

Competitiveness of the Labour Market and the Welfare Burden on Employing Entities – Selected Reflections from the Polish Perspective

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Abstract: *The aim of this paper is to analyse selected issues related to the phenomenon of the self-employment in Poland from the perspective of the competitiveness of the labour market. This topic remains particularly relevant in the view of the growing number of the self-employed in Poland. It also touches upon an important constitutional sphere related, on the one hand, to the guaranteed social rights of working people (the rights of the second generation) and, on the other hand, to the right to freedom of economic activity. The Polish practice to this day is not fully able to deal effectively with the problem of fictitious self-employment. This text is of a contributory nature. Its purpose is to indicate some research problems related to the phenomenon of the self-employment in Poland from the perspective of the market competitiveness and social burdens as well as to indicate the main weaknesses of the current material and procedural solutions in this matter.*

Key Words: *Labour Law; Competitiveness; Employee; Self-employed Person; Social Benefits; Employer; Entrepreneur; Poland.*

Introduction

The choice of a form of employment, be it employee or non-employee staff, is each time connected with a specific range of welfare benefits for employees and welfare burdens for employing entities. At the same time, the choice of a form of the employment is often conditioned by the organisational and, in particular, financial costs, which the employing entity (and especially the entrepreneur) incurs as a result. This is because entrepreneurs strive to achieve the greatest possible market competitiveness. The literature indicates that competitiveness is “the ability of an enterprise to provide its customers with goods or services of appropriate quality, at the right time and in the right place, so that their needs are sat-

ified in a more efficient and effective way than by other enterprises”.¹ Competition usually comes down to a competitive advantage over other entities in the sector in acquiring orders or customers. Businesses in the service sector compete with each other to a large extent on the price of services offered and this price ultimately consists of, among other things, the cost of employing staff.

Employment of employee staff is connected with a whole range of welfare benefits for employees, not directly reflected in their work (holiday pay, sick pay, severance pay, paid leave from work, benefits and services from the company’s welfare benefits fund, covering the costs of medical examinations, occupational health and safety training, etc.). In social policy, such benefits are called social benefits or social transfers.² Their axiology is derived from the human rights.³ The occurrence of such benefits in labour law is justified on the basis of the constitutional principles of social solidarity,⁴ social justice⁵ and the common good.⁶

In the case of employee staff, the costs of these transfers are, by virtue of the relevant statutory provisions (which are, in our opinion, public provisions), borne by the employer, which results in an increase in overall employment costs. On the other hand, the employment relationship is characterised by a strong bond between the employee and the workplace, subordination to the employer (which is foreign for non-employee staff, especially self-employment) which, to a certain extent, justifies such non-reciprocal and not equivalent benefits. As Anna Musiała, following Alain Supiot, points out, “a man who personally performs work – with his/her body alone, as it were – cannot remain outside his/her employ-

¹ See KRASZEWSKA, M. 1 Nowe koncepcje kształtowania konkurencyjności przedsiębiorstw źródłem budowania ich przewagi konkurencyjnej. In: M. KRASZEWSKA and K. PUJER. *Konkurencyjność przedsiębiorstw: Sposoby budowania przewagi konkurencyjnej*. 1. wyd. Wrocław: Exante, 2017, p. 9. ISBN 978-83-65374-57-8.

² See MĘDRALA, M. *Spółeczny charakter świadczeń w polskim prawie pracy*. 2. wyd. Warszawa: Wolters Kluwer, 2020. 602 p. ISBN 978-83-8187-703-9.

³ For more about this issue, see MĘDRALA, M. *Spółeczny charakter świadczeń w polskim prawie pracy*. 2. wyd. Warszawa: Wolters Kluwer, 2020. 602 p. ISBN 978-83-8187-703-9.

⁴ The Preamble of the Constitution of the Republic of Poland calls for solidarity with others. The social market economy, which is the basis of the Polish system, is based on the social solidarity.

⁵ Pursuant to the Article 2 of the Constitution of the Republic of Poland, the Republic of Poland is a democratic state ruled by the law, implementing the principles of the social justice.

⁶ Pursuant to the Article 82 of the Constitution of the Republic of Poland, it is the duty of a Polish citizen to be faithful to the Republic of Poland and to care for the common good.

ment as an employee”.⁷ One should also agree with the position that subordination is a concept characteristic for the employment relationship, while in civil law employment one should speak of organisational dependence.⁸ Therefore, in our opinion, subordination should be the basic criterion for differentiating employees and not employees in terms of protective and social regulations.

The social benefits accompanying the employment relationship are undoubtedly a significant financial burden for employers. Moreover, many organisational and fiscal obligations depend on the number of employees employed, e.g. in Poland contributions to the National Disabled Persons Rehabilitation Fund (in Polish Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych, abbreviated as PFRON), the obligation to establish a company welfare benefits fund, the introduction of work or remuneration regulations. These costs (both financial and organisational) do not have to be borne by those using the services of the self-employed. This means that, for obvious reasons, an entrepreneur who employs staff under the same conditions bears higher costs than an entity using the so-called self-employed. Entrepreneurs who employ workers are thus less competitive on the services market than entrepreneurs who use the so-called self-employment. The price of services offered using employees is usually ultimately higher than the price of services offered using the self-employed.

Poland is, in fact, one of the countries with the highest level of self-employment.⁹ At the same time, the scale of forced self-employment is

⁷ See MUSIAŁA, A. *Polskie prawo pracy a społeczna nauka Kościoła: Studium prawno-społeczne*. 1. wyd. Poznań: Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza, 2019, p. 9. ISBN 978-83-232-3428-9.

⁸ See MUSIAŁA, A. Problematyka kwalifikacji umowy o zatrudnienie jako umowy o pracę bądź umowy cywilnoprawnej o świadczenie usług. *Monitor Prawa Pracy*. 2015, vol. 12, nr 1, p. 9. ISSN 1731-8165. Similarly *Judgement of the Supreme Court of the Republic of Poland Ref. No. II PK 372/12* [2013-09-11]. OSNP 2014, no. 6, item 80. Compare also MUSIAŁA, A. Podporządkowanie jako kryterium różnicowania ochrony człowieka pracy. *Praca i Zabezpieczenie Społeczne*. 2017, nr 5, pp. 2-7. ISSN 0032-6186 and DURAJ, T. Funkcja ochronna prawa pracy a praca na własny rachunek. In: A. NAPIÓRKOWSKA, B. RUTKOWSKA and M. RYLSKI, red. *Ochronna funkcja prawa pracy: Wyzwania współczesnego rynku pracy*. 1. wyd. Toruń: TNOiK – Dom Organizatora, 2018, pp. 54-55. ISBN 978-83-7285-846-7.

