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SELF-EMPLOYMENT AND THE LEGAL MODEL OF PROTECTION IN POLAND*

Abstract

The growing popularity of self-employment, in which self-employed persons very often operate in conditions similar to those of employees, has necessitated the need to extend this category of workers to protection, which until recently was reserved exclusively for the employment relationship. *De lege lata* under Polish law, the self-employed already benefit from: legal protection in the field of life and health; protection against discrimination; a guaranteed minimum wage and protection of wages for work; the protection of parenthood; and also from coalition rights, which consequently gives them broad collective rights. The tendency to extend legal protection to self-employed persons is consistent with both the standards of international and EU law, as well as the norms of the Constitution of the Republic of Poland. The aim of this study is to answer the question whether the legal protection of the self-employed should be extended at all, and if so, what should be the statutory model of this protection and the criteria for determining its limits in Poland to ensure its effective functioning in practice.

Słowa kluczowe: samozatrudnienie, praca na własny rachunek, jednoosobowa działalność gospodarcza, ochrona praw socjalnych, zatrudnienie niepracownicze

Keywords: self-employment, sole proprietorship, protection of social rights, non-employee

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1. Introduction

Since the beginning of the 1990s, we have been observing a dynamic development of atypical forms of rendering services, including self-employment (e.g. Chobot 1997; Davies 1999; Jończyk 2000; Kubot 2000; Hajn 2003; Pisarczyk 2003; Duraj 2009). According to the

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GUS (Statistics Poland) report from the first quarter of 2020, the number of self-employed in Poland was over 1.33 million. At the same time, OECD research conducted in 2019 shows that around 16% of working people in EU countries were self-employed. In Poland, this ratio is slightly lower and amounts to over 14% of all working people.

The spread of self-employment, under which people who engage in gainful activity very often operate in conditions similar to those of employees, forced the need to cover this category of contractors with protection, which until recently was reserved exclusively for the employment relationship (Duraj 2018a, pp. 37 ff; Duraj 2020a, pp. 15 ff). *De lege lata* under Polish law, the self-employed already benefit from: legal protection in the field of life and health, which covers all self-employed people rendering their services in a place belonging to the commissioning entity; the prohibition of discrimination and the requirement of equal treatment in employment; a guaranteed minimum wage and protection of wages for work; the protection of motherhood and parenthood; as well as the right of association in trade unions, which consequently gives them access to broad collective rights. The trend of extending legal protection to self-employed persons is consistent with both the standards of international and EU law, under which the legislator introducing protective regulations covers all working people, using the term “pracownik” in a broad sense (“worker” or “travailleur”), as well as with the norms of the Constitution of the Republic of Poland of 2 April 1997 (Dz.U. 1997, No. 78, item 483 as amended, hereinafter referred to as: “Constitution of the Republic of Poland”), which broadly define protective guarantees (Gersdorf 2019, pp. 2 ff).

The aim of the foregoing study is to answer the question whether the legal protection of the self-employed should be extended at all, and if so, what should be the statutory model of this protection and criteria when determining its limits? The discussion on this problem has been going on for a long time both in Poland and in other EU countries. It is worth pointing out here that the four basic concepts were formulated in this area by Adalberto Perulli in the report on self-employment prepared on behalf of the European Commission (Perulli 2011, pp. 112 ff). The first of them is based on maintaining the *status quo*, under which self-employment should be governed exclusively by civil law, where the parties themselves decide, in accordance with the principle of freedom of contract, on mutual relations and possible protection guaranteed by a civil law contract. In this model, the legislator does not interfere at all in the relationship between the self-employed and their contractor. The second concept is based on identifying the economically dependent self-employed person as a separate category of the contractor, placing him between an employee employed on the basis of an employment relationship and an ordinary entrepreneur running a business, and introduces coverage of such self-employed person by legal protection (e.g. Ludera-Ruszel 2017, p. 56; Musiała 2014, pp. 69 ff). The third model is based on the inclusion of the economically dependent self-employed person in the scope of the employment relationship. This would mean extending the condition of employee subordination to the criterion of economic dependence on the employing entity. In this view, the self-employed who is dependent in such way would have an employee status and would enjoy the same scope of protection as all employees (e.g. Świątkowski 2001, p. 290). The fourth concept is based on the creation of a catalogue of fundamental social rights applicable to all forms of work, regardless of their legal basis. It assumes the transformation of labour law into

employment law, where issues concerning the employment relationship would constitute one of the sections of the Employment Code. Such solutions are in force in Germany, where the legislator created a single regulation for all social rights and gradually introduced the social code (Sozialgesetzbuch).

