code of Civil Procedure). While labour courts are

333 This is the minimum amount of compensation guaranteed by the legislator, which can be increased by a collective agreement or other agreement between the employing entity and the trade unions.

334 K.W. Baran, *Refleksje o ochronie stosunku zatrudnienia działaczy związkowych na poziomie zakładowym po nowelizacji ustawy związkowej z 5 lipca 2018 r.*, "Praca i Zabezpieczenie Społeczne" 2018, no. 10, p. 25.

335 P. Grzebyk, Ł. Pisarczyk, *Krajobraz po reformie*…, p. 92.

336 K.W. Baran, *Refleksje o ochronie stosunku zatrudnienia*…, p. 26; M. Kurzynoga, *Ochrona stosunku zatrudnienia*…, p. 182.

definitely best placed to hear disputes related to trade unions, a literal interpretation of the act on trade unions precludes their jurisdiction in these matters, instead giving the jurisdiction to civil courts.[337] If the Polish legislator had wished to provide for the jurisdiction of labour courts in these matters, it would have explicitly regulated this issue, as it did with regard to claims by self-employed trade union officials for violation of the prohibition of unequal treatment to the holding a trade union office. Pursuant to Article 3(3) of the act on trade unions, the provisions of the Code of Civil Procedure on proceedings in labour law cases apply *mutatis mutandis* to proceedings in discrimination cases against workers other than employees. The court competent to hear these cases is the competent labour court – yet there is no analogous provision in Article 32 of the act on trade unions.

On the other hand, the manner in which the right of self-employed workers to paid exemption from work for the duration of their trade union function (permanent and ad hoc exemptions) is highly problematic. Pursuant to Article 31 of the act on trade unions, the right to permanent exemption from the obligation to provide work for the duration of a term of office on the management board of a facility-based trade union organisation is granted to persons other than employees who perform paid work (including self-employed workers) indicated by that organisation; these are so-called trade union posts. During the period of this exemption, these workers are guaranteed by the legislator the rights or benefits of a worker and the right to remuneration or cash benefits, provided that the management board of the facility-based trade union organisation has so requested. Burdening the clients with the costs of providing trade union officials with rights and remuneration for longer periods of not working (in the form of creating artificial trade union posts), when these officials do not perform work but rather focus exclusively on the duties related to their trade union office, has long been questionable, even in relation to trade union members who are employees. It is difficult to see this solution as justifiable in a market economy, given the equal position of social partners – and the problem is even more starkly visible in relation to trade union members who are self-employed. They are bound to the client (i.e. the business where the trade union operates) by a civil law contract, which generally offers neither the permanence nor the stability typically associated with an employment relationship. This usually results in the absence of a strong legal bond with the workplace (this is clearly visible, for example, in relation to the contract to perform a specific assignment). If the right of self-employed trade union officials to permanent paid time off from work for the duration of their term of trade union office is guaranteed at all, then certainly only in the cases where the workers are economically dependent on the client. Unfortunately, the Polish legislator fail to take economic dependence into account at all when introducing the right to permanent exemptions from work in the context of self-employed workers.

337 Similarly, P. Grzebyk, Ł. Pisarczyk, *Krajobraz po reformie*…, p. 92.

As for exemptions from the obligation to perform work of an ad hoc nature, they are granted to self-employed workers for the time necessary to perform an ad hoc activity resulting from their trade union function (Article 31(4) of the act on trade unions) or resulting from a trade union function outside the workplace (Article 25(6) of the act on trade unions), if that activity cannot be performed during their free time. The worker retains the right to remuneration during this period, unless specific provisions provide otherwise. This right therefore depends on the specific legal relationship in question. If a civil law contract for services is the basis for self-employment, and remuneration depends on the number of hours worked, then the time exempt from work will be paid at the rate specified in the contract. If remuneration is specified in the civil law contract as a lump sum, or depends on the results of the work, then no remuneration for the time necessary to perform the ad hoc activity will be due. The legislator does not require a separate request from the management board of the trade union organisation here. In order to protect the interests of the client, the Polish legislator has indicated that a contract between the client and the worker employee in which a deadline for the performance of the work (e.g. the handover of the work) is specified is not extended by the time off work related to the trade union function. Importantly, a collective agreement may set limits on the time off from work for the time necessary to perform an ad hoc activity arising out of holding a trade union office. The notion of guaranteeing self-employed trade union officials an exemption from work for the time necessary to perform an ad hoc activity arising in connection with their trade union office deserves approval. *Prima facie*, it even appears that the legislator has taken into account the specific nature of self-employed work. In my view, however, this entitlement goes too far, interfering significantly with the principle of freedom of contract. Firstly, there is the problem of the potentially limiting these exemptions, which have been a bone of contention for years due to how burdensome they are for the client.[338] This limit can be set solely in a collective agreement (in Poland, the number of collective agreements in force is negligible); I believe this is insufficient, and the legislator should allow the introduction of such limits at the level of ordinary agreements concluded between the client and the trade union. Secondly, I find the concept of the right to remuneration for periods of ad hoc exemptions from work to be problematic. In general, exceptions from the principle of reciprocity of obligations are permissible in an employment relationship, where they are a manifestation of the protective function of labour law (protection of the weaker party in an employment relationship). However, transplanting this mechanism into civil law relationships, which by their nature are not permanent, is much harder to justify. In my opinion, exemptions for the time necessary to carry out ad hoc activities due to holding a trade union office with regard to self-employed workers who are officials should, as a rule, be

338 See K. Kulig, *Doraźne czynności związkowe. Prawo podmiotowe pracownika czy prawo organizacji związkowej*, "Praca i Zabezpieczenie Społeczne" 2015, no. 8, pp. 9 et seq.

unpaid. Exceptions could be made with regard to self-employed workers who are economically dependent on the client.[339]

In conclusion, the legal solutions with regard to exemptions from work for the purpose of handling trade union matters, which lean towards equating the rights of self-employed workers with the situation of employees performing, must be assessed negatively. In particular, the extension paid permanent exemptions from work to self-employed workers must be seen as unjustified. Under market economy conditions, imposing the costs trade union office on the client is problematic even in relation to employees, let alone in the case of self-employed workers providing work under civil law contracts (B2B) based on the principle of contractual freedom (Article 353^1 of the Civil Code). The current manner of regulation also fails to take into account the specific nature of self-employed work, where the focus is on result of this work. A legitimate question therefore arises with regard to calculating the remuneration due to self-employed workers, as generally the amount of remuneration is variable and (unlike in the employment relationship) often depends on completing the performance of specific tasks.[340]

5.2.7.3. Concluding remarks

The amendment of the act on trade unions is a move in the right direction, because it boosts the protection of self-employed workers in the area of collective labour relations. The extension of the freedom of association to this category of workers is in line with the standards of international and European Union law and the provisions of the Polish Constitution. The new regulations contribute to improving the legal situation of self-employed workers in Poland in general, and the conditions under which services are provided in particular, which must be assessed positively.

Unfortunately, the manner in which the Polish legislator has regulated the protection of these persons in the collective labour law raises far-reaching doubts and reservations. The first problem is rooted in the imprecise definition of non-employee workers in Article $1^1(1)$ of the act on trade unions. Another problem is the continued insistence on the model focusing on facility-based trade union organisations, which has not been adapted to the specific nature of self-employed work and which hardly encourages self-employed workers to make effective use of the protections of collective labour law. Another drawback is the material scope of protection, namely the questionable mechanism of *mutatis mutandis* references to relevant provisions regulating the situation of employees (the method of expansion of labour law). It

339 This refers to self-employed workers whose income is wholly or predominantly derived from the client where the trade union in question operates. On the other hand, the 2018 draft of the Polish Individual Labour Code provided for an hourly criterion of economic dependence for self-employed workers (provision of services to one client at an average rate of at least 21 hours per week, for a period of at least 182 days). This issue will be discussed further in chapter V.

340 Cf. P. Grzebyk, Ł. Pisarczyk, *Krajobraz po reformie*…, p. 91.

causes interpretative problems and creates uncertainty around the legal situation of self-employed workers in the context of practical application of their collective labour law rights. I feel that these above-discussed methods of regulating the collective rights of self-employed workers by relying on reference to the provisions on employees must be assessed negatively. I believe that the Polish legislator should try to create separate regulations in this respect (modelled on the provisions of labour law), which would be a better fit for the specific realities of self-employed work. This would eliminate a number of interpretative doubts that are currently perceptible to legal scholar and that will become even more apparent when trade union organisations of self-employed workers (such as the new trade union wBREw) will want to exercise these rights in practice.

Problematically, in many cases the scope of protective guarantees provided for the self-employed workers is identical to the level of protection afforded to employees. This is evident both in relation to the protection of trade union officials and in the case of rights concerning the resolution of collective labour disputes, in particular when it comes to the right to strike and other forms of protest. The Polish legislator, when amending the act on trade unions, failed to include therein any criteria that would differentiate the scope of collective protection granted to self-employed workers covered by the freedom of association. These workers, by forming a trade union or joining an already existing organisation, currently all enjoy the same rights, whether or not they are long-term affiliated with the client or only occasionally provide services to that client. While this is not objectionable with regard to protection against discrimination on grounds of membership of a trade union or holding trade union office, or the protections derived from collective agreements, it is definitely questionable in the context of the right to paid exemptions from and the right to strike and engage in other forms of protest. However, the scope of this protection should be differentiated, for instance on the basis of economic dependence on the client.

In conclusion, I fully share the pessimistic view of Monika Latos-Miłkowska, who believes that "[…] given the reality of the Polish trade union movement, with its strong roots in employee-dominated facility-based trade union organisations, and given the specific nature of self-employment, the rights guaranteed by the legislator to self-employed workers in terms of collective protection of their rights and interests will not be effective." In Latos-Miłkowska's opinion, "[…] the model offered by the legislator for the collective protection of the rights and interests of self-employed workers, even taking into account 'respective' application of the institutions of collective protection of rights and interests, insufficiently takes into account the specifics of this form of work provision, and thus makes this protection in many cases ineffective."[341]

341 M. Latos-Miłkowska, *Praca na własny rachunek*…, pp. 201–202.

6. The problem of bogus self-employment in Poland

The proliferation of self-employment, both in Poland and in many Western European countries, is – in and of itself – neither harmful or undesirable. It is a manifestation of individual entrepreneurship focused on economic activity providing an individual with a source of income. The problem is that in Poland, as well as in some of the countries analysed in our research project, it is increasingly common to encounter situations in which self-employment is used in business under conditions that are generally typical for an employment relationship, in order to circumvent labour law provisions. This leads to the pathological development of bogus (false) self-employment, which is a violation of labour law.[342] In Poland, self-employment is essentially endemic under conditions characteristic for an employment relationship, where work is usually provided to a single entity in a relationship of subordination as regards the place, time and manner of work provision, and at the risk of that entity. It is even popular to replace an employment relationship with a contract with a sole trader, with the same person performing the same work (but now in the format of a service provided by a sole trader).[343] Such practices violate the provisions of Articles $22(1^1)$ and $22(1^2)$ of the Labour Code, which I now will discuss in more detail.

