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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