⁹ According to the Polish Labour Force Survey (in Polish Badania Aktywności Ekonomicznej Ludności, abbreviated as BAEL) data, in the first quarter of year 2021, the share of the self-employed workers was 18.5 % (i.e. 3 030 thousand), the rate of the self-employed among women was 10.3 % and among men was 18.1 %; see *Aktywność ekonomiczna lud-*

not known,¹⁰ all the more so as in the public perception this form of the employment is quite well perceived.¹¹ This phenomenon is particularly common in the transport or information technologies sectors.

While in current discussions in Poland the problem of mainly civil law contracts of mandate is most often raised, the issue of abusing the so-called self-employment is raised relatively less frequently. For example, as a remedy for the abuse of the so-called civil law employment, the Codification Commission 2016 – 2018 proposed the introduction of flexible types of the employment contracts for short-term work.¹² Although such a model would undoubtedly be more coherent, it is hard to resist the impression that the proposed flexible employment contracts will differ little in practice from current civil law employment in terms of the employment stability and in the welfare terms.¹³ In this context, it is also worth mentioning the so-called junk contracts.¹⁴ This concept is very broad and,

ności Polski – I kwartał 2021 r. [online]. 1. wyd. Warszawa: Główny Urząd Statystyczny, 2021, p. 8 [cit. 2021-11-08]. ISSN 1425-7890. Available at: <https://stat.gov.pl/obszary-tematyczne/rynek-pracy/pracujacy-bezrobotni-bierni-zawodowo-wg-bael/aktywnosc-ekonomiczna-ludnosci-polski-i-kwartal-2021-roku,4,41.html>. According to the OECD data, this indicator is approximately 20 %; see SZYMAŃSKI, D. W Polsce co piąty pracownik jest na samozatrudnieniu. To jeden z najwyższych wskaźników na świecie. In: *Business Insider Polska* [online]. 2020-10-23 [cit. 2021-11-08]. Available at: <https://businessinsider.com.pl/twoje-pieniadze/praca/samozatrudnienie-w-polsce-dane-oecd/nvp23vs>.

¹⁰ See DROZDOWSKI, R. and P. MATCZAK, red. *Samozatrudnienie: Analiza wyników badań*. 1. wyd. Warszawa: Polska Agencja Rozwoju Przedsiębiorczości, 2004, p. 99. ISBN 83-88802-83-6.

¹¹ If only because of the greater sense of independence and lower labour costs (compare DROZDOWSKI, R. and P. MATCZAK, red. *Samozatrudnienie: Analiza wyników badań*. 1. wyd. Warszawa: Polska Agencja Rozwoju Przedsiębiorczości, 2004, pp. 93 and 97. ISBN 83-88802-83-6), or greater autonomy (especially among highly qualified people) and the possibility of combining work with personal development and professional life. See CIEŚLIK, J. Samozatrudnienie w Polsce na tle tendencji ogólnoświatowych: wyzwania w sferze polityki wspierania przedsiębiorczości i zabezpieczenia emerytalnego przedsiębiorców. *Studia BAS* [online]. 2019, nr 2, p. 12 [cit. 2021-11-08]. ISSN 2082-0658. Available at: <https://doi.org/10.31268/studiabas.2019.10>.

¹² See Uzasadnienie projektu kodeksu pracy 2018. In: *Portal Gov.pl* [online]. 2018 [cit. 2021-11-08]. Available at: <https://www.gov.pl/attachment/41db0993-afaf-4ef0-b3e4-cec94187edae>.

¹³ For more about this topic, see GŁADOCH, M. Wypowiadanie umów o pracę przez pracodawcę w projekcie Komisji Kodyfikacyjnej Prawa Pracy z lat 2016 – 2018: Refleksje krytyczne. In: A. NAPIÓRKOWSKA, B. RUTKOWSKA and M. RYLSKI, red. *Ochronna funkcja prawa pracy: Wyzwania współczesnego rynku pracy*. 1. wyd. Toruń: TNOiK – Dom Organizatora, 2018, pp. 79-98. ISBN 978-83-7285-846-7.

¹⁴ See MĘDRALA, M. „Umowy śmieciowe”: Wybrane problemy. *Zeszyt Naukowy Wyższej Szkoły Zarządzania i Bankowości w Krakowie*. 2012, nr 25, pp. 99-113. ISSN 1897-659X.

in our opinion, inaccurate due to its pejorative overtone. Anyway, it is not known whether only civil law contracts outside economic activity should be considered as such, or the cases of the so-called forced self-employment or perhaps also flexible forms of short-term employment contracts. Along with the development of globalization, the diversity of forms of the employment is inevitable, but employment relationship should remain the core. Therefore, in our opinion, it is important, first of all, to develop effective mechanisms of circumventing employment relationship with civil law employment or self-employment, i.e. eliminating the pathology of the labour market, which may affect especially the lowest paid people.

The aim of this paper is to assess the scope of freedom to choose self-employment or employment relationship from the perspective of competitiveness of economic market in the current Polish legal system, when this border remains fairly fluid (one of the analysed example is employment in road transport), as well as the effectiveness of possible current legal instruments aimed at evading employment as an employee by means of self-employment.

From this perspective, we seek to answer two fundamental questions:

- 1) firstly, when should the use of self-employment be allowed at all (particularly in the context of the potential possibility for entrepreneurs to reduce the costs of social services associated with employment as an employee);
- 2) secondly, whether, and if so, what legal instruments are available to the employing entity to challenge the form of the employment with other entrepreneurs on the grounds of the principle of competitiveness in the economic market.

The principle of proportionality

The issue under analysis requires consideration of two opposing values: on the one hand, the principle of freedom of economic activity, freedom of the market¹⁵ and, on the other hand, the welfare rights of working people.¹⁶ For the sake of implementing the welfare rights, the state trans-

¹⁵ See the Articles 20 and 22 of the *Constitution of the Republic of Poland of 2 April 1997* [1997]. Journal of Laws of Poland, 1997, no. 78, item 483.

¹⁶ Social benefits are an emanation of the human social rights, such as the right to holiday leave, health and safety, family protection, etc. For more, see MĘDRALA, M. *Spółeczny cha-*

fers many social burdens in the field of labour law to employers, including charging them with the financial costs of work-related social benefits.¹⁷ On the other hand, excessively welfare regulations may conflict with the principle of freedom of economic activity,¹⁸ the right to property¹⁹ and the freedom of contract.²⁰ In this context, there is also a certain dissonance between labour law – which aims to protect the welfare rights and interests of working people – and economic law – which is based on the principle of freedom of economic activity.²¹

The above-stated dissonance also needs to be viewed from a constitutional perspective. The Polish legislature adopted a free market economy, but it is also a “social” market economy. According to the Article 20 of the Constitution of the Republic of Poland, “A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland”. Social aspects justify the necessity to make adjustments to the mechanisms of the free market by the state. The Article 31 Section 3 of the Constitution of the Republic of Poland formulates cumulative premises for the admissibility of limitations in the exercise of the constitutional rights and freedoms, which are: the statutory form of restriction, the existence in a democratic state of the need to introduce a restriction, a functional relationship between the restriction and the implementation of the restrictions indicat-

rakter świadczeń w polskim prawie pracy. 2. wyd. Warszawa: Wolters Kluwer, 2020, pp. 222-276. ISBN 978-83-8187-703-9.