The Polish Economic Institute estimates that the number of self-employed workers hired in violation of Article 22 of the Labour Code is between 130 000 and 180 000.[344] In my opinion, this is an underestimate, and the actual number is closer to 500 000. According to this Institute, over the years 2010–2020, bogus self-employment remains at a similar level (the highest rate was recorded in 2018), and the phenomenon is most common in industries such as IT (26 000 workers), professional and academic (25 000 workers), healthcare (24 000 workers), transport (17 000 workers), construction (17 000 workers), industry (13 000), finance and insurance (12 000), and commerce and vehicle repair (11 000).[345] The legal regulations in force in Poland

342 This is also referred to in the literature as "apparent self-employment." See e.g. Z. Kubot, [in:] H. Szurgacz (ed.), *Prawo pracy. Zarys wykładu*…, p. 81. A. Chobot refers to "fake self-employment" [in:] *Nowe formy zatrudnienia*…, p. 169.

343 See, e.g. T. Duraj, *Problem wykorzystywania pracy na własny rachunek*…, pp. 103 et seq.; T. Duraj, *Kilka uwag na temat stosowania pracy*…, pp. 175 et seq.

344 Calculations from report prepared by the Polish Economic Institute based on data from the Labour Force Survey of the Statistics Poland. Importantly, the notion of bogus self-employed workers includes only workers who jointly meet three conditions: 1. they are self-employed (excluding farmers), 2. they do not hire other workers, 3. they declare that they work exclusively or mainly for one client. See "Tygodnik Gospodarczy Polskiego Instytutu Ekonomicznego" 2022, no. 3, https://pie.net.pl/wp-content/uploads/2022/01/Tygodnik-Gospodarczy-PIE_03-2022.pdf (accessed: 19.02.2023).

345 Polish Economic Institute calculations for 2020 made for PKD (Polish Classification of Economic Activity) sections in which bogus self-employment is estimated to be higher than 4000 persons.

in this respect are not sufficient and the scale of abuse is enormous, which makes it a significant social problem today.

The reason for bogus self-employment is primarily the desire to reduce labour costs and public levies and obligations that are associated with having employees. When an employee is replaced by a self-employed worker, the employer no longer bears the costs associated with providing an appropriate level of protection and rights associated with the employment relationship, such as paid annual leave and other paid breaks, remuneration for periods of incapacity due to illness, other compulsory employee benefits (severance payments due to retirement, death, or termination of employment for reasons attributable to the employer), compensation and indemnity benefits, seniority awards, etc. In addition, the employer transfers onto the self-employed workers obligations to pay the income tax and the compulsory social security contributions.

The elimination of employment in favour of self-employment lends itself to a more flexible production processes and allows for a needs-adjusted hiring policy, making it possible to quickly adjust the level of workforce to the changing economic situation, without the need to respect the provisions of labour law. A business staffed with self-employed workers in breach of Article 22 of the Labour Code is not bound by the restrictions on contract termination (against which employees are generally protected).

Choosing bogus self-employment instead of employment allows the client to make full use of the potential of the worker, with the client free from constraints imposed by labour law on the extent to which the worker can be available to a client versus to an employer. In particular, the maximum daily and weekly working time restrictions, statutorily guaranteed rest periods and restrictions on the permissibility of overtime, night-time and Sunday and public holiday work do not apply.

The use of self-employment in lieu of an employment relationship in breach of Article 22 of the Labour Code also provides the client with the opportunity to protect its property-related interests more aggressively. Firstly, a self-employed worker (unlike an employee) providing services on the basis of civil law contracts bears full liability (is liable with all of their assets), both for losses suffered and profits lost. Secondly, B2B contracts may contain additional clauses (not permitted in an employment contract) that allow for more effective enforcement of property claims against the worker (e.g. liquidated damages, a blank promissory note, a surety).

To summarise the considerations so far: the preference for self-employment over employment, despite the fact that work is still performed under the conditions typical of employment, results in a change in the legal regime within which the relations between the client and the worker operate. The hitherto employer ceases to be bound by the restrictions arising from the provisions of the labour law geared towards the protection of the employee as the weaker party to the employment relationship (in particular, the principle of privileging the employee set out in Article

18 of the Labour Code ceases to apply),[346] and its position vis-à-vis the sole trader is determined on the basis of the civil law principle of freedom of contract.

Polish businesses, taking advantage of the principle of freedom of contract set out in Article 353^1 of the Civil Code and the increasingly blurred boundaries between the employment relationship and forms of work provision based on the civil law, draft the civil law contracts with self-employed workers in a way that renders the work performance very similar to the employment relationship. This is contrary to Article $22(1^1)$ of the Labour Code, according to which a relationship designed to provide work in such circumstances constitutes employment regardless of the name of the contract between the parties,[347] and also to Article $22(1^2)$ of the Labour Code, which prohibits replacing an employment contract with a civil law contract while maintaining the conditions typical of employment.[348] The problem is that the Polish legislator, in defining the employment relationship and its core elements, has left room for far-reaching interpretative freedom, which effectively prevents verification and assessment of the qualification of a given form of work provision from the point of view of its compliance with Article 22 of the Labour Code, both before the National Labour Inspection and before labour courts. In the judgment of 18 June 1998,[349] the Supreme Court noted that the classification of a contract for the provision of services either as an employment contract or as a civil law contract raises significant problems. This is because the Polish labour legislation offers no list of objectively essential elements of an employment contract, and the legal definition of the employment relationship specifies only its basic conceptual features.[350] Even such seemingly obvious structural elements of the employment relationship as remuneration, the allocation of risk (to the client or employer), and the responsibility for managing the work, are interpreted in various different ways, both in the labour law scholarship and in the case law.[351] The Polish legislator also contributes significantly to blurring the boundaries between employment and

346 Pursuant to Article 18 of the Labour Code, the provisions of employment contracts and other acts on the basis of which the employment relationship is created may not be less favourable to the employee than the provisions of the labour law. Provisions less favourable to the employee than the provisions of the labour law are invalid by virtue of the law; the relevant provisions of the law apply instead.

347 Cf. H. Lewandowski, Z. Góral, *Przeciwdziałanie stosowaniu umów cywilnoprawnych do zatrudnienia pracowniczego*, "Praca i Zabezpieczenie Społeczne" 1996, no. 1, pp. 30 et seq.

348 In a judgment of 4 August 2005, the Supreme Court held that "as part of the restructuring of an establishment, a change involving the replacement of an employment contract into a civil law contract is not prohibited if it is justified by the type of work" (II PK 357/04, OSNP 2006, no. 11–12, item 178).

349 I PKN 191/98, OSNP 1999, no. 14, item 449.

350 See further 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.

351 See further T. Duraj, *Podporządkowanie pracowników zajmujących stanowiska kierownicze w organizacjach*, Warszawa 2013, pp. 45 et seq.

self-employment. The best example is the legislation (in force since 1 January 2017) implementing a mandatory minimum wage in contracts of mandate and contracts to provide services made under Article 750 of the Civil Code. It introduces the requirement of a minimum hourly rate for self-employed workers providing work in person, and offers wage protection that was only applicable to employee remuneration before.[352] Consequently, neither an action to establish the existence of an employment relationship nor a fine, ranging from PLN 1 000 to PLN 30 000, which may be imposed on an entity violating Article 22 of the Labour Code (Article 281(1)(1) of the Labour Code), is effective.

The legal regulations under review here have been in force for over a decade, and – in light of their practical implications in this period –their effectiveness must be assessed negatively. What deserves particular criticism is the liberal approach of Polish labour courts, which unfortunately (especially at the level of courts of first and second instance) continue to attribute excessive importance to the parties' declarations of intent, rather than to the actual conditions under which the self-employed work is performed. An exception in this respect is the judgment of 24 July 2001,[353] in which the Supreme Court challenged bogus self-employment, stating that the declaration in the municipal office in the register of economic activity of running one's own business consisting in the provision of sales agency services (and obtaining an entry in this register), and the subsequent conclusion of a contract for the provision of sales agency services, does not preclude the establishment and assessment that the parties to the contract were, in fact, connected by an employment relationship resulting from a contract of employment for the position of salesperson. In the explanation of the grounds for the ruling, it is noted that the parties' expression of intent (as articulated in the name of the ostensibly-civil law based contract) cannot be considered a decisive factor, because the parties have no authority, not even by means of a consensual, mutual declaration, to void the effects of the mandatorily applicable provisions of the labour law (Article 22(1^1) of the Labour Code). The Supreme Court argued that the key factor for the legal qualification of a contract is the nature of the service, i.e. the type of work, the manner of its provision, its nature, and the conditions of its provision. Unfortunately, in the vast majority of cases centred around a claim to establish the existence of an employment relationship, the Supreme Court has been guided primarily by the principle of freedom of contract, giving it primacy over the mandatorily applicable provisions of labour law, in particular over Article 22(1^1) of the Labour Code.[354] However, the intent of the self-employed worker is very often heavily swayed by economic blackmail

352 Wage protection for self-employed workers is discussed more extensively in an earlier section above.

353 I PKN 560/00, OSP 2002, no. 5, item 70 with a gloss by M. Skąpski.

354 In a judgment of 26 March 2008 (I UK 282/07, Lex, no. 411051), the Supreme Court ruled that the choice of the basis of employment is primarily determined by the consensual, autonomous intent of the parties. Cf. also, inter alia: judgment of the Supreme Court of 4 February 2011, II PK 82/10, Lex, no. 817515; judgment of the Supreme Court of 23 September 1998,

on the part of the client (usually the former employer). Barbara Wagner argues that genuine freedom of contract only exists when the parties are equal not only in formal (legal) terms but also in economic and social terms.[355] Such equality, however, for obvious reasons, is absent in the relationship between a self-employed worker and a client. If, in a specific case, the type of services provided by a self-employed worker, the manner in which they are provided, and the nature and conditions of the work unequivocally demonstrate the predominance of features characteristic of an employment relationship (in particular, if there is subordination to the instructions of the party for whose benefit the work is provided, and if these instructions aim to specify on an on going basis the type of work provided and the place, time, and manner of its provision, i.e. the core elements of management, and if the services are performed at the risk of the other party), the intent of the parties as expressed in the civil law contract for the provision of services in general and in its name in particular cannot predetermine the legal classification of such a contract. The court should uphold the mandatorily applicable provisions of Article 22 of the Labour Code when ruling to establish the existence of an employment relationship.[356] Only if it is established that the contract between the self-employed worker and the client has both the elements typical of an employment contract and those typical of a civil law contract in equal measure (which should be confirmed by the actual conditions under which work is provided) does the intent of the parties have a decisive impact *in concreto* as to the type of legal relationship between the parties.[357]

According to the National Labour Inspection, an additional difficulty in effectively combating the practice of using self-employment in breach of Article 22 of the Labour Code is the attitudes of the parties – and especially those of the self-employed workers. Unwilling to risk losing their source of income, the self-employed workers rarely have an interest in bringing an action to establish the existence of an employment relationship. Often, they refuse to cooperate with the State Labour Inspection.[358] In such cases, labour inspectors are reluctant to take the matter to the

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II UKN 229/98, OSNP 1999, no. 19, item 627; judgment of the Supreme Court of 3 June 1998, I PKN 170/98, OSNP 1999, no. 11, item 369.