Taking into account the above concepts, the main objective of this article will be an attempt to propose *de lege ferenda* an optimal legal model for the protection of the self-employed in Poland. However, before this happens, it is necessary to consider the legitimacy of covering this category of people performing gainful activity by protective mechanisms and it is necessary to assess the legal regulations in force in our country *de lege lata* in the field of protection of the self-employed.

2. Justification of legal protection of self-employed persons

In the first place, the above-mentioned concept of maintaining the *status quo*, under which the legislator should not interfere at all in the relations between the self-employed and the contracting entity, leaving the issue of protection only to be regulated in the civil law contract, should be rejected. At this point, four main arguments can be identified in favour of establishing legal mechanisms for the protection of the self-employed. The first is the need to adapt the national legal order to the standards resulting from the norms of international and EU law. They set out extensive guarantees to be given to every person providing work, regardless of the legal basis for its performance. The international and EU legislator introduces protective regulations for all working people (“workers” or “travailleurs”) in the field of: occupational health and safety, non-discrimination and equal treatment, respect for dignity, remuneration, rest, as well as parental or collective rights, including coalition rights (see Duraj 2018b, pp. 127 ff). At the Social Summit for Fair Jobs and Growth in Gothenburg on 17 November 2017, in the so-called European Pillar of Social Rights, the European Union established the principle that “regardless of the type and duration of their employment relationship, workers and, under comparable conditions, the self-employed have the right to adequate social protection” (Chapter III, Rule No. 12). The second argument for the legal protection of the self-employed is that the Polish legislator ensures that the provisions of the applicable law comply with the Constitution of the Republic of Poland. This act provides for a number of protective safeguards, which are addressed not only at employees employed on the basis of an employment relationship, but also to other citizens or working people. For example, the aforementioned constitutional guarantees include: the right to safe and healthy working conditions (Art. 66(1)); the right to health protection (Art. 68(1)); the right of a family in a difficult material and social situation to special help from public authorities (Art. 71); equality and non-discrimination (Art. 32), with particular regard to equality between women and men in family life and in education, employment and promotion, the right to equal pay for work of equal value, to social security and to occupy posts and perform functions (Art. 33), and finally as regards freedom of association in trade unions (Art. 59(1)). Significantly, Art. 24 of the Constitution of the Republic of Poland states that any work is under the protection of the

Republic of Poland, and it is the responsibility of the state to supervise the conditions of work. This provision gives rise to a special obligation of the state to adopt legal norms protecting the work of citizens. All types of work are to be subject to this protection, including work provided in conditions of self-employment (see more broadly Sobczyk 2013, pp. 51 ff; also: judgement of the Constitutional Tribunal of 23 February 2010, P 20/09, LEX 559164; judgement of the Supreme Court of 7 October 2004, II PK 29/04, OSNP 2005, No. 7, item 97). The third important argument in favour of establishing legal mechanisms for the protection of the self-employed is the need to provide them with a standard of protection similar to that of employees, provided that they work in conditions similar to those of employees. This applies primarily to those contractors who are associated with the contracting entity by a relatively permanent organizational and legal bond (civil law contract concluded for a period of at least 6 months) based mainly on economic dependence. Fourthly and finally, the need for legal protection for the self-employed stems from the fact that this form of work has become widespread on a huge scale. Statistical research shows that in Poland self-employment is currently a very popular form of making a living, and nearly 80% of entrepreneurs are self-employed. It should be expected that the scale of the use of self-employment will continue to grow, displacing the classic employment relationship. This is due to the high attractiveness of this form of work, which allows for a significant reduction in employment costs (public law burdens and risks related to the work performed, especially social risk, are passed on to the self-employed) and the conduct of a rational employment policy (the contracting entity can resign from the services of the self-employed in a relatively easy way).

3. Legal model of protection of the self-employed in Poland (remarks *de lege lata*)

De lege lata it is difficult to talk in Poland about the existence of a legal model for the protection of the self-employed. The attitude of the Polish legislator shows the complete lack of a systemic and comprehensive approach to this issue. We are dealing with randomness and fragmentation of legal solutions adopted in the field of protection of the self-employed. Changes in this area are often made *ad hoc*, without a coherent and well-thought-out concept, also under the influence of political factors. Seeing the need to protect the self-employed, Polish legislator gradually began to introduce certain regulations, most often by referring to the relevant provisions regulating the rights of employees. In 2007, the provisions of the Labour Code Act of 26 June 1974 (Dz.U. 2020, item 1320 consolidated text, as amended, hereinafter referred to as: “the Labour Code”) guaranteeing safe and hygienic working conditions were extended to the self-employed. Pursuant to Art. 304 § 1 and 3 of the Labour Code, this protection applies to natural persons who are self-employed and whose work is organised by the contracting entity, in particular when the work is performed in a workplace or other place designated by it (see more broadly: Wyka 2000, 2007, p. 171 ff; Duraj 2007, pp. 36 ff; Mędrala 2015, pp. 143 ff; Raczkowski 2019, pp. 66 ff). On the other hand, the Act of 3 December 2010 on the implementation of certain EU provisions in the field of