¹⁷ See MĘDRALA, M. *Spółeczny charakter świadczeń w polskim prawie pracy*. 2. wyd. Warszawa: Wolters Kluwer, 2020, pp. 222-276. ISBN 978-83-8187-703-9.

¹⁸ For more, see MĘDRALA, M. *Spółeczny charakter świadczeń w polskim prawie pracy*. 2. wyd. Warszawa: Wolters Kluwer, 2020, pp. 334-336. ISBN 978-83-8187-703-9.

¹⁹ For more, see MĘDRALA, M. *Spółeczny charakter świadczeń w polskim prawie pracy*. 2. wyd. Warszawa: Wolters Kluwer, 2020, pp. 330-333. ISBN 978-83-8187-703-9.

²⁰ For more, see MĘDRALA, M. *Spółeczny charakter świadczeń w polskim prawie pracy*. 2. wyd. Warszawa: Wolters Kluwer, 2020, pp. 337-338. ISBN 978-83-8187-703-9.

²¹ According to a textbook definition, private economic law is “a set of legal norms regulating by means of the civil law method social relations consisting in acts of exchange of goods and provision of services, which are performed by entrepreneurs or between entrepreneurs in connection with self-employed economic activity”. See DOLIWA, A. § 1. Pojęcie prawa gospodarczego prywatnego. In: T. MRÓZ and M. STEC, red. *Prawo gospodarcze prywatne: Podstawowe instytucje*. 1. wyd. Warszawa: C. H. Beck, 2021, p. 5. ISBN 978-83-8235-561-1. These relations are characterized by mutual autonomy (civil law method). See DOLIWA, A. § 1. Pojęcie prawa gospodarczego prywatnego. In: T. MRÓZ and M. STEC, red. *Prawo gospodarcze prywatne: Podstawowe instytucje*. 1. wyd. Warszawa: C. H. Beck, 2021, p. 7. ISBN 978-83-8235-561-1.

ed in the Article 31 Section 3 values (the state security, public order, environmental protection, public health and morality, freedoms and rights of other people) and the prohibition of violating the essence of a given right or freedom.²² In turn, according to the Article 22 of the Constitution of the Republic of Poland, “Limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons”. This provision indirectly expresses the constitutional principle of proportionality.²³ It justifies the occurrence of social transfers in labour law, which are financed by employers under the statutory acts and for public-law reasons.

Therefore, at the basis of the restriction of the freedom of economic activity in the scope of the freedom to choose the form of the employment of personnel should be the protection of the public interest and such interest will be in this case, on the one hand, the fiscal interest of the state and, on the other hand, the welfare rights of working people, which are under the constitutional protection.²⁴ In this context, it is also important to bear in mind the concept of an employee in the constitutional sense, as reflected in the case law of the Constitutional Tribunal of the Republic of Poland.²⁵ The proposed Article 18 of the draft Labour Code prepared from year 2018 should also be approvingly referred to,²⁶ under which when interpreting the provisions of labour law, the principle of proportionality must be applied, taking into account in particular the right to work, freedom to conduct a business activity and the need to achieve social objectives.

Social protection of the self-employed

The genesis of labour law is believed to be the so-called workers' issue, the need to protect the weakest social groups working for their mainte-

²² See *Judgement of the Constitutional Tribunal of the Republic of Poland Ref. No. SK 54/06* [2007-03-06]. OTK-A 2007, no. 3, item 23.

²³ For more, see MĘDRALA, M. *Spółeczny charakter świadczeń w polskim prawie pracy*. 2. wyd. Warszawa: Wolters Kluwer, 2020, p. 327 and following. ISBN 978-83-8187-703-9.

²⁴ See the Articles 65 – 72 of the *Constitution of the Republic of Poland of 2 April 1997* [1997]. Journal of Laws of Poland, 1997, no. 78, item 483.

²⁵ See *Judgement of the Constitutional Tribunal of the Republic of Poland Ref. No. K 1/13* [2015-06-02]. Journal of Laws of Poland, 2015, item 791.

²⁶ See Teksty projektu Kodeksu pracy i projektu Kodeksu zbiorowego prawa pracy opracowane przez Komisję Kodyfikacyjną Prawa Pracy. In: *Portal Gov.pl* [online]. 2021-08-19 [cit. 2021-11-08]. Available at: <https://www.gov.pl/web/rodzina/bip-teksty-projektu-kodeksu-pracy-i-projektu-kodeksu-zbiorowego-prawa-pracy-opracowane-przez-komisje-kodyfikacyjna-prawa-pracy>.

nance.²⁷ In turn, the genesis of the self-employment is seen in the pursuit of cost reduction and the global “fight for efficiency” by employing entities,²⁸ the “business” approach to employment,²⁹ the dynamics of economic activity and the need for its flexibility,³⁰ the development of information and telecommunications technologies.³¹

The problem of the social rights protection of the self-employed is slowly being recognised by the Polish legislator. A certain response to this growing phenomenon is the gradual extension of the employee rights to the self-employed,³² e.g. the introduction of minimum salary rates for the self-employed,³³ the right of association,³⁴ guarantees of equal treatment,³⁵ parental rights³⁶ and the right to health and safety at work.³⁷

²⁷ Compare MITRUS, L. 6.3. Rewolucja przemysłowa i powstanie prawa pracy. In: K. W. BARAN, red. *System Prawa Pracy: Tom I: Część ogólna*. 1. wyd. Warszawa: Wolters Kluwer, 2017, p. 351. ISBN 978-83-8092-784-1.

²⁸ See WALCZAK, K. Rozdział 9 Zatrudnienie niepracownicze w ramach pozarolniczej działalności gospodarczej. In: K. W. BARAN, red. *System Prawa Pracy: Tom VII: Zatrudnienie niepracownicze*. 1. wyd. Warszawa: Wolters Kluwer, 2015, pp. 300-301. ISBN 978-83-264-8225-0.

²⁹ See WALCZAK, K. Rozdział 9 Zatrudnienie niepracownicze w ramach pozarolniczej działalności gospodarczej. In: K. W. BARAN, red. *System Prawa Pracy: Tom VII: Zatrudnienie niepracownicze*. 1. wyd. Warszawa: Wolters Kluwer, 2015, p. 303. ISBN 978-83-264-8225-0.