355 B. Wagner, *Zasada swobody umów w prawie pracy*, "Państwo i Prawo" 1987, no. 6, p. 64.

356 It is only in recent years that a change in the reasoning of the Supreme Court has become apparent; it seems to be moving away from the primacy of the intent of the parties and towards favouring Article 22 of the Labour Code. In the judgment of 7 June 2017 (I PK 176/16, Lex, no. 2300072), the Supreme Court ruled that if the contract is dominated by employment characteristics, such as the subordination or absence of the option for a person other than the worker to perform the contract, the contract is an employment contract, even when the intent of the parties was to enter into a civil law contract. Indeed, the intent of the parties cannot change the legal relationship when the manner in which the worker performs the activities specified in the contract falls within the regime of Article 22(1) of the Labour Code.

357 See further T. Duraj, *Granice pomiędzy stosunkiem pracy*… and the judicial decisions cited therein.

358 Following the entry into force of the guaranteed minimum hourly rate, self-employed workers in conditions characteristic of an employment relationship are generally not interested in

labour court, against the will of the interested parties themselves, despite the fact that the law gives them the authority to do so (Article 63^1 of the Code of Civil Procedure); in practice, when the labour inspectors do take these cases to court against the will of the interested parties, the courts usually dismiss the claims. I believe the situation in this respect was negatively impacted by the judgment of the Supreme Court of 3 June 1998,[359] which has been echoing through the case law ever since. According to the Supreme Court, the rationale behind establishing that a contract ostensibly called a contract of mandate in fact resulted in the establishment of an employment relationship (Article 189 of the Code of Civil Procedure read in conjunction with Article 22(1) and (1^1) of the Labour Code) is not to undermine the principle of *pacta sunt servanda*, but rather to protect a person who, while providing work under the terms of a contract of employment, was deprived of the status of an employee due to the abuse of economic and organisational advantage by the employing entity. Therefore, if the person in this position (i.e. the self-employed worker) has no interest in claiming this protection, the action to establish the existence of an employment relationship should be dismissed. Consequently, the State Labour Inspection can only issue a notice to the client that uses bogus self-employment, offering a non-binding recommendation to convert the problematic B2B contract into an employment contract. It is also not uncommon for workers who brought an action to establish the existence of an employment relationship to a court (after being self-employed but providing work under conditions characteristic of an employment relationship) to later decide to withdraw the action or, in the course of proceedings before the labour court, to declare that they were not interested in having an employment contract. Naturally, this undermines the effectiveness of legal mechanisms to combat bogus self-employment.

The increasing prevalence of self-employment under conditions typical for an employment relationship is also a problem in other European countries, which is clearly confirmed by our research. The issue has been brought to the attention of the European Union. Its European Economic and Social Committee has therefore issued an opinion on the abuse of self-employed status,[360] which provides detailed guidance for Member States. According to this opinion, when considering the employment status of a person who is nominally self-employed and is *prima facie* not considered as an employee, it must (may) 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 their income over a period of one year; they depend on the person for

bringing actions to establish the existence of an employment relationship. This is because the unlimited hourly self-employment formula allows them to obtain remuneration at a much higher level than the minimum wage guaranteed to employees.

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

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

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 for themselves 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; their 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. These guidelines, in my opinion, should also be taken into account by Polish authorities (the National Labour Inspection and labour courts) when dealing with the assessment of the adequacy of the classification of a legal relationship as self-employment from the point of view of Article 22 of the Labour Code. More effective and efficient measures are also necessary to prevent bogus self-employment, to render the protections for workers who are genuinely self-employed more realistic.

The Polish legislator, in an attempt to curb the rise in self-employment under conditions typical for an employment relationship, has also correspondingly amended the tax law. The amendment to the Personal Income Tax Act,[361] in force since 1 January 2007, was a part of this effort. It eliminated the applicability of the favourable 19% flat tax rate[362] in cases where services provided by a sole trader meet the following three requirements jointly: the services are performed under the direction of the clint and at a place and time designated by the client; the services are performed without economic risk for the sole trader; the liability towards third parties for the result of such services and their performance, excluding liability for committing tortious acts, rests with the client (Article 5b(1) of the Personal Income Tax Act).[363] These requirements are articulated in a manner that clearly references the terminology used in the Labour Code,[364] and if they are jointly met, there are grounds to conclude that the self-employment of the sole trader is in violation of

361 Act of 16 November 2006 amending the Personal Income Tax Act and certain other acts, Dziennik Ustaw, no. 217, item 1588.

362 When choosing the flat rate of taxation, the self-employed worker foregoes the right to benefit from a tax-free amount of earnings (exempt amount); the flat tax is always 19% of income, regardless of its amount. In relation to the tax scale, the self-employed workers on a flat tax rate usually also pay a lower healthcare contribution – only 4.9% of income. Additionally, they are able to reduce their taxable income by a maximum of PLN 11 600.00 of the healthcare contribution paid. However, they cannot claim tax allowances or settle jointly with their spouse.

363 A broader analysis of these premises is presented by A. Woźniak in: *Nowelizacja prawa podatkowego a outsourcing i prawo pracy*, "Praca i Zabezpieczenie Społeczne" 2007, no. 1, pp. 25–26.

364 Similarly, A. Wozniak, *ibidem.*

Article 22 of the Labour Code[365]. Self-employed workers whose situation meets these three criteria must pay the income tax at the general rate applicable to all taxpayers.[366] In addition, under Article 9a(3) of the Personal Income Tax Act, in order to discourage bogus self-employment, the favourable flat tax rate is not available to those sole traders who provide services to their former or present employer, if those services are identical to those performed on the basis of an employment contract in the same tax year.[367] Unfortunately, scholars in the area of tax law note that the regulations "(…) are ineffective, because in practice it is very easy to create a legal relationship that is not in violation of these regulations yet still constitutes self-employment." Jakub Chowaniec argues that "(…) it is sufficient if the services performed for the former employer differ from those previously provided as an employee or if they are to be performed for an affiliated entity to circumvent the disposition of Article 9a(3) of the act."[368]

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365 Due to the autonomy of tax law, a determination of the existence of an employment relationship by a labour court does not have automatic consequences under tax law. However, a judgment of a labour court may constitute relevant evidence for the subsequent issuance of a decision determining the amount of the due tax (provided that the court's decision on the recognition of the employment relationship does not go beyond the time limit of the statute of limitations). *Ibidem*, J. Chowaniec, *Problematyka samozatrudnienia w podatku dochodowym od osób fizycznych – czy nadszedł czas na wyodrębnienie nowego źródła przychodów?*, "Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych" 2022, no. 1, https://isp-modzelewski.pl/wp-content/uploads/2022/01/Problematyka-samozatrudnienia-w-podatku-dochodowym-od-osob-fizycznych.pdf (accessed: 13.03.2024).

366 There are currently two tax thresholds and an exempt amount. Income up to PLN 30 000 is exempt from tax. Income up to PLN 120 000 is taxed at a 12% rate. Above the first tax threshold, the tax rate is 32%. An unquestionable advantage for a sole trader settling according to the scale is that, in addition to the tax-free exempt amount, tax allowances and joint matrimonial settlements are available. The disadvantage is the very high obligatory healthcare contribution, set as a rule at 9% of income (and therefore best understood as a public levy).

367 In addition, some self-employed sole traders or partners in a general partnership may opt for a registered lump sum taxation (a simplified form of business taxation). This involves paying tax on the entirety of income, without the option of write-offs. Registered lump sum taxation is available to self-employed workers whose income as sole traders or partners in a general partnership – in the year preceding the tax year – did not exceed the equivalent of EUR 200 000. Rates vary depending on the type of business activity (2%, 3%, 5.5%, 8.5%, 17% and 20%). Importantly, from the point of view of preventing bogus self-employment, this form of taxation cannot be used by sole traders who provide services to a former or current employer, if these services which correspond to activities performed under an employment contract in the same and the previous tax year. This form of taxation is particularly beneficial for self-employed workers with few possible wrote-offs. It is regulated in the act of 20 November 1998 on flat-rate income tax on certain income earned by natural persons, uniform text: Dziennik Ustaw of 2022, item 2540, as amended.

368 *Ibidem,* p. 13. The unsuccessful tax reform introduced in Poland as of 1 January 2022 in the form of the so-called Polish Deal was also intended to reduce bogus self-employment. However, it ultimately had the opposite effect, encouraging self-employment, even in violation of Article 22 of the Labour Code. See further R. Mierkiewicz, M. Gajda, *Czy Polski Ład zwiastuje*

To recapitulate: the mechanisms in place in Poland to prevent self-employment under conditions typical for an employment relationship are ineffective, and the rates of bogus self-employment remain very high. Taking into account the vague definition of the employment relationship set out in Article 22 of the Labour Code, which fails to define what, specifically, is to be understood as "management by the employer", thus blurring the boundaries between the employment relationship and forms of work based in civil law, and also having regard to the inadequate enforcement of the law in this area (firstly due to the case law giving priority to the stated intent of the parties rather than to the mandatorily applicable regulation of Article 22 of the Labour Code, and secondly due to the very low level of potential fines for bogus self-employment) and the introduction of a minimum hourly rate as of 1 July 2024 at the level of PLN 28.10 gross for the majority of self-employed workers (a rate that is much more attractive than the minimum wage guaranteed to employees), bogus self-employment is unlikely to decline. These conclusions are hardly optimistic. Urgent intervention of the legislator is needed, boosting the effectiveness of its prevention by interlinking the applicable mechanisms that discourage bogus self-employment across labour law, tax law, and social insurance law.

7. Concluding remarks

The considerations presented in this chapter unequivocally demonstrate 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, 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, as I have demonstrated herein.