equal treatment (Dz.U. 2020, item 2156 consolidated text, as amended) extended to all self-employed natural persons (conducting business or professional activity) protection against discrimination in the conditions for starting and performing business activity on the basis of a civil law contract (see more broadly Barzycka-Banaszczyk 2019, pp. 6 ff). The next step of the Polish legislator was to guarantee the self-employed certain rights related to parenthood. The amendment to the Labour Code introduced on 24 July 2015 extended protection in this area to the self-employed who are covered by voluntary social insurance regarding illness or parenthood. In particular, Polish legislator granted the insured person (the child's mother) and the insured person (the child's father or another member of the immediate family) the right to maternity allowance for the period corresponding to the period of maternity leave and parental leave (in the case of fathers—also paternity leave). In the case of a self-employed mother, the only prerequisite for acquiring this right is the fact that the child has been born or adopted for upbringing (see Duraj 2019a, pp. 11 ff), and in the case of a self-employed father (or another member of the immediate family)—the cessation of gainful activity in order to exercise personal care over the child (see more Mędrala 2016, pp. 24 ff; Babińska-Górecka 2018, pp. 127 ff; Duraj 2019b, pp. 341 ff; Latos-Miłkowska 2019, pp. 71 ff). In 2017, the Act of 22 July 2016 amending the act on the minimum wage for work and certain other acts (Dz.U. 2016, item 1265) came into force, which covered the self-employed with protection in the field of the minimum wage (in 2022, the rate of this wage is PLN 19.70 gross per hour), provided that they perform business activity personally, without hiring employees or concluding contracts with any contractors (Art. 1 point 1b letter a). This applies to those natural persons who, when providing certain services (work) to the contracting entity on the basis of contracts for the provision of services within the meaning of Art. 750 of the Civil Code Act of 23 April 1964 (Dz.U. 2020, item 1740 consolidated text, as amended), do not decide on the place and time of the provision of these services, and their remuneration is not commissioned (Art. 8d(1)(1) of the Act on the minimum wage for work). In addition, the minimum wage for the self-employed enjoys the protection of prohibiting the waiver of the right to remuneration and the prohibition of the transfer of this right to third parties, as well as the requirement of a monetary form of payment of remuneration and the obligation to pay remuneration at least once a month in the case of mandate contracts concluded for a period longer than 1 month (see more broadly Tomanek 2017, pp. 13 ff.; Maniewska 2019, pp. 29 ff; Duraj 2021b, pp. 49 ff; see also Sobczyk 2012, pp. 2 ff). Finally, it is impossible to ignore the Act of 5 July 2018 amending the act on trade unions and certain other acts (Dz.U. 2018, item 1608), which since 1 January 2019 has been guaranteeing the self-employed the full right of coalition, provided that they provide services personally for remuneration and have rights and interests related to the performance of work, which can be represented and defended by a trade union (Art. 2(1) in conjunction with Art. 11(1) of the Act of 23 May 1991 on trade unions). The right of coalition not only gave the self-employed the opportunity to form their own trade unions and join already existing organizations, but also allowed them to enjoy the protection of trade union activists and the right to bargain in order to conclude different types of collective agreements or to resolve collective disputes, where the Polish legislator guaranteed them the right to organize strikes and other forms of protest within the limits

set by law (see more Baran 2018, pp. 2 ff; Grzebyk, Pisarczyk 2019, pp. 81 ff; Duraj 2021a, pp. 63 ff). Thanks to trade union membership, the self-employed can apply for an extension of protection on an individual basis, especially in the areas of: remuneration, working time, annual and parental leave and other paid breaks in work or durability of employment.