³⁰ See MUSIAŁA, A. *Zatrudnienie niepracownicze*. 1. wyd. Warszawa: Difin, 2011, pp. 23-24. ISBN 978-83-7641-425-6.

³¹ See WALCZAK, K. Rozdział 9 Zatrudnienie niepracownicze w ramach pozarolniczej działalności gospodarczej. In: K. W. BARAN, red. *System Prawa Pracy: Tom VII: Zatrudnienie niepracownicze*. 1. wyd. Warszawa: Wolters Kluwer, 2015, p. 301. ISBN 978-83-264-8225-0.

³² For more, see DURAJ, T. Funkcja ochronna prawa pracy a praca na własny rachunek. In: A. NAPIÓRKOWSKA, B. RUTKOWSKA and M. RYLSKI, red. *Ochronna funkcja prawa pracy: Wyzwania współczesnego rynku pracy*. 1. wyd. Toruń: TNOiK – Dom Organizatora, 2018, pp. 43-56. ISBN 978-83-7285-846-7.

³³ See the Article 1 point 1b of the *Act of 10 October 2002 on Minimum Remuneration for Work* [2002]. Journal of Laws of Poland, 2020, item 2207.

³⁴ See the Article 1 point 1 and the Article 2 Section 1 of the *Act of 23 May 1991 on Trade Unions* [1991]. Journal of Laws of Poland, 2019, item 263.

³⁵ See *Act of 3 December 2010 on Implementation of Certain Provisions of the European Union in the Field of Equal Treatment* [2010]. Journal of Laws of Poland, 2020, item 2156.

³⁶ See the provisions of the Labour Code added by the *Act of 24 July 2015 amending the Act – Labour Code and Certain Other Acts* [2015]. Journal of Laws of Poland, 2015, item 1268, as amended.

³⁷ According to the Article 304 § 1 of the Labour Code, the employer is obliged to ensure the conditions of health and safety at work as referred to in the Article 207 § 2 of the Labour Code to individuals performing work on a basis other than an employment relationship in

On the other hand, however, the self-employed are not entitled to many of the social benefits to which employees are entitled, such as entitlement to annual leave,³⁸ severance pay on termination of employment, paid time off from work, sick pay, or they have to undergo occupational health checks at their own expense. And one should agree with such a construction, in principle, because the protection of the self-employed cannot come down to a simple extension of the protective labour law regulations, as some of them are, in principle, contradictory to the essence of this form of activity.³⁹ In the case of the self-employment, we are dealing with business contracts.⁴⁰ Social benefits remain typical of employee relations, in the case of providing business services, a self-employed person who decides to use this form of activity should be able to independently satisfy at least some of his/her social needs. But the protection of dependent self-employed persons should be larger. While the financing of holiday leave, paid exemptions from the provision of services or sick pay by service providers is questionable, interruptions in the provision of services for these reasons, at least in the case of the dependent self-employment, should, nevertheless, constitute a justifiable reason to appoint a substitute or to suspend the provision of services and they should be entitled to relevant social benefits from the social insurance. Another idea is to support the activity of the self-employed in the

a work establishment or in a place designated by the employer as well as to self-employed individuals conducting business activity on their own account in the work establishment or in a place designated by the employer. According to the Article 304 § 3 point 2 of the Labour Code, the duties specified in the Article 207 § 2 of the Labour Code apply accordingly to enterprises that are not employers and that organise work performed by individuals who are self-employed.

³⁸ It is worth noting that there has recently been a project to introduce a 14-day leave for entrepreneurs of 14 days, for which the economic activity would be suspended and there would be no obligation to pay social security contributions. See Druk nr 1120: Poselski projekt ustawy o zmianie ustawy – Kodeks pracy oraz ustawy – Prawo przedsiębiorców [2021-04-02]. In: *Sejm Rzeczypospolitej Polskiej* [online]. 2021 [cit. 2021-11-08]. Available at: <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1120>. In the light of this project, a person providing work under another contract, in particular a contract for the provision of services, provided that he or she performs work in person, on a permanent basis, for a period of at least 6 months, in the daily amount of time corresponding to a period of at least 1/2 of the contract time, will be considered as an employee.

³⁹ Compare KUBOT, Z. *Szczególne formy zatrudnienia i samozatrudnienia*. In: Z. KUBOT, red. *Szczególne formy zatrudnienie*. 1. wyd. Wrocław: Uniwersytet Wrocławski, Wydział Prawa i Administracji, 2000, pp. 33-35. ISBN 83-913715-0-6.

⁴⁰ See KUBOT, Z. *Szczególne formy zatrudnienia i samozatrudnienia*. In: Z. KUBOT, red. *Szczególne formy zatrudnienie*. 1. wyd. Wrocław: Uniwersytet Wrocławski, Wydział Prawa i Administracji, 2000, p. 17 and following. ISBN 83-913715-0-6.

event of a need by the state itself, including through social transfers.⁴¹ In this context, in our opinion, it is, therefore, crucial to precisely define the provision of services within the self-employment in order to avoid forcing to use this form in practice due to cost reduction by employing entities. Applying this form of cooperation to people with low earnings, in turn, deepens the phenomenon of the precariat.

In the Polish law, doubts are exacerbated especially by the lack of a uniform definition of the self-employment and the lack of distinction between dependent and independent self-employment.⁴² There is also no established jurisprudence in the field of questioning fictitious self-employment. The doctrine states that “dependent self-employment is economic activity conducted for the benefit of a single contractor/client who usually decides about working time and the manner of performance of tasks”.⁴³ To this should also be added the condition of not employing workers. A similar definition can be found on the website of the Central Statistical Office of the Republic of Poland, where the ‘self-employed’ are treated as ‘persons who run their own farm or run a business on their own account, not employing hired workers’.⁴⁴ This is why we believe it is right to recognise as an entrepreneur a person who employs at least one employee⁴⁵ or who owns separate premises for conducting business activity. It would be desirable for the legislator to introduce a kind of entrepreneur test.

⁴¹ See SOBCZYK, A. *Podmiotowość pracy i towarowość usług: Analiza prawna*. 1. wyd. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2018, pp. 130-131. ISBN 978-83-233-4398-1.

⁴² See DURAJ, T. Funkcja ochronna prawa pracy a praca na własny rachunek. In: A. NAPIÓR-KOWSKA, B. RUTKOWSKA and M. RYLSKI, red. *Ochronna funkcja prawa pracy: Wyzwania współczesnego rynku pracy*. 1. wyd. Toruń: TNOiK – Dom Organizatora, 2018, pp. 52-53. ISBN 978-83-7285-846-7.