The tendency of the Polish legislator to expand protective mechanisms to include self-employed workers must be assessed positively. In this respect, Poland fares relatively well in comparison with other European countries analysed in our research project; the standard of protection of self-employed workers in Poland is relatively high. Arguably, this standard is sometimes actually too high, dangerously approaching the standard of protection offered to employees (for instance with regard to collective rights). However, it would be difficult to argue that there is a coherent legal model in place for the protection of self-employed workers in Poland. On the contrary, even a cursory glance at the relevant laws demonstrates the

koniec niekontrolowanego rozwoju samozatrudnienia?, "Acta Universitatis Lodziensis. Folia Iuridica" 2022, vol. 101, pp. 259 et seq.

absence of systematic approach to the issue. The legal mechanisms are haphazard and fragmented. Changes are often made *ad hoc*, without a clear, coherent underlying foundational concept, and under the influence of short-term political factors. The laws pertaining to the situation of self-employed workers are not properly correlated with international and European Union standards and the Polish Constitution. The term "self-employed" is not defined in the legislation, which negatively affects the precise delimitation of the scope of protection afforded to self-employed workers. The rights afforded to self-employed workers are scattered across numerous legal instruments, and these in turn use diverse, non-uniform conceptual matrices and rely on criteria that are difficult to justify, which must also be assessed negatively. Often, these criteria are incompatible with the aim and rationale of the protection they grant. This is best seen in the case of the minimum wage legislation, which makes the applicability of the minimum wage guarantee to self-employed workers contingent on two issues: who determines the place and time when they provide work, and whether their remuneration is commission-based. Economic dependence on the client is not taken into account at all – yet in view of the nature of the protection and the nature of remuneration, precisely that aspect should be decisive. Economic dependence on the client is a requirement for the application of protective guarantees to self-employed workers in certain European countries (Spain and Italy, for instance). Unfortunately, the Polish legislator completely disregards economic dependence as a factor in affording protection to self-employed workers, which, in my opinion, must be assessed negatively.

A significant shortcoming of the Polish regulations laying down protections for self-employed workers is the absence of norms that would take into account the specific nature of their functioning in broadly understood legal transactions. Unfortunately, the legislator often chooses the path of the least resistance and grants rights to self-employed workers by making extensive use of references to the provisions of labour law that apply to employees (the method of expansion of labour law). This is the case, for example, with regard to protection of life and health, protection against discrimination and unequal treatment, as well as collective rights. This legal approach must be considered inadequate and, in many cases, even counterproductive to the effective protection of self-employed workers. It breeds problems of interpretation, creating uncertainty in terms of the practical application of the rights guaranteed to self-employed workers. Furthermore, this expansion often creates an unjustified equality of the protective guarantees provided for self-employed workers and employees (as is the case, for example, with regard to the protection of trade union officials, the right to strike, and the right to engage in other forms of protest). This is problematic both axiologically and legally, because it represents excessive interference of the Polish legislator with the principle of freedom of contract (Article 353^1 of the Civil Code), in the constitutional principle of freedom of business activity (Article 22 of the Constitution of the Republic of Poland) and in the principle of fair (free) competition (Article 9 of the act of 6 March 2018 – Law on Traders).

The above considerations also demonstrate that the mechanisms in place in Poland to counteract bogus self-employment are insufficient and ineffective. This is due to the imprecise definition of the employment relationship (Article 22 of the Labour Code) and to inadequate enforcement of the law in this area. It is therefore necessary to develop a coherent and comprehensive model for counteracting this pathology, combining solutions from the field of labour law with tax law and social insurance law. It is also necessary to take a fresh look at the regulations responsible for promoting self-employment as one of the instruments of combating unemployment and of labour market activation of the unemployed; the current legal framework in this area also appears to be insufficient.

The analysis of the current Polish regulations on self-employment presented in this chapter demonstrates unequivocally that the intervention of the legislator is necessary and urgent. The legislator cannot remain passive and apathetic, and instead must create a comprehensive regulatory framework for self-employment, broadly regulating the key aspects of self-employed work, with particular emphasis on social protection of self-employed workers. There is a need for an optimised legal model of self-employment in Poland, one that would take into account the standards of international and European Union law and the requirements of the Constitution of the Republic of Poland, as well as the experiences of the European countries studied in the present research project. My subsequent chapter, "The legal model of self-employment in Poland – the perspective of employment law", is an attempt to outline this very model.

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nsf/0/2B4B4692D149D147C1257FEE003BBAFD/%24File/600-002.pdf (accessed: 17.07.2024).

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Chapter IV

The legal model of self-employment in Poland – the perspective of social insurance

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1. Initial remarks

A debate about the model of social security of self-employed persons has been ongoing among experts in legal and social sciences ever since the 1950s.[1] At its core are the issues of: compulsory or voluntary character of social insurance of the self-employed, the personal scope of social security, and the principles of financing contributions or taxes due on account of self-employed activity. It is worth mentioning that national legal systems enjoy autonomy in shaping social security regulations. Consequently, individual elements of social security, such as: the obligation to have social insurance, the social security contribution assessment basis, and the scope of the benefits to which the insured are entitled, vary to a great degree. At the same time, due to the economic change, the concept of a person who carries out business activity has been evolving. The objective of this chapter is to present the situation of the self-employed in Polish social insurance law against the background of selected social security systems. The subject of the analysis will be the reasons for and the consequences of the choice of self-employment as a form of gainful work activity. Moreover, the publication attempts to develop an optimal model of social security of the self-employed in Poland.

1 B. Baumberg, N. Meager, *Job Quality and Self-Employment: Is it (Still) Better to Work for Yourself? The Handbook of Research on Freelancing and Self-Employment*, [in:] A. Felstead, D. Gallie, F. Green (eds.), *Unequal Britain at Work. The evolution and distribution of intrinsic job quality in Britain*, Oxford 2015; I. Tsuruga, Q.A. Nguyen, Ch. Behrendt, *Extending social security to self--employed workers Lessons from international experienc*e, International Labour Organization, 2019; J. Cieślik, *Samozatrudnienie w Polsce na tle tendencji ogólnoświatowych: wyzwania w sferze wspierania przedsiębiorczości i zabezpieczenia emerytalnego przedsiębiorców*, "Studia BAS" 2018, no. 2.

2. Social security of self-employed workers

Between the end of the 19th century and the 1940s, social security covered mainly employees and farm workers. The personal scope of social security expanded after World War II. Protection was gradually extended to cover successive professional groups: mandataries, individual farmers, as well as persons who carried out business activity (e.g. retirement pension insurance of the self-employed was introduced in Belgium in 1957; in turn, social insurance of craftspeople was introduced in Poland in 1965).[2] The expansion of social security's personal scope to cover the self-employed was a consequence of the demand for common social security that emerged in that time. One of the arguments in favour of covering the self-employed with social insurance was the swiftly rising number of sole proprietors. The low amount of savings accumulated by those persons in the period of their business activity paired with the liquidity risk frequently precluded them from ensuring real protection against the risk of old age or incapacity for work. At the same time, the available forms of individual prudence, including mainly business insurance, constituted excessive financial burden for many entrepreneurs. Analyses carried out by the International Labour Organization for 2019 reveal that self-employed workers were not covered by social security in many legal systems, which could essentially lower their level of protection in the event of old age or disablement.[3]

The increase in the number of sole proprietors noted since the 1970s is a consequence of the technological development, free movement of persons, corporate expansion, and recently also the development of digital platforms.[4] Keen competition between entities operating both in national markets and globally results in search for new, flexible forms of providing work based on minimised risk and costs borne by the businesses. In order to cap the costs of their activity, businesses lay off their employees and hire mandataries (contractors under mandate contracts) or the self-employed in their stead. Fairly often, the employer makes cooperation contingent on whether the other party starts their business and additionally provides their services in person. A common practice is to include in the contract stipulations that prevent the self-employed person from providing services to other entities or significantly limit their capacity to do so. Despite the formally equal status of the contracting party and the self-employed, the mode of providing services is often similar to work as an employee (the time and place of providing services are specified by the contracting party, and the provider's autonomy is restricted). That is why both EU bodies and the member states are looking for solutions that would be a compromise between freedom to choose the form of employment and the need to

2 Act of 29 March 1965 on the social insurance of craftspeople, Dziennik Ustaw of 1965, no. 13, item 90.

3 I. Tsuruga, Q.A. Nguyen, Ch. Behrendt, *Extending social security*…, p. 1.

4 C. D'Arcy, L. Gardiner, *Just the job – or a working compromise? The changing nature of self-employment in the UK*, London 2014.

grant wider protection to bogus, or false self-employed persons. I understand this concept to mean the establishment of a one-person business in order to provide services to one contracting party. An example could be the rights granted to economically dependent self-employed persons in Spain. An economically dependent self-employed person is defined in the Act of 11 July 2007 on self-employment. The characteristic feature of this form of gainful activity is that at least 75% of the self-employed person's global income comes from one source (one contracting party).[5]

In the face of numerous challenges, the legal status of the self-employed covered by social security continues to evolve. The free movement of persons and services results in the need to increase their competitiveness in both the internal and the external markets. For that purpose, individual countries bring changes to their legal provisions, usually with the aim to increase the flexibility of the rules for paying contributions (reduce the percentage rates of the contributions, introduce the possibility to declare the contribution assessment basis, replace the contribution calculated as percentage rate with lump sums), and if the contribution is a part of the tax system – to lower due taxes. This process results in reducing the real level of social protection of persons who carry out business activity, as is especially evident in the case of the economically dependent self-employed workers. These persons typically declare the lowest social contribution assessment basis.[6]

Carrying out business activity does not constitute a separate social insurance title under the Polish social insurance law. There are two reasons for this. The first is the fact that it was decided in 1990 to distinguish between agricultural and non-agricultural business activity.[7] In the case of social insurance of farmers, the provisions introduced separate rules for insurability,[8] a preferential lump-sum social insurance contribution, and the funding of benefits from a supplementary subsidy from the state budget (making up for 90% of the Pension Fund's income).[9] A separate social insurance of farmers made it possible to transform the Polish agricultural sector, but at the same time rendered minor farmers dependent from state budget subsidies.

Second, the legislature rightly decided to introduce the so called collective insurance title of "non-agricultural activity" into the Act on the Social Insurance System[10] that would cover several categories of self-employed persons. The adopted construction made it possible to cover with social insurance not only the self-employed, but also: partners or shareholders in some partnerships and companies

5 Art. 11 Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo, BOE (Boletin Oficial del Estado) no 166.

6 *Social protection rights of economically dependent self-employed workers*, Directorate General for Internal Policies, 2013, p. 9.

7 Act of 20 December 1990 on the social insurance of farmers, Dziennik Ustaw of 2024, item 90, as amended.

8 J. Jończyk, *Prawo zabezpieczenia społecznego*, Kraków 2006, pp. 240–241.

9 *KRUS w liczbach 2021–2023*, Kasa Rolniczego Ubezpieczenia Społecznego, Warszawa 2024.