Although the tendency of the Polish legislator to extend protective mechanisms to the self-employed should be overall assessed positively, I believe that legal regulations in this area are not properly correlated with international standards, EU standards and the Constitution of the Republic of Poland. There is no legal definition of the term “self-employed,” which has a negative impact on the precise definition of the scope of this protection. The rights guaranteed to the self-employed are scattered in many legal acts that use a diverse conceptual grid and unjustified criteria determining the scope of this protection. Often, these criteria are incomprehensible from the point of view of the characteristics and objectives of a given protection. This is best illustrated by the example of the Act on the minimum wage for work, which makes the possibility of application of the guarantees regarding the minimum wage to the self-employed dependent on two issues: freedom in terms of deciding on the place and time of providing services and the a commission-based remuneration. It is surprising that the Polish legislator, when extending the scope of protection in the area of the minimum wage to the self-employed, did not take into account the criterion of economic dependence on the commissioning entity, which in this case, due to the nature of the protection and the fact that the remuneration is the only source of income of the self-employed and therefore is vital in terms of the person’s maintenance, should be decisive (see more broadly Duraj 2021b, pp. 63 ff). Such a criterion for the application of protective guarantees to the self-employed appears in the legislation of some European countries, such as Spain or Italy. Unfortunately, the Polish legislator does not perceive the criterion of economic dependence as a prerequisite determining the scope of social protection of the self-employed, which in my opinion should be assessed negatively. An important drawback of our regulations in the analysed area is the lack of regulations dedicated to this category of work contractors, which would take into account the specificity of their functioning in legal transactions. Unfortunately, the Polish legislator in many cases takes shortcuts and, when granting certain rights to the self-employed, makes extensive use of references to labour law provisions regulating the protection of employees through their appropriate application. Such situation occurs, for example, in the case of protection of life and health or collective rights (e.g. Duraj 2020b, pp. 67 ff). Such legal constructions should be considered incorrect, and in many cases even harmful to the effective protection of the self-employed. They raise a number of interpretative problems, creating uncertainty in the legal situation of the self-employed in the context of the practical application of the rights guaranteed to them. In addition, the application of the reference mechanism to the provisions governing the protection of workers very often leads to an unjustified situation when the scope of the protective guarantees provided for the self-employed and employees is identical. This is the case, for example, with regard to the protection of trade union activists and the right to strike and other forms of protest. This raises justified doubts, both axiological and legal ones, constituting an excessive interference of the Polish legislator in the principle of freedom of contract applicable under Art. 3531 of

the Civil Code, in the constitutional principle of freedom to conduct business activity (Art. 22 of the Constitution of the Republic of Poland) and in the principle of fair (free) competition (Art. 9 of the Entrepreneurs' Law Act of 6 March 2018, Dz.U. 2021, item 162 consolidated text, as amended).

4. Legal model of protection of the self-employed in Poland (*de lege ferenda* remarks)

Referring to the concepts presented in the introduction by Adalberto Perulli (2011) regarding protection of the self-employed, in Poland it is necessary to consider the adoption of a mixed model. I believe that the optimal solution will be to adopt a separate law that will comprehensively regulate this matter without references to the proper application of the provisions regulating the situation of employees.¹ This act should take full account of the specificities of the gainful activity of the self-employed, including the above-mentioned principles of freedom of contract, freedom to conduct business activity and fair competition. The law on the self-employed must guarantee them a two-stage model of protection. The first step should cover all self-employed persons who personally, under their own responsibility and risk, provide services as entrepreneurs to at least one contracting entity under B2B conditions. At this level, there is a need to create a catalogue of fundamental social rights applicable to all natural persons engaged in gainful activity, regardless of the legal basis. Referring to the standards of international and EU law and the provisions of the Constitution of the Republic of Poland (also to the principle of social justice—Art. 2, and the principle of equality before the law—Art. 32), the Polish legislator should provide the self-employed with: protection of life and health, protection against discrimination and unequal treatment,² protection of human dignity,³ protection of women immediately after the birth of a child, the right to maternity allowance,⁴ as well as the right of coalition and the resulting system protection and protection of the durability of the civil law contract of the trade union activist. On the other hand, the second level of protection must apply to those self-employed who personally provide their services under conditions of economic dependence on a specific contracting entity. On the other hand, the second level of protection must apply to those self-employed

¹ This solution is successfully applied in Spain, where a separate Act 20/2007 of 11 July 2007—Law of the Self-Employed (Boletín Oficial del Estado No. 166) [uwagi do zapisu w bibliografii] was adopted, setting the scope of protection for this category of contractors.

² Unlike it is currently done, the legislator should introduce an open catalogue of legally protected features against discrimination, similar to the provisions of the Labour Code.

³ Unlike it is currently done, the legislator should cover all self-employed people with the protection against mobbing at work, similar to the provisions of the Labour Code.