⁴³ See CIEŚLIK, J. Samozatrudnienie w Polsce na tle tendencji ogólnoswiatowych: wyzwania w sferze polityki wspierania przedsiębiorczości i zabezpieczenia emerytalnego przedsiębiorców. *Studia BAS* [online]. 2019, nr 2, p. 19 [cit. 2021-11-08]. ISSN 2082-0658. Available at: <https://doi.org/10.31268/studiabas.2019.10> and the cited literature there.

⁴⁴ See Pracujący na własny rachunek – definicja. In: *Portal Statystyczny* [online]. 2019-07-14 [cit. 2021-11-08]. Available at: <https://portalstatystyczny.pl/pracujacy-na-wlasny-rachunek-definicja/>.

⁴⁵ See CIEŚLIK, J. Samozatrudnienie w Polsce na tle tendencji ogólnoswiatowych: wyzwania w sferze polityki wspierania przedsiębiorczości i zabezpieczenia emerytalnego przedsiębiorców. *Studia BAS* [online]. 2019, nr 2, p. 18 [cit. 2021-11-08]. ISSN 2082-0658. Available at: <https://doi.org/10.31268/studiabas.2019.10>.

Noteworthy is the definition contained in the Article 1(1a) of the Polish Act on Minimum Remuneration for Work, according to which “a commissioned person or a service provider” is a natural person carrying out business activity registered in the Republic of Poland or in a state not being a Member State of the European Union or a state of the European Economic Area, not employing employees or not concluding agreements with commissioned persons, who accepts a commission or provides services on the basis of agreements referred to in the Article 734 and the Article 750 of the Polish Civil Code to an entrepreneur or to another organisational unit within the framework of the activity conducted by these entities. In turn, an “entrepreneur” in the light of the aforementioned Act (Article 1 item 4a) is, among others, a natural person performing organised gainful activity in its own name and in a continuous manner. Thus, the feature that distinguishes a self-employed entrepreneur from other entrepreneurs is the lack of organisation of a gainful activity and not employing employees or concluding contracts with contractors. The term “organisation” can be understood in the both formal and factual terms.⁴⁶

The condition of not employing employees for the purpose of being recognised as self-employed is also present in the Polish Act of 23 May 1991 on Trade Unions.⁴⁷ Pursuant to the Article 11(1) thereof, a person who is gainfully employed is understood as a person who provides work for remuneration on a basis other than employment relationship, if he/she does not employ other persons for this type of work, regardless of the basis of employment, and has such rights and interests related to work performance that may be represented and defended by a trade union.

These definitions can, therefore, be used as a guide to distinguish between self-employment which is dependent on a single entity and independent self-employment; however, they have some lacks. In the case of the dependent self-employed, the decisive factors are that they are per-

⁴⁶ For more, see Commentary to Art. 5(a) in KOWALSKI, R. PIT. Komentarz do wybranych przepisów [2020-05-01]. In: *OpenLEX* [online]. 2020 [cit. 2021-11-08]. Available at: <https://sip.lex.pl/komentarze-i-publikacje/komentarze/pit-komentarz-do-wybranych-przepisow-587818249>.

⁴⁷ See *Act of 23 May 1991 on Trade Unions* [1991]. *Journal of Laws of Poland*, 2019, item 263.

sonally active,⁴⁸ that they do not have organised business resources and that they do not employ others in the course of their business.

Moreover, it should be noted that this definition is relevant only for tax purposes. In practice, the authorities use it when questioning the self-employment of people who have exceeded the second tax threshold (the tax rate of 32 % at the income of 85.529 PLN) and benefit from preferential taxation in the form of a flat tax (19 %), instead of a tax scale. In the case of the self-employed whose income does not exceed the first tax threshold, the authorities will not be interested in questioning their activity as self-employed. And such a situation takes place in the case of majority of small entrepreneurs.

Fiscal prerequisites attesting to the self-employment

The Polish Natural Persons' Income Tax Act of 26 July 1991⁴⁹ sets out for tax purposes the prerequisites attesting to the self-employment. These regulations are intended to pursue the state fiscal objectives, i.e. public objectives. The intention of their introduction by virtue of the Act of 16 November 2006 amending the Natural Persons' Income Tax Act and Certain Other Acts⁵⁰ was precisely to eliminate abuses in the area of transition to the self-employment from economic life.⁵¹

According to the Article 5a(6) of the Polish Natural Persons' Income Tax Act, economic activity or non-agricultural economic activity – gainful activity means:

- a) in the fields of production, construction, commerce, services;
- b) consisting in prospecting, exploration and extraction of minerals from deposits;

⁴⁸ See DURAJ, T. Funkcja ochronna prawa pracy a praca na własny rachunek. In: A. NAPIÓR-KOWSKA, B. RUTKOWSKA and M. RYLSKI, red. *Ochronna funkcja prawa pracy: Wyzwania współczesnego rynku pracy*. 1. wyd. Toruń: TNOiK – Dom Organizatora, 2018, p. 42. ISBN 978-83-7285-846-7.

⁴⁹ See *Act of 26 July 1991 on Income Tax of Natural Persons* [1991]. *Journal of Laws of Poland*, 2021, item 1128.

⁵⁰ See *Act of 16 November 2006 amending the Act on Personal Income Tax and Certain Other Acts* [2006]. *Journal of Laws of Poland*, 2006, no. 217, item 1588, as amended.

⁵¹ See Fikcyjne samozatrudnienie jako forma uchylania się od PIT i ZUS: Odpowiedź podsekretarza stanu w Ministerstwie Finansów – z upoważnienia ministra – na interpelację nr 3962 w sprawie rozwiązania podatkowego dla osób prowadzących samodzielną pozarolniczą działalność gospodarczą. In: *Podatki.biz* [online]. 2012-05-28 [cit. 2021-11-08]. Available at: https://www.podatki.biz/artykuly/fikcyjne-samozatrudnienie-jako-forma-uchylania-sie-od-pit-i-zus_14_17600.htm.

c) consisting in the use of things as well as intangible fixed assets;
– carried on one's own behalf, irrespective of the results thereof, in an organized and uninterrupted manner, the revenues earned from which are not included in other revenues from the sources listed in the Article 10(1) (1 – 2) and (4 – 9) of the above-stated Act.

At the same time, in order to avoid evading employment of people as employees by means of the application of the self-employment, the Article 5b(1) of the Polish Natural Persons' Income Tax Act states that a business activity shall not be deemed non-agricultural economic activity, if all the following conditions are met at the same time:⁵²

- 1) the liability towards third parties for the result of such acts and for the performance thereof, except for liability for torts, is borne by the party commissioning the performance thereof;
- 2) the acts are performed under the supervision and in the place and time specified by the party commissioning the performance of such acts;
- 3) the person performing such acts does not bear the economic risk connected with the activity carried on.