10 Act of 13 October 1998 the act on the Social Insurance System, Dziennik Ustaw of 2024, item 497, as amended.

(sole-shareholder limited liability company, general partnership, limited liability partnership, limited partnership), liberal professionals, creators and artists, persons who run public or non-public schools, other forms of preschool education, education facilities or their complexes, since 2021[11] shareholders in the simplified joint stock company whose contribution to the company consists in providing work or services and since 2023 general partners in the limited joint-stock partnerships.[12] The common denominator of all the above persons is the right to declare the social insurance contribution assessment basis. The basic difference is that only persons who carry out non-agricultural business activity within the meaning of the Act on entrepreneurs[13] may benefit from the concessions and preferences with regard to paying contributions.

Most of the European social security systems are characterised by a dualistic division into employed and self-employed persons.[14] Some of them contain special regulations covering farmers or persons employed in the civil service. For instance, separate rules have been introduced in Belgium for those working in the civil service, called the system for civil servants of the Belgian federal government.[15] In Finland, farmers are covered by social security in MELA – Maatalousyrittäjien eläkelaitos.[16] The Polish social insurance system includes a third group of the insured, in between employees and the self-employed, namely persons who provide work under civil law contracts and are not self-employed. This category includes e.g. people who provide home-based work or work under a mandate contract (mandataries). Social insurance of persons who provide work under civil law contracts in Poland shares characteristics with both employee insurance and insurance of persons who carry out business activity. The element in common with employee insurance is the obligation to pay the contribution in full, i.e. based on the income earned under one of the contracts. The status of a mandatary whose only source of income is one contract is similar to that of the employee (an exception is the mandatary's voluntary sickness insurance). In turn, the obligation to cover with insurance only one of the contracts, provided that the income under such contract corresponds at least to the minimum wage (PLN 4300 in 2024) is something shared with the status of the self-employed.[17] A mandatary who provides services to several entities, similarly

11 Act of 19 July 2019 amending the Code of Commercial Partnerships and Companies and some other acts, Dziennik Ustaw of 2019, item 1655.

12 Act of 9 June 2022 amending the Law on Personal Income Tax and some other acts of 2022, item 1265.

13 Act of 6 March 2018 on entrepreneurs, Dziennik Ustaw of 2024 item 236, as amended.

14 *Social Security Programs Throughout the World: Europe*, Social Security Administration, Washington 2018.

15 *Social Security. Everything you have always wanted to know* (in Belgium), Federal Public Service, 2018, p. 7.

16 A. Huhtamäki, *Farmers' work-related social security in Finland, implemented by Mela*, "Ubezpieczenia w Rolnictwie – Materiały i Studia" 2020, no. 2(74), pp. 311–312.

17 Regulation of the Council of Ministers of 14 September 2023 on the amount of minimum wage and the amount of minimum hourly rate in 2024, Dziennik Ustaw of 2023, item 1893.

to a person carrying out business activity, may determine the level of protection by joining the social insurance scheme based on one, several, or all of the contracts they have concluded.

The Polish social insurance system is based on the disproportion of the burden imposed on the various insurance titles. The fact that the burden varies affects the employment structure in those sectors of the economy where keen competition forces businesses to cut the employment costs (e.g. construction, transportation, the hotel trade, and the catering trade). In the above lines of business, employment under civil law contracts is preferred. Similarly, civil law contracts prevail in the case of low-qualified personnel as well as short-term contracts. Self-employed activity, in turn, dominates among experts in the fields of IT, healthcare, and recently also construction. It is preferred mainly by young people as well as persons with high or unique qualifications. The young choose self-employment predominantly because it involves higher current income as a result of reduced contribution assessment basis, and because the risk of incapacity for work is relatively low and the perspective of old age – remote.

The dichotomous division into employment and self-employment present in a vast majority of social security systems[18] determines the purpose of social protection granted. In the case of social insurance of employees, this purpose is to ensure a level of benefits that can replace the lost income. This is why the social insurance obligation covers total income under the employment relationship (in Poland, it covers also income under civil law contracts concluded with the employer). As for the self-employed, the right to declare the contribution assessment basis gives them flexibility in determining the level of social protection, and the lump-sum amount of contribution assessment basis or the minimum declarable contribution assessment basis, present in many legal systems, are intended to ensure at least a minimum level of benefits. Thanks to these solutions, it is possible to individualise the contribution assessment basis, and thus to accomplish the economic goal – the optimum development of business activity.

Most social security systems provide the self-employed with preferences with regard to paying contributions. Tools used to reduce the level of social protection or to make it more flexible include: the possibility to declare the contribution assessment basis (Poland), lump-sum social security contribution (UK), and reduction of the percentage rate of the contribution assessment basis (Belgium, France).[19] A reduced contribution assessment basis results in reduced assessment basis of benefits granted to self-employed persons. It should be emphasised that optimisation of the contribution assessment basis is limited by the need to ensure a certain

18 It should be noted that there are also unified systems, witness Hungary (*Social protection for the self-employed. Hungary*, MISSOC – Mutual Information System on Social Protection, 2021, p. 3), or the Dutch system with retirement pensions funded from taxes (*Social protection for the self-employed. Netherlands*, MISSOC – Mutual Information System on Social Protection, 2021, p. 3).

19 *Social Security Programs Throughout the World. Europe*, Washington 2018.

minimum living standard; hence, national schemes generally provide for a minimum declarable contribution. Thus, for example in Belgium, it is a quota contribution for low-income earners, and in Poland, it is the minimum declarable contribution assessment basis corresponding to 60% of the expected average remuneration.[20]

The increase in self-employed activity has resulted in the emergence of a specific professional group – economically dependent self-employed workers, which can be placed between the employed and the self-employed. Economically dependent self-employment is defined as a work relationship where the worker is formally self-employed, but they fulfil their duties in conditions similar to those of employees.[21] A legal definition of an economically dependent self-employed person has been introduced in Spain (Los trabajadores autónomos económicamente dependientes). The concept refers to a person who carries out regular business or professional, profit-oriented activity for a natural or legal person (i.e. client) on whom they are economically dependent in that they derive 75% of their income from this relationship.[22] No legal definition of an economically dependent self-employed worker exists in the Polish system, yet the draft individual labour code from 2018 (which did not come into force) developed by the Labour Law Codification Commission included a demand for the adoption of such definition in the labour code. According to Article 177 of the Draft,[23] the concept was construed to refer to a person who personally provides services directly to a specific business, organisational unit other than a business, or an agricultural holding (contracting party), on average for at least 21 hours per week, for a period of at least 182 days. Although the definition proposed by the Codification Commission referred directly to labour law regulations, it could in the future well determine the scope of social protection of the dependent self-employed under Polish social insurance law.

The legal and financial status of economically dependent self-employed persons raises numerous doubts in the light of both labour law and social insurance. The reason for this is that economically dependent self-employed persons who work for and are remunerated by one entity, similarly to other persons who carry out business activity, profit from preferential treatment granted to the latter. This preferential treatment consists in first and foremost reduced assessment basis of social

20 Pursuant to Article 18(8) of the Act on the social insurance system, the assessment basis for retirement and disability pension contributions is the amount declared, but not lower than 60% of the expected average monthly remuneration adopted to determine the limit of the annual contribution assessment basis, announced pursuant to Article 19(10) for a given calendar year. The contribution in the new amount applies from 1 January to 31 December of a given year.

21 *Social protection rights of economically*…, p. 7.

22 *Social protection for the self-employed. Spain*, MISSOC – Mutual Information System on Social Protection, 2021, p. 7.

23 *Teksty projektu Kodeksu pracy i projektu Kodeksu zbiorowego prawa pracy opracowane przez Komisję Kodyfikacyjną Prawa Pracy*, https://www.gov.pl/web/rodzina/bip-teksty-projektu-kodeksu-pracy-i-projektu-kodeksu-zbiorowego-prawa-pracy-opracowane-przez-komisje-kodyfikacyjna-prawa-pracy (accessed: 1.02.2022).

insurance and health insurance contributions, as well as preferential rules for paying the income tax. An entity who contracts services from an economically dependent self-employed person reduces their own business activity costs by financing the other party's contribution (formally speaking, the contribution payer is the economically dependent self-employed worker), thus gaining economic advantage over entities that employ workers. By way of example, the nominal social contribution assessment basis for persons who carry out non-agricultural business activity in Poland amounted to 60% of the expected average remuneration, which was equal to 109% of the minimum wage (July 2024).[24] An income barely exceeding the amount of minimum wage sets the level from which a contracting entity (e.g. a hospital), by terminating the employment contracts with its medical staff and then offering the redundant employees to co-operate as self-employed persons, can significantly reduce the costs of running business. The same mechanism is used with regard to drivers, IT specialists, or aviation staff. The higher the self-employed person's income, the greater the contracting entity's savings. Unable to withstand the competition resulting from the optimisation of social security contributions, successive employers in many sectors in Poland are forced to change the basis of employment of their employees and impose on them self-employment.

It is emphasised in subject literature that economically dependent self-employment is characterised by curbing the autonomy that a person carrying out business activity should enjoy[25] and replacing it with stronger subordination, bond, supervision, and economic dependence on the contracting party.[26] The contracting party is in this case the recipient of the self-employed person's services. From this perspective, the risk typical of carrying out autonomous business activity is greatly reduced. Due to the lump-sum social insurance contribution assessment basis, the shifting of their payment to the self-employed, and the lack of protection available to employees under the labour code, economically dependent self-employment is becoming an increasingly popular form of carrying out gainful activity and, in many sectors, the dominant and only legal basis offered to jobseekers. A prime example are the creative industries, where a significant proportion of those working there either provide services under a contract of mandate or are self-employed.[27]

24 Persons who have only just established their business activity may for two years reduce the contribution assessment basis to 30% of the minimum wage, which corresponds to 15,9 % of average remuneration in enterprise sector (July 2024, author's own calculations).

25 L. Rodgers, *The Uberization of work case developments in the UK*, "Revue de Droit Comparé du Travail et de la Sécurité Sociale" (English edition) 2019, no. 4, p. 74.

26 A. Musiała, *Prawna problematyka świadczenia pracy przez samozatrudnionego ekonomicznie zależnego*, "Monitor Prawa Pracy" 2014, no. 2.

27 K. Zawadzki, *Praca i wynagrodzenia w gospodarce kreatywnej. Uwarunkowania – specyfika – ewolucja*, Toruń 2016, pp. 106–111.