⁴ Unlike it is currently done, the legislator should grant the child's father, and then the closest family members, an independent right to maternity allowance, which can be used without interrupting professional activity. Parents of a new-born child should also be allowed more freedom to choose which of them will benefit from this allowance (with the exception of the period of the first eight weeks after the birth of a child, when the right to maternity allowance should be obligatory for a self-employed mother).

who personally provide their services under conditions of economic dependence on the specific contracting entity. The aim is therefore to create a separate category of economically dependent self-employed people. Such category would fill in the gap and place them between regular employees and entrepreneurs conducting business activity. It is to them that a separate law should guarantee the widest range of rights and privileges, closest to the employee standard. In particular, the economically dependent self-employed should enjoy the right to a minimum wage for work and the protection of this remuneration, the right to rest (see, e.g., Stefański 2018, pp. 99 ff; Zwolińska 2019, pp. 54 ff; Barwaśny 2019, pp. 97 ff), the right to paid leave in connection with the birth of a child, the right to refrain from dangerous work with a guarantee of remuneration, the right to paid breaks related to the function of a trade union activist, the right to strike or the right to proceedings before the labour court (see Baran, Florczak 2021, pp. 23 ff). Importantly, the protection of the self-employed cannot in any case be equated with the protection that the legislator guarantees to employees who work under conditions of subordination. This would unduly interfere with the principles of freedom of contract, freedom to conduct a business and fair competition. It would lead directly to a disturbance of the relationship between labour and capital. It is the employees who must be given the most far-reaching rights. The model of working under an employment agreement must guarantee the widest (fullest) scope of protection, which should compensate the employee for a permanent state of subordination to the employer. The protective function of labour law, which underlies the emergence and development of this branch of law, must first of all concern persons with employee status (Wagner 2002, p. 378).

In order to adopt a two-stage model of protection for the self-employed in a separate act, it is necessary to introduce a definition of the terms “self-employed” and “economically dependent self-employed.” A self-employed person is a natural person engaged in the personal performance of work for at least one entrepreneur, an organizational unit that is not an entrepreneur or an agricultural holding (commissioning entity), on its own responsibility, risk and outside the scope of the management of this entity, in the conditions of registered business activity within the meaning of the provisions of the Entrepreneurs’ Law Act, which for this purpose does not hire any employees and does not engage people to work on the basis of civil law contracts. On the other hand, when it comes to defining the term “economically dependent self-employed,” consideration should be given to adopting a dependency formula that is easy to verify on the basis of objective criteria. The Spanish legislature, in Art. 11, assumed that this applies to those self-employed who receive at least 75% of their income from one contractor. A similar situation exists in German law, where this income threshold is 50% (opinion of the European Economic and Social Committee of 29 April 2010 on new trends in self-employed work: the specific case of economically dependent self-employed work, SOC/344, CESE 639/2010, pp. 7–8). Nevertheless, since in practice, as the Spanish experience shows, objective verification of this criterion is difficult, it might be advisable to adopt the hourly criterion of dependence, which was proposed in the draft of the Individual Labour Code of 2018. According to Art. 177 § 1 of this project, a person engaged in the provision of services, performing them independently for a specific entity, or an organizational unit that is not an entrepreneur or an agricultural holding (contractor), in a direct manner,

on average for at least 21 hours per week, and for a period of at least 182 days⁵ may be called an economically dependent self-employed person.

The proposed model of protection of the self-employed in Poland should be complemented by the introduction of mechanisms for effectively counteracting bogus self-employment in order to circumvent labour law. The fight against the phenomenon of using self-employment to work in conditions characteristic of the employment relationship, which is contrary to the provisions of labor law, in particular Art. 22 of the Labour Code, is currently not effective. According to approximate estimates, the number of fictitiously self-employed in our country is currently about 500 thousand people and is still growing (see more details Duraj 2017, pp. 103 ff). Many of them could successfully benefit directly from employee protection guarantees, and not as sole proprietors. On the one hand, it is therefore necessary to call for a more effective fight against the phenomenon of fictitious self-employment, which would make it possible to make the protection of people who are actually self-employed in a real way more realistic. On the other hand, the Polish legislator should clarify in Art. 22 § 1 of the Labour Code the concept of “employer’s management” by indicating that it is a management that entitles the employer to specify—by means of binding instructions—employee obligations. Such element does not occur when working in the conditions of self-employment. This would give the National Labour Inspectorate and labour courts establishing the existence of an employment relationship an additional instrument in tackling bogus self-employment aiming at circumventing labour law (judgment of the Supreme Court of 24 July 2001, I PKN 560/00, OSP 2002, No. 5, item 70).

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⁵ Dependence on the commissioning party based on a certain number of hours of work performed on its behalf falls within the notion of economic dependence in the broad sense. It should be presumed that with such a significant level of time commitment, a self-employed person is economically dependent on his contractor.

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