This definition is an autonomous definition under the Act in question. Therefore, it does not matter whether a person has the status of an entrepreneur according to the Polish Act of 6 March 2018 – Entrepreneurs' Law,⁵³ he/she is subject to entry in the Central Register and Information on Economic Activity (in Polish Centralna Ewidencja i Informacja o Działalności Gospodarczej, abbreviated as CEiDG) or is subject to the value-added tax.⁵⁴

It is worth emphasising that for non-qualification of non-agricultural activity for tax purposes it is necessary to meet the indicated negative premises together. Therefore, the absence of any of them is sufficient,

⁵² See *Act of 26 July 1991 on Income Tax of Natural Persons* [1991]. Journal of Laws of Poland, 2021, item 1128. The reference to the above-mentioned definition of economic activity is also included in the Article 4 Section 1 point 12 of the *Act of 20 November 1998 on Flat-rate Income Tax on Certain Revenues Obtained by Natural Persons* [1998]. Journal of Laws of Poland, 2021, item 1993.

⁵³ See *Act of 6 March 2018 – Entrepreneurs' Law* [2018]. Journal of Laws of Poland, 2021, item 162.

⁵⁴ See Commentary to Art. 5(a) in KOWALSKI, R. PIT. Komentarz do wybranych przepisów [2020-05-01]. In: *OpenLEX* [online]. 2020 [cit. 2021-11-08]. Available at: <https://sip.lex.pl/komentarze-i-publikacje/komentarze/pit-komentarz-do-wybranych-przepisow-587818249>.

which is most often achieved, in practice, by means of appropriate contractual provisions. In the view of the fact that the self-employment is a cheaper form of the employment of staff for entrepreneurs and, from the point of the view of the self-employed, may be attractive due to relatively higher earnings, in many cases the parties to the contract themselves will not be interested in undermining it.

Self-employment in road transport

Self-employment is one of the quite common forms of the employment in services, including the transport market. It is not uncommon for one entrepreneur to have a staff of drivers exclusively under employment contracts and for another to be self-employed. Sometimes, the same employing entities act as competitors in tender procedures, which, by the definition, makes their tender position unequal. Although certain limitations of freedom, in this respect, are provided by the Polish Act of 11 September 2019 – Public Procurement Law,⁵⁵ its subjective scope is quite limited.⁵⁶

The self-employment as a form of the employment of drivers in road transport raises doubts, in practice, as regards the fulfilment of the three tax prerequisites proving the actual pursuit of business activity, i.e. independence, responsibility towards third parties and bearing the economic risk by the business operator. Often, the self-employment takes place on the basis of a single contract with a single client – the transport company – and the self-employed person issues a single invoice per month to the same entity. What is more, in practice, self-employed drivers do not have independent authorisations in the form of a licence⁵⁷ and a certificate of professional competence,⁵⁸ but use an extract from the licence and a certificate of the employing entity in the vehicle they use. The above-stated raises serious doubts in the light of the provisions of the

⁵⁵ See *Act of 11 September 2019 – Public Procurement Law* [2019]. Journal of Laws of Poland, 2021, item 1129.

⁵⁶ See the Article 4 of the *Act of 11 September 2019 – Public Procurement Law* [2019]. Journal of Laws of Poland, 2021, item 1129.

⁵⁷ The kinds of licences are regulated in the Articles 5a, 5b and 6 of the *Act of 6 September 2001 on Road Transport* [2001]. Journal of Laws of Poland, 2021, item 919.

⁵⁸ See the Article 4 point 20 of the *Act of 6 September 2001 on Road Transport* [2001]. Journal of Laws of Poland, 2021, item 919. In order to obtain permit/licenses authorizing to perform economic activity in the field of national/international road transport, at least one of the natural persons managing road transport must have a certificate of professional competence. See *Przewoźnik drogowy – uzyskanie certyfikatu kompetencji zawodowych w drogowym transporcie osób/rzeczy*. In: *Biznes.gov.pl* [online]. 2021-09-12 [cit. 2021-11-08]. Available at: <https://www.biznes.gov.pl/pl/opisy-procedur/-/proc/1599>.

Polish Act of 6 September 2001 on Road Transport⁵⁹ and of the Polish Labour Code.

Such a solution also depletes revenues to the state budget coming from tax and contribution obligations and, on the other hand, the parties themselves may not be interested in changing it.

In this context, noteworthy is also the definition of a “self-employed driver”, as defined in the Article 3(e) of the Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the Organisation of the Working Time of Persons Performing Mobile Road Transport Activities.⁶⁰ According to this definition, a “self-employed driver” shall mean anyone whose main occupation is to transport passengers or goods by road for hire or reward, as defined in the Community legislation based on the Community licence or any other professional authorisation to provide the aforementioned transport services, who is entitled to work for himself/herself and who is not tied to an employer by an employment contract or by any other type of working hierarchical relationship, who is free to organise his/her working activities, whose income depends directly on the profits made and who has the freedom to, individually or through a cooperation between self-employed drivers, have commercial relations with several customers. For the purposes of this Directive, those drivers who do not satisfy these criteria shall be subject to the same obligations and benefit from the same rights as those provided for mobile workers by this Directive.

As can be concluded from the above-stated, the criteria determining the self-employment are independent organisation of work, obtaining income dependent on the profits made and the possibility of concluding contracts with a number of clients – entrepreneurs. Doubts should, therefore, be raised about situations in which self-employed drivers work with equipment handed over to them by their principal who, at the same time, bears all the costs connected with the use of the equipment, such as fuel, insurance, repairs and maintenance. The self-employed persons cannot, therefore, practically provide other services for other entities, much less with the equipment provided to them. In most cases, the self-employed

⁵⁹ See *Act of 6 September 2001 on Road Transport* [2001]. *Journal of Laws of Poland*, 2021, item 919.

⁶⁰ See *Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the Organisation of the Working Time of Persons Performing Mobile Road Transport Activities*. *OJ EC L 80*, 2002-03-23, pp. 35-39.

do not seek orders themselves, but carry out orders instructed to them by their main contractor. In particular, it is questionable, in the light of this definition, when, on the basis of one permanent contract, the income from this contract constitutes for them a source of permanent living.