3. Autonomy of social security systems in the EU

The shape and level of social protection of the self-employed in Poland is undoubtedly influenced by EU regulations. Social security is a vital element of the economic system of each EU member state. It ought to be noted that the individual social security systems evolved over the course of the 20th century. The personal scope of security became more diversified, the retirement age was gradually increased, the pillars of the pension scheme were introduced, and the systems of social security of public officers, civil servants, or farmers emerged from the general scheme. As a result, the individual national systems differ so essentially[28] that no harmonisation is possible at this juncture. The autonomy of social security systems is strongly emphasised in EU legislation. The need for coordination of social securty schemes to the extent necessary to implement the principle of free movement of persons was indicated already in the EEC Treaty[29] and later also in regulations.[30] As indicated in subject literature, the principle of preserving the distinctiveness of national social security systems and the self-determination of each member state's public authority to shape its own system has been inherent in the supranational coordination process from the outset and as such set indefinitely.[31]

Detailed regulations covering the personal scope of the insurance or the amount of contributions are determined by national legislatures. This solution makes it possible to adopt national rules that respond to the changing employment structure, unemployment rate, or economic processes. It needs to be remembered, however, that the autonomy of social security systems stimulates competition between countries. Temporary transfer of business under provisions on the coordination of social security systems in the EU allows the self-employed who pay lower contributions to expand to neighbouring labour markets. An intense competition hampers the development of social security, which is inextricably linked to the need to increase contributions or taxes. The consequence is the erosion of the social protection of the insured, particularly the self-employed. By way of example, solutions adopted in Czechia or Lithuania that make it possible to pay lower social insurance contributions than in Poland motivate Polish authorities to reduce the social insurance

28 R.C.A. White, *Workers, Establishment, and Services in the European Union*, Oxford European Union Law Library, 2005, pp. 164–165.

29 Treaty establishing the European Economic Community signed in Rome on 25.03.1957, https://eur-lex.europa.eu/legal-content/DE/ TXT/PDF/?uri=CELEX:11957E/TXT&from=EN (accessed: 7.02.2022).

30 Regulation (EC) no. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, p. 1; Regulation (EC) no. 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) no. 883/2004 on the coordination of social security systems, OJ L 284, p. 1.

31 T. Majewska-Bińczycka, *Koordynacja systemów zabezpieczenia społecznego w UE na progu XXI w.*, [in:] M. Rycak, J. Wratny (eds.), *Prawo pracy w świetle procesów integracji europejskiej. Księga jubileuszowa Profesor Marii Matey-Tyrowicz*, Warszawa 2011, p. 159.

contribution assessment basis or to increase its flexibility. Lower social insurance contributions of self-employed workers paired with lack of corresponding solutions for employees stimulates a rise in self-employment. In turn, a correlation between the contribution and the benefits results in the situation when self-employed people who pay low contributions in the course of their working life acquire lower, often minimum retirement or disability pensions in the future.

Supranational entities focused on cooperation with the self-employed, such as global corporations and those employing on so-called digital platforms, strive to maximise their profits and therefore are not interested in an adequate level of social protection for the self-employed they cooperate with. By optimising the type of employment, these actors gain a significant economic advantage in the relevant national market. One of the forms of gainful activity of which digital platforms take advantage is bogus (false) self-employment. This phenomenon has been the subject of several national court judgments, including in Spain and the post-Brexit UK (judgment *Uber vs. Aslam*).[32] Directive 2014/67/EU,[33] which is part of the mobility package, explicitly states that it is intended to be a useful tool helping to effectively combat false self-employment and ensure that posted workers are not falsely declared as self-employed. The solutions introduced in the directive are intended to contribute to preventing, avoiding, and combating circumvention of the legislation in force. In my opinion, the phenomenon of bogus self-employment could be effectively countered by introducing a legal definition of economically dependent self-employed persons at the European level and granting them rights comparable to those of workers in an employment relationship.

4. Preferences for persons who carry out business activity in Poland

Business activity constitutes a special title to social insurance. First, a person who carries out such activity acts as both the payer and the insured. This means that they are obliged to pay their insurance contributions, with the source of financing being their income. In addition, the contribution payer is liable with their assets for the correct calculation and payment of the contribution.

Second, the legislation which determines the form of social security of entrepreneurs (i.e. the Act on the social insurance system and the Act on entrepreneurs),

32 Judgment. Uber BV and others (Appellants) v Aslam and others (Respondents), https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf (accessed: 19.07.2024).

33 Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) no. 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159/11.

similarly to most western regulations[34] provide for preferences with regard to the rules of paying social insurance contributions. The provisions in force in Poland essentially introduce two types of preferences: exemption from the obligation to have social insurance, and possibility to pay contributions based on a lower assessment basis.

The first category (exemption from the insurance obligation) includes the so called unregistered activity provided for in the Act on entrepreneurs, as well as exemption from the payment of contributions for the first six months of carrying out business activity. Pursuant to Article 5(1) of the Act on entrepreneurs, when a natural person who carries out business activity does not generate in any month income from it in the amount of at least 75% of the minimum wage, such activity does not constitute business activity within the meaning of the Act (so-called unregistered activity), and thus a title to social insurance.[35] This means that activity performed sporadically or on a minor scale is exempt from the obligation of registering for social insurance. Before the Act on entrepreneurs entered into force (i.e. until 2018), a self-employed person could declare a lower contribution assessment basis for 24 months calculated from the establishment of business activity. If the activity run by the self-employed failed to develop sufficiently for them to be able to pay their social insurance contributions, then usually, after 24 months, they were forced to suspend or close the business. Based on the low income criterion, the concept of unregistered business activity is addressed primarily to two categories of people: persons who begin self-employed activity – during the period of looking for contracting partners – and persons who have another main source of income (e.g. under employment) and provide specific services only occasionally.

Furthermore, a person who begins their business activity can exercise their right to exemption from paying contributions for the first six months. This right does not depend on the amount of income the self-employed earns. Importantly, Article 18(1) of the Act on entrepreneurs provides for two situations in which the right to use this preference is excluded. The purpose of the first one is to limit the possibility of exercising the right on a cyclical basis. Namely, the exemption from paying contributions cannot be used by a person who once again starts a business before at least 60 months have elapsed from the date of its last suspension or termination. The second condition covers situations where the self-employed person performs activities for a former employer to whom, prior to the date of commencement of business activity in the current or previous calendar year, they performed activities falling within the scope of the business activity under an employment or cooperative employment relationship.[36] This condition is significant because the law does not prohibit the possibility of converting an employment relationship into

34 *OECD Tax Database Explanatory Annex. Part III. Social Security Contributions*, OECD, May 2021, https://www.oecd.org/tax/tax-policy/tax-database/social-security-contributions-explanatory-annex.pdf (accessed: 1.08.2022).

35 A. Pietrzak (ed.), *Prawo przedsiębiorców. Komentarz*, Warszawa 2019, p. 86.

36 M. Wierzbowski (ed.), *Konstytucja biznesu. Komentarz*, Warszawa 2019, p. 112.

self-employment, but only excludes the right to exemption from paying contributions in the case of performing services for a former employer. Persons co-operating with their own employer will be obliged to pay social security contributions under general provisions, i.e. they must declare a contribution assessment basis not lower than 60% of the average expected remuneration (the nominal contribution assessment basis for a person who carries out non-agricultural activity).

The second group of preferences is the possibility to pay contributions on a lower than nominal assessment basis. The Act on the social insurance system provides for such a privilege in two cases. The first one covers the period of the first 24 months of business activity.[37] This preference can be exercised from the moment of starting business, which entails either waiving the six-month exemption from paying social security contributions or shortening this period (e.g. after two months of non-payment of contributions). An entrepreneur may also use the entire period of exemption from the payment of social security contributions to which they are entitled and then declare a lower than nominal contribution assessment basis for the next 24 months. Article 18a of the Act on the social insurance system provides for the possibility to reduce the assessment basis for insurance contributions to a maximum amount corresponding to 30% of the minimum wage. In the period covered by the preference, a person who carries out business activity may declare a contribution assessment basis that is higher or lower than the income they earn. Similarly as in the case of the exemption from paying social insurance contributions, under Article 18a of the Act on the social insurance system, this right is not granted to persons who carry out non-agricultural activity or carried it out in the last 60 calendar months before the day of commencement of business activity, and to persons who carry out business activity for a former employer to whom, prior to the date of commencement of business activity in the current or previous calendar year, they performed activities falling within the scope of the business activity under an employment or cooperative employment relationship. The total period in which a self-employed worker may benefit from the exemption from paying contributions and declare a contribution assessment basis lower than the nominal one is 30 months (i.e. 2.5 years). The duration of the preference granted to persons starting a non-agricultural business is comparable to other social security systems. For example, self-employed persons in Belgium pay a contribution on a lower than nominal assessment basis for the first three years. In Greece, on the other hand, there is a preferential contribution for a period of five years from the date of first establishment of business activity.[38]

Article 18c of the Act on the social insurance system provides for the possibility of a cyclical reduction of the contribution assessment basis in the event that the income earned in the previous calendar year was lower than the amount specified in the Act. In 2021, the right to pay contributions at a preferential rate was available to persons

37 P. Kostrzewa, *Ustawa o systemie ubezpieczeń społecznych. Komentarz*, System informacji prawnej LEX-el, 2014.

38 *OECD Tax Database Explanatory Annex*…, p. 43.

whose income before taxes in the previous calendar year was less than PLN 120,000, which gives an average income of PLN 10,000 per month. The relatively low level of income entitling to the preference means that, in practice, this relief will cover only a small percentage of self-employed persons who, as a rule, are sole proprietors. The solution is aimed at lowering the contribution assessment basis in the event of an economic slowdown or other unforeseeable circumstances reducing the dimensions of business activity. A person who earned less than PLN 120,000 in the previous calendar year pays in the next calendar year a contribution whose assessment basis is half of the income earned from the activity in the previous calendar year, but the basis may not be lower than 30% of the minimum wage. As I have already mentioned, it is possible under provisions in force to benefit from this relief on a cyclical basis. The right to pay a preferential contribution is granted for 36 calendar months during the last 60 calendar months of non-agricultural business activity. Apart from its evident pros, such as increasing the flexibility of the rules for paying contributions, the solution favours economically dependent self-employed persons, in particular those who work via digital platforms or in construction, whose monthly income is lower than PLN 10,000. Additionally, the question arises as to whether preferences shaped in this way do not unduly stimulate the growth of false self-employment. A person starting a business is exempt from paying contributions for a period of six months, and then has the possibility to pay contributions on a preferential basis for the next 24 months and, with an appropriate level of income, to pay lower contributions for the next 36 months. In practice, the first social security contribution of a nominal amount (60% of the average remuneration) will be paid only after 66 months, i.e. after more than five years of non-agricultural business activity. It seems that the possibility of combining the available preferences will influence the growth of self-employment in successive branches of the economy.