In Poland, the problem in question is still quite little contested by the authorities and courts. A certain exception is the judgement of the Supreme Court of the Republic of Poland of 20 February 2018, II UK 711/16,⁶¹ in which the Supreme Court of the Republic of Poland held that the mere registration of a business activity and the subsequent conclusion of a cooperation agreement does not cause that the services provided on the basis of this agreement should be considered as provided by an entrepreneur. Although the provision of services (work) by natural persons who are entrepreneurs may take place in various conditions, a self-employed person loses the status of an entrepreneur in the situation where the liability towards third parties for the result of such acts and for the performance thereof is borne by the party commissioning the performance thereof, the acts are performed under the supervision and in the place and time specified by the party commissioning the performance of such acts and, additionally, the person performing such acts does not bear the economic risk connected with the activity carried on.

The situation is different in the Western European countries, where the use of illegal self-employment, in practice, much more often results in consequences both in the spheres of social insurance and fiscal penalties. The authorities pay attention not only to the formal issues, such as the registration of a business activity itself, but also to the actual performance of work in conditions of subordination. In the German law, the courts assume that a contract covering undeclared work or with an undervalued contribution base is invalid in the part concerning non-payment of taxes and social security contributions. In criminal law and tax law, on the other hand, there may be charges of contribution fraud against the social insurance institution and charges of making false statements regarding tax-relevant facts.⁶² The first judgements in this ar-

⁶¹ See *Judgement of the Supreme Court of the Republic of Poland Ref. No. II UK 711/16* [2018-02-20]. LEX No. 2459704.

⁶² We took the above-mentioned information from the speech of Paweł Polaczuk during the Legal Delegation Workshop on October 26, 2021, organized by the European Institute of Labour Mobility. The author analysed the provisions of the German Penal Code [§ 266a (1), § 263 (1)], the German Act on Income Tax [§ 41a (1), § 41b (1)] and the German Penal Fiscal Ordinance [§ 370 Section 1 point 1].

ea come from Spain⁶³ and Germany.⁶⁴ Under the European Union law, there is a need to adopt the definition of the self-employment that applies in the country where the transport is provided. According to the Federal Ministry of Finance, the German Act on Minimum Remuneration (in German Gesetz zur Regelung eines allgemeinen Mindestlohns, abbreviated as MiLoG) does not apply only to sole traders who provide services with their vehicle (on their transport licence). Furthermore, an additional condition for the recognition of the self-employment is that a maximum of 5/6 of the income may come from a single client.⁶⁵

Litigation aspects of challenging the self-employment by another entrepreneur on the basis of the competition principle

The judgements regarding the illusory nature of the employment contract were issued mainly in the cases where the employing entity was sued by a person employed under a civil law contract. The self-employment is much less often questioned. According to the opinion of the Supreme Court of the Republic of Poland expressed in the judgement of 3 June 2008, I PK 311/07,⁶⁶ the court may establish the existence of an employment relationship even when the parties conclude a civil law contract in good faith, but its content or manner of performance corresponds to the features of an employment relationship. In the judgement of 24 June 2015, II PK 189/14,⁶⁷ the Supreme Court of the Republic of Poland confirmed that, in the light of the Article 22 § 1 of the Polish Labour Code, the nature of an agreement should be assessed not only on the basis of its provisions adopted by the parties, which may be aimed at creating the appearance of another contract, but also on the basis of the actual conditions of its performance. However, there is no presumption of an employment relationship in the Polish Labour Code.

⁶³ See 4,3 mln euro za zatrudnianie kierowców „na działalność” – wyrok dla firmy z Hiszpanii. In: *40ton.net* [online]. 2021-10-18 [cit. 2021-11-08]. Available at: <https://40ton.net/43-mln-euro-za-zatrudnianie-kierowcow-na-dzialalnosci-wyrok-dla-firmy-z-hiszpanii/>.

⁶⁴ See Kara więzienia za zatrudnianie kierowców „na działalność” – wyrok sądu z Niemiec. In: *40ton.net* [online]. 2020-12-16 [cit. 2021-11-08]. Available at: <https://40ton.net/kara-wiezienia-za-zatrudnianie-kierowcow-na-dzialalnosci-wyrok-sadu-z-niemiec/>.

⁶⁵ See WOLAŃSKI, K. Samozatrudnienie kierowcy – korzyści i zagrożenia. *Transport Manager*. 2015, nr 6, p. 87. ISSN 2300-164X.

⁶⁶ See *Judgement of the Supreme Court of the Republic of Poland Ref. No. I PK 311/07* [2008-06-03]. OSNP 2009, no. 19-20, item 258.

⁶⁷ See *Judgement of the Supreme Court of the Republic of Poland Ref. No. II PK 189/14* [2015-06-24]. LEX No. 1764808.

In other rulings, however, in doubtful cases the Supreme Court of the Republic of Poland tends towards the will of the parties. In the judgement of the Supreme Court of the Republic of Poland of 4 February 2011, II PK 82/10,⁶⁸ it was stated that performance of property guarding services does not have to take place exclusively under an employment relationship. The decisive factor – when determining the normative basis for employing a person providing such services – should be the will of the parties to the legal relationship and the circumstances surrounding its performance. Similarly, in the ruling of the Supreme Court of the Republic of Poland of 27 May 2010, II PK 354/09,⁶⁹ it was stated that a farmer insured for many years with the Agricultural Social Insurance Fund (in Polish Kasa Rolniczego Ubezpieczenia Społecznego), who persistently refuses to conclude an employment contract with an entity which employs other farmers under employment contracts for construction work, cannot, due to the provisions of the Article 11 of the Polish Labour Code in connection with the Article 60 of the Polish Civil Code in connection with the Article 300 of the Polish Labour Code, be regarded as an employee within the meaning of the Article 22 § 1 and § 1.1 of the Polish Labour Code.

In the rulings of the Supreme Court of the Republic of Poland to date, a typological method has been developed which is used in the process of classifying a given employment relationship as an employment relationship or a civil law relationship for the provision of services.⁷⁰ The view is presented that if a contract shows common features of an employment contract and a civil law contract for provision of services to the same extent, its type (kind) is determined by the will of the parties or a consensual intention of the parties and the purpose of the contract, which may also be expressed in its name.⁷¹ Ultimately, therefore, in contentious situations, the primacy of the will of the parties is granted.

The rulings to date on claims for establishing the existence of an employment relationship concerned the situations where it was the would-

⁶⁸ See *Judgement of the Supreme Court of the Republic of Poland Ref. No. II PK 82/10* [2011-02-04]. LEX No. 817515.

⁶⁹ See *Judgement of the Supreme Court of the Republic of Poland Ref. No. II PK 354/09* [2010-05-27]. LEX No. 598002.

⁷⁰ See MUSIAŁA, A. Problematyka kwalifikacji umowy o zatrudnienie jako umowy o pracę bądź umowy cywilnoprawnej o świadczenie usług. *Monitor Prawa Pracy*. 2015, vol. 12, nr 1, p. 7. ISSN 1731-8165.

⁷¹ See *Resolution of the Supreme Court of the Republic of Poland Ref. No. I PK 101/18* [2019-04-04]. LEX No. 2649758.

be employee who challenged the form of an employment or (much less frequently) such employment was challenged by the tax authorities. By contrast, in entrepreneur-to-entrepreneur relations, there are no procedural means to challenge the form of an employment used by the other entity. The only potential possibility for such an entrepreneur could be an action for determination under the Article 189 of the Polish Civil Procedure Code. However, in this case, the legitimacy of the plaintiff entrepreneur will be questionable, because the plaintiff has to prove in the proceedings for determination that he/she has a legal interest in bringing an action against a particular defendant who, at least potentially, poses a threat to his/her legally protected interests.⁷² However, a contractual relationship with a self-employed person is not a legal relationship with another entrepreneur. In practice, the only possibility for competition remains the notification of the public law authorities (social insurance institution, state office). The fact that the self-employed may also have an interest in this form of the employment makes it even more difficult for the authorities to challenge the contract in the course of an investigation. Thus, the competition principle does not encourage the employment as an employee.

A certain limitation, in this respect, is given in Poland by the Article 95 of the Polish Public Procurement Law of 11 September 2019,⁷³ under which the awarding entity shall – in the contract notice or in the documents concerning the orders for services or construction works – specify the requirements connected with the performance of the contract in terms of the employment by the contractor or subcontractor under an employment relationship of the persons performing the activities indicated by the awarding entity in the scope of performance of the contract, if the performance of those activities consists in the performance of work as specified in the Article 22 § 1 of the Polish Labour Code. In the event that the awarding entity provides for requirements regarding the employment of employees, it shall specify in the contract documents, in particular:

- 1) the type of activities connected with the performance of the contract to which the requirements of the employment under an employment

⁷² See *Judgement of the Supreme Court of the Republic of Poland Ref. No. II CSK 33/09* [2009-06-18]. OSNC 2010, no. B, item 47.

⁷³ See *Act of 11 September 2019 – Public Procurement Law* [2019]. *Journal of Laws of Poland*, 2021, item 1129.

- relationship by the contractor or subcontractor of persons performing activities during the performance of the contract apply;
- 2) the method of verifying the employment of such persons;
 - 3) the rights of the awarding entity as regards the control of fulfilment by the contractor of the requirements related to the employment of such persons and sanctions due to the failure to comply with these requirements.

At the same time, when assessing whether a given activity is of an employment relationship nature, the Polish Public Procurement Law refers to the rulings of labour courts.⁷⁴ Failure to meet the requirements, in this respect, may be sanctioned in the contract by the payment of a contractual penalty or the possibility to withdraw from the contract.⁷⁵

The literature points out that “the obligation to specify in the description of the subject of the contract the requirements concerning employment under an employment contract is a manifestation of the legislator’s will to guarantee compliance with labour law when carrying out public procurement and to break with the practice of concluding civil law contracts in a situation where this is not justified by the nature of the relationship. Permitting such a practice, i.e. recognising the non-employment status of an employee, means that by performing work, the employee obtains a less favourable legal status [...], while the employer incurs lower costs, obtaining the same benefits as from the work of an employee employed under a contract of employment”.⁷⁶

The Article 438 § 2 of the Polish Public Procurement Law also provides for the possibility of verification of the employment as an employee by the contractor by requesting relevant documents necessary to verify the employment under an employment contract. However, as it has been

⁷⁴ See *Opinia dotycząca art. 29 ust. 3a ustawy Pzp*. In: *Urząd Zamówień Publicznych* [online]. 2021 [cit. 2021-11-08]. Available at: <https://www.uzp.gov.pl/baza-wiedzy/interpretacja-przepisow/opinie-archiwalne/opinie-dotyczace-ustawy-pzp/inne/opinia-dotyczaca-art.-29-ust.-3a-ustawy-pzp>.

⁷⁵ See Commentary to Art. 95 of the Act, Thesis IV.1 in MATUSIAK, A. Oddział 3. Ustalenie niektórych warunków zamówienia. In: M. JAWORSKA, D. GRZEŚKOWIAK-STOJEK, J. JARNICKA and A. MATUSIAK, red. *Prawo zamówień publicznych: Komentarz*. 1. wyd. Warszawa: C. H. Beck, 2021, pp. 248-284. ISBN 978-83-8235-085-2.

⁷⁶ See Commentary to Art. 95, Thesis 2 in GRANECKI, P. Oddział 3. Ustalenie niektórych warunków zamówienia. In: P. GRANECKI and I. GRANECKA. *Prawo zamówień publicznych: Komentarz*. 1. wyd. Warszawa: C. H. Beck, 2021, pp. 283-337. ISBN 978-83-8198-605-2. See also *Judgement of the Supreme Court of the Republic of Poland Ref. No. 1 PK 139/15* [2016-05-17]. OSNP 2017, no. 12, item 159.

mentioned, this act is not applicable to economic relations between private entities.

Conclusions

The costs of the employment as an employee and in particular the social benefits involved make this form of the employment inherently more expensive than the provision of services by the self-employed. This significantly affects the competitiveness of enterprises using different forms of employing staff for the same work/services. Due to the numerous welfare burdens, it is a truism that employing staff is considerably more expensive than using the services of the self-employed.

The tax and contribution incentives and the resulting higher net pay in the case of the self-employment may make this form of the employment more attractive than employment under an employment contract for some self-employed workers. The most characteristic example is the self-employment of road transport drivers discussed in this paper, with its attendant legal dilemmas.

The Polish law lacks a uniform definition of the self-employed and also lacks a legal definition of the dependent and independent self-employment. The public interest, including the fiscal and welfare aspects, is against the evasion of the employment under an employment contract by means of the self-employment. However, it is not always in the interests of the parties themselves.

The possibility for entrepreneurs in various tendering procedures to challenge the form of the employment used by a competitor is very limited, in fact non-existent. The Polish law does little to counteract this phenomenon and the practice is only just beginning to take shape. Probably under the influence of signals from the Western European case law, the fight against this phenomenon may intensify. The authorities should pay attention not only to the formal issues, such as the registration of a business activity itself, but also to the actual performance of work in conditions of subordination. Due to the public nature of the employment relationship and the related social costs, we state that a procedure action for establishing the existence of an employment relationship, due to the principle of market competitiveness, should also be available to other entrepreneurs.

A remedy for the occurrence of a false self-employment *de lege ferenda* could be the introduction of clear criteria for the application of

the self-employment, divided into the dependent and independent self-employment. A good solution would be to use some kind of entrepreneur test by legislator. The decisive presumptions for the status of the self-employed person should be e.g. providing services to more than one client, having own equipment and material resources to provide services, having own certificates of professional competence