The most important privilege offered to persons engaged in non-agricultural activities is the possibility to declare the assessment basis for social security contributions. Between 1965 and 1990, initially craftspeople, and later others covered by self-employment insurance, paid a lump-sum contribution whose amount depended on the number of inhabitants of the locality where the business activity was carried out, as well as on the type of activity undertaken by the person. This way of determining the contribution was introduced mainly out of the legislature's concern that self-employed workers would deliberately under-record their income and thus underestimate their contribution assessment basis. The lump-sum contribution imposed a substantial burden on some persons who carry out business activity; hence, the possibility to apply to the Social Insurance Institution (Zakład Ubezpieczeń Społecznych, ZUS) for a reduction of the contribution assessment basis was introduced in 1974.[39] ZUS's decision was discretionary. The disability pension

39 Regulation of the Minister of Labour, Wages and Social Affairs of 24/11/1983 to amend the Regulation on the implementation of the Act on the social insurance of craftspeople and some other self-employed persons and their families, Dziennik Ustaw of 1983, no. 66, item 300.

authority could reduce the contribution, but by no more than half of the contribution due. In the 1990 regulation,[40] the lowest possible social insurance contribution that could be declared was linked to the average remuneration. According to Section 30 of this act, the contribution assessment basis was the declared income. The amount indicated by a self-employed person could not be lower than 60% of the average remuneration. The Act on the social insurance system reproduced the solutions in force in earlier years. The contribution assessment basis was the amount declared, but not lower than 60% of the average monthly remuneration in the previous quarter. Scholars expressed the view that the contribution assessment basis was defined "in a conventional manner" and that moreover, "there are no clear reasons for it to be exactly 60% of the average remuneration".[41] The adoption of the quarter as the period determining the lowest declarable contribution assessment basis was mainly due to the high inflation during the period of political transformation. It was not until 2008, after the economy had stabilised, that Article 18(8) of the Act on the social insurance system was amended. As from 1 January 2009, the contribution assessment basis has been the amount declared, but not lower than 60% of the expected average monthly remuneration adopted to determine the limit of the annual contribution assessment basis. The contribution in the new amount applies from 1 January to 31 December of a given year.

As I have already indicated, the assessment basis for social insurance contributions is declared by the person carrying out non-agricultural activity.[42] The Supreme Court in its resolution of 21 April 2010[43] found that the Social Insurance Institution is not entitled to question the amount declared by a person who carries out non-agricultural activity as the social insurance contribution assessment basis, if it is within the limits set out in the Act of 13 October 1998 on the social insurance system (except when, during the initial period of this activity, the insured person declares a basis for social security contributions the amount of which is not reflected in income[44]). As a result, an entrepreneur may, in periods of their choice, declare a contribution higher than the income earned in that period, which will enable them to acquire a higher sickness or maternity allowance. In an extreme case, i.e. when a self-employed person with low income pays a sickness contribution based on the maximum

40 Regulation of the Council of Ministers of 29/01/1990 on the amount of and the assessment basis for social insurance contributions, registering for social insurance, and settling social insurance contributions and benefits, Dziennik Ustaw of 1990, no. 7, item 41.

41 J. Wantoch-Rekowski, *Składki na ubezpieczenia emerytalne. Konstrukcja i charakter prawny*, Toruń 2005, p. 156.

42 D. Karkowska, A. Nerka, *Pozycja płatnika składek w ubezpieczeniu społecznym i zdrowotnym*, Warszawa 2007, p. 127.

43 Resolution of the Supreme Court of 21 April 2010, ref. no. II UZP 1/10, OSNP 2010, no. 21–22, item 267.

44 Resolution of the Supreme Court of 29 November 2023, ref. no. II UZP 3/23, OSNP 2024, no. 5, item 51.

monthly assessment basis (250% of the average remuneration) for a year, they may receive a benefit higher than the income obtained from running the business.

It should be emphasised that the Act on the social insurance system provides for two restrictions with regard to the possibility to declare the maximum social contribution assessment basis. First, pursuant to Article 19(1) of the Act on the social insurance system, the annual pension contribution assessment basis in a given calendar year may not exceed the amount equal to thirty times the expected average monthly remuneration in the national economy in that calendar year set forth in the interim budget law or its draft, if the relevant law has not been passed yet. Second, pursuant to Article 20(3) of the Act on the social insurance system, the sickness insurance contribution assessment basis for persons who carry out non-agricultural activity may not exceed 250% of the expected average remuneration per month. If then the insured had pension insurance for a part of the year and due to high income reached the contribution assessment basis equal to thirty times the expected average remuneration, they will not be able to pay pension insurance contributions until the end of the calendar year. In this situation, the period when the social security contributions are not paid should be treated equally with the period when they are paid. In the case of sickness insurance, the amount declared in a given month may not exceed 250% of the expected average remuneration. This means that the law introduces a minimum and a maximum declarable rate for persons who carry out business activity. The upper limit is a consequence of the principle that social insurance is supposed to protect against social risk only up to a certain (average) degree. Persons who earn highest income and wish to receive benefits to compensate for lost income have to seek protection outside of the social insurance scheme. In addition, the upper limit of the contribution protects against the possibility of a short-term increase of the contribution assessment basis in order to obtain undue sickness or maternity allowances. The cap on the contribution assessment basis guarantees higher stability and predictability of social insurance finances.

Then, the minimum declarable contribution (nominally: 60% of the average remuneration) is intended to enable the insured to obtain benefits that guarantee a minimum standard of living and at the same time ensure a sufficient amount of income to the Social Insurance Fund. As I have mentioned, the lowest contribution assessment basis in 2024 was equal to 109% of the minimum wage. It follows that if a self-employed person earns more, they may pay a lower contribution that an employer pays for their employee. At the same time, due to the correlation between the contribution and the benefit existing in the Polish social insurance system, a lower contribution assessment basis results in a lower sickness allowance, or lower retirement pension or disability pension based on incapacity for work. Persons who run a major business and declare the lowest possible contribution assessment basis may in the future receive benefits whose replacement rate will amount to merely a few per cent of the lost income. Similarly to Poland, selected other legal systems include restrictions on the minimum amount of social insurance contributions. For instance, persons whose income is below a set amount (EUR 14,042.57 in 2021)

in Belgium pay a lump-sum contribution, while those whose income exceeds this amount pay a contribution determined as a percentage rate based on the income. The scheme introduced a maximum annual basis amount above which no contribution is paid (EUR 89,361.89 in 2021).

5. Social security model for persons who carry out business activity

As I have indicated in the introduction, the objective of this study is to try and assess the effectiveness of the current system of social insurance of persons who carry out non-agricultural business activity in Poland, and to develop a proposition of an optimum model of such social insurance. This is a complicated task due to the considerable variation in the legal status of persons who carry out non-agricultural activity. Such persons can be divided into three groups. The first group are persons who carry out business activity, employ others, and are open to cooperation with an unlimited number of business partners. The second category consists of people who do not employ others, and are open to cooperation with an unlimited number of business partners. Finally, the third group are the economically dependent self-employed, who do not employ others, and who intend to cooperate mainly with one entity. This division is vital in order to ascertain the potential sources of financing social protection (determine the contribution payer). As for the first two categories of persons who carry out non-agricultural business activity, the contribution payer is undoubtedly this specific self-employed worker. Since they cooperate with numerous partners, it is not possible to specify another person or entity that could be burdened with the contribution in their stead. When we consider the economically dependent self-employed, two approaches are possible. In the first approach, the self-employed person themselves is the contribution payer. It is possible to adopt another approach, where the contribution payer will be the contracting party, especially when the self-employed worker provides services to that party personally and employs no other persons, and the income earned from one source amounts to at least 67–75%[45] of the total income earned in the previous calendar year.

According to an OECD report,[46] a numerous group among the self-employed are persons who treat this type of work as a source of extra earnings.[47] If several insurance titles coincide, it is necessary to find out whether the insured person earns income from other sources. Therefore, if persons who work under an employment

45 It amounts to alternatively 2/3 or 3/4 of the annual income.

46 *Pensions at a Glance 2021: OECD and G20 Indicators*, OECD Publishing, Paris, p. 72, https://doi.org/10.1787/ca401ebd-en

47 Up to 27% in OECD countries are people for whom self-employment is an additional (side) source of income.

relationship earn income from business activity and provide services as self-employed for entities other than their employer, they can be covered by voluntary social insurance on account of business activity. It should be emphasised that Article 9 of the Act on the social insurance system does not stipulate an obligation to register for insurance under the type of activity that yields the highest income.

A secondary and less significant division of the self-employed is based on the criterion of the amount of income earned from business activity. The amount of income is important from the perspective of legislation, e.g. for the purpose of determining the minimum declarable contribution, or the percentage rate of the social security contribution. It should be noted at this point that the minimum declarable contribution assessment basis should be such that a straight majority of the self-employed earn enough to afford its payment. As I have mentioned, social insurance is intended to provide social protection up to a certain level, above which the insured seeks protection against social risks themselves. This level in Poland is equivalent to: in retirement and disability insurance – thirty times the expected average monthly remuneration in the national economy for a given calendar year (Article 19(1) of the Act on the social insurance system), while in sickness insurance for self-employed persons – 250% of the expected average remuneration (Article 20(3) of the Act on the social insurance system).

The least problematic issue is to establish whether the social insurance of the self-employed should be compulsory or voluntary. The obligation to be covered by social security for the self-employed is a corollary of the possibility of a social risk. Moreover, it should be noted that the social risks of employees and the self-employed are similar, and that therefore the scope and level of protection of both groups should be comparable. In some legal systems, insurance for the self-employed is voluntary. However, it is worth pointing out that social insurance is based on a non-profit method of protecting against social risks. This means that the contribution is calculated in such a way as to cover (secure) the consequences of random events that occur during a given period in the population of the insured persons. The non-profit nature of social insurance means that its cost is lower than in the case of private insurance, where the primary purpose of conducting insurance business will be the insurer's profit. In addition, social insurance is guaranteed solvency by the state budget and is the only one that realistically ensures that the benefits it provides are paid out for life. When insurance is voluntary, some self-employed workers deliberately do not register for it. Those not covered by social insurance are generally entitled to benefit from social assistance schemes. The cost of protecting those entitled to social assistance benefits is passed on to taxpayers, including those who have secured social protection by regularly paying social insurance contributions. The obligation for the self-employed to have insurance furthermore reduces self-selection of risk, and reduces and averages the insurance costs in that the contribution is paid both at times when the exposure to a random event is low and in situations when it is high. Voluntary character of social insurance would certainly cause an increase in the number of self-employed workers. It seems that the pressure to choose this form

of gainful activity would be much higher than at present and, as a consequence of the so-called push out to self-employment, some of the gainfully active would be left with no social protection at all. The arguments presented above support the recognition of compulsory insurance as the optimal solution for the self-employed.

Another issue is to determine the optimal contribution assessment basis. The assessment basis can be determined by three methods. The first is to introduce a uniform amount of social security contribution into the system (lump-sum contribution). The second method consists in correlating the contribution with the income earned or the income reduced by certain costs of its acquisition (income-based contribution). The third method involves giving the insured the right to declare the social security contribution assessment basis (declared contribution assessment basis). Each of the options outlined above involves significant advantages as well as disadvantages. The advantage of the lump-sum contribution is the independence of the income earned by the entrepreneur and the social security burden. However, the lump-sum contribution has the fundamental disadvantage that the amount of benefits does not correspond to the income lost through social risk activation. The rate of replacement of income earned from business activity with a sickness allowance or retirement pension will correspond not with the income actually lost, but with the contribution rate that applies at the date of activation of the social risk. This may also mean that the benefit will provide the insured person with only the bare minimum living standard. Thus, in the case of a lump-sum contribution, there is a problem of determining the contribution–benefit ratio. Certainly, it is possible to imagine a system in which the person who carries out business activity pays a lump-sum contribution for a certain period (e.g. 25 years) and then receives a benefit depending on the capacity of the system, or a minimum benefit.

In my opinion, the model of contribution paid on income is the optimal solution. First, it is transparent, i.e. the self-employed person is able to calculate the social security contribution at the end of the month, quarter, or year. Second, the method of correlating income with the amount of social security contribution prevails in OECD countries.[48] Due to the wide disparity when it comes to the income of the self-employed, individual legislations introduce certain modifications to give them certain preferences. The most common modifications to the contribution assessment basis include: cap amounts above which no contribution is collected, a preferential contribution rate for employees, or a gradual progressive or degressive social security contribution rate. This model appears to be the most effective in terms of insurance fund revenues. The preferences applied (e.g. a lower contribution rate) compensate for the economic risk borne by the self-employed. In the case of a contribution calculated on income, the contribution–benefit relationship is maintained. Although there may be differences in the benefits of employees and the self-employed in this model since the contribution rate is preferential to the latter, the level of their

48 *Tax Database. Table III. 3 Self-employed social security contribution rates*, OECD, https://stats.oecd.org/Index.aspx?DataSetCode=TABLE_III3 (accessed: 1.02.2022).

protection will correspond to that of the other occupational groups covered by social insurance. Importantly, the contribution rate paid on income reduces competition between individual insurance titles. Given a choice of comparable contribution rates, employees will not be as motivated to choose self-employment as the basis for their co-operation with a contracting entity.[49] A disadvantage of this contribution calculation method may be the relatively high burden on the self-employed who earn the highest income. This method should take into account the fact that a sole trader's earnings do not equal income – hence the importance of taking into consideration a certain level of expenses involved in running a business that should not be included in the social security contribution assessment basis.

The method where the social security contribution assessment basis is declared, adopted in Poland, is also strongly justified. The flexible way in which the contribution is determined is intended to take into account, first and foremost, the economic needs of the self-employed person, to guarantee the possibility of their development, and to allow them to reduce the contribution during periods of economic downturn. The self-employed person can adjust the amount of the contribution to their individually defined economic needs in periods of their choice. Moreover, ZUS is not entitled to verify whether a need actually exists. A sole trader can also pay a contribution at the lowest rate and additionally save in various forms of the so-called third pillar (IKE, IKZE), which enables them to diversify the sources of security for old age.

Yet when granting a certain level of preferences, the interest of the other insured must be taken into account, as well. This means that the common contributory fund for the insured should be financed in such a way that each occupational group contributes enough to finance their future benefits. This is because it can hardly be considered fair that an employee earning the minimum wage should self-finance their retirement pension, while at the same time a self-employed person earning several times the former's income should have their pension financed from taxes or contributions paid by the other insured. In view of the disproportion in contributions paid, the law should clearly define the criteria that will distinguish the self-employed and prevent the bogus self-employed workers from accessing the preferences. The optimum solution should be to introduce solutions into the social insurance system that approximate the legal position of the economically dependent self-employed person, the employee, and the mandatary. If the income of a self-employed worker comes from a single source (at least 67% or 75% of the income earned in the previous calendar year) or in a situation where a self-employed worker performs activities for a single contracting entity for at least 21 hours a week, it should be assumed that such income is subject to taxation under the rules applicable to employees. The global income criterion has been introduced in Spain, while the hourly criterion was proposed by the Labour Law

49 However, it should not be forgotten that the pressure from employers to choose self-employment as a basis for co-operation is also caused by the obligations imposed on them by labour legislation in the context of employment.

Codification Committee in the draft individual labour law code. It is worth noting that ZUS has adequate instruments to verify both criteria.

An important issue is the possibility to benefit from preferences at the stage of setting up sole proprietorship. Self-employment is a way of entering the labour market.[50] During the first two years counted from the date of starting the business, self-employed persons, as long as they do not perform activities for a former employer, should benefit from preferential rules for the payment of contributions and taxes. This solution would, on the one hand, allow for the unhindered pursuit of sole proprietorship and, on the other hand, even if the business were set up solely for the purpose of cooperating with a contracting entity, the self-employed would have the necessary time to diversify their sources of income. After every 24 months of activity, the sole trader would have to demonstrate that the economic activity they were carrying out did not meet the criteria for recognition as bogus self-employment. As I have already mentioned, these criteria are the percentage of income from one source, and the employment of other persons. Businesses that are geared to cooperating with the self-employed would lose the incentive to impose this form of gainful activity because of the possibility of changing the way contributions are paid if the self-employed person meets the criteria for an economically dependent self-employed worker. In my view, the proposed solution would not violate the constitutional freedom of economic activity, or the freedom to choose one's occupation. Indeed, a self-employed person would be able to continue their business activity, but at the same time they would have to pay a contribution on the income earned from their activity for the contracting entity.

6. Conclusion

Globalisation has a significant impact on the shape of social security. A phenomenon that co-shapes the level of social protection is the accompanying optimisation of employment processes and costs. In practice, this entails looking for solutions that maximise the profit of the contracting entity and minimise its risk. For this reason, the labour law and social security law regulations focused on employee protection are, from the point of view of a global employer, ineffective and increase the costs of such an entity's activities.

Social security for the self-employed is gaining in importance. The growing interest in this form of gainful activity is the result of pressure to reduce the costs of running a business. The decades-old bond between the employer and the employee, manifested on the part of the employer as concern for the employee's welfare and on the part of the employee as loyalty to the employer, is gradually being loosened. The place of both ties is being replaced by loose cooperation, often only on a single task or project. As a result, the contracting parties do not see the need to provide

50 *Social protection rights of economically*…, p. 9.

their partners with adequate social protection, understood not only as classic social insurance, but also as company-based forms of supplementary old-age risk insurance, even when they have been co-operating for several years.

The Polish model of social insurance for the self-employed can be considered flexible and susceptible to optimisation. The Act on the social insurance system allows for changes in the title of insurance, differentiates the levels of charges depending on the basis of social insurance coverage and, above all, enables the self-employed person to declare the assessment basis for social insurance contributions. The preferences granted to the self-employed enable them to pay contributions on a reduced basis for 30 months, which corresponds to solutions implemented in other European countries. The regulations do not limit cooperation with the former employer. However, the consequence of performing activities for a former employer is that it is not possible to benefit from the preferential rules for declaring social security contributions.

Polish law does not define the concept of an economically dependent self-employed person. Recognising dependent self-employment as a normal form of business activity means that such a person will be entitled to the preferences enjoyed by persons running a non-agricultural business activity. The choice of this form of gainful activity is motivated by a desire to reduce the employment costs borne by the contracting entity. Hence, such entities show no interest in providing opportunities to make additional savings for old age.

The expansion of economically dependent self-employment, due to the limited number of contractors and relatively low income, will necessitate further optimisation of the social security contribution assessment basis. In order to meet the expectations of the self-employed, states are increasing the flexibility of the rules for the payment of social security contributions. The contracting entity, taking into account the successive changes in the current legislation, often consumes all or part of the preference granted by the state, rarely offering more favourable conditions of cooperation to the economically dependent person. Of course, there are also sectors, such as IT, where due to the high demand for specialised services, it is the self-employed who decide on the terms and conditions under which they provide their services. It is important to emphasise that individuals operating in the IT sector perform exactly the same activities under employment relationships as under civil law contracts, as self-employed, or also as economically dependent self-employed workers.

Therefore, I believe that a step in the right direction would be to introduce into the Act on the social insurance system a separate title for insurance – the economically dependent self-employed, whose status should be similar to that of the employee. This would reduce the need for optimising the type of employment. With this solution, it would be possible to preserve preferences in the case of sole proprietorships geared towards cooperation with multiple contracting parties and, on the other hand, reduce the pressure to choose economically dependent self-employment as the basis for gainful activity.

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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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Enactments

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This monograph is the result of the work of scholars from various European countries who joined the research project funded by the National Science Centre and led by Tomasz Duraj, titled “In Search of a Legal Model of Self-Employment in Poland. A Comparative Legal Analysis”.

The chief research objective tackled by the project participants consisted in a complex legal analysis of self-employment – not only from the perspective of Polish regulations and case law, but also with regard to solutions existing in international law, European Union law, and selected European countries. The area of study covered the legal systems of the United Kingdom, Germany, Austria, Spain, France, Italy, Hungary, as well as Lithuania, Latvia, and Estonia. Research design was rather innovative. To date, no large-scale research had been conducted into the legal environment as it pertains to self-employment, encompassing not only the Polish regulations and case law, but also the solutions adopted in international law, European Union law, and the laws of selected European countries. The inclusion of the regulations on self-employment in other countries, processed to fit within in the framework of a structured study, provides added value for Polish legal scholarship.

This monograph contains an analysis of self-employment under the law of the Baltic States and under Polish law. The concluding chapter presents the final results of the research carried out as part of the research project. On their basis, an attempt was made to create an optimal legal model of self-employment in Poland. The comments as to the potential future regulatory approaches are designed to help the Polish legislator draft a new law on the legal status of self-employed workers, in order to systematically and comprehensively regulate the key aspects of self-employed work, with particular emphasis on the social protection of the workers. 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 proposed optimal legal model of self-employment in Poland outlined in this monograph has a universal dimension, going much beyond self-employment as such. The research results suggest certain conclusions that offer a springboard for a broader discussion about the future of labour law. They encourage reflection on the need and legitimacy of expanding the applicability of protective regulations of labour law, with a view to bringing under their umbrella various new groups of workers who provide work, independently, outside the employment relationship (in particular under conditions of dependence on the client). The scope of this protection and manner of its differentiation require further critical reflection and development.

The monograph is primarily addressed to legal academics, students, legislators, judges and representatives of other legal professions, social partners, practitioners and other circles interested in the issue of atypical forms of employment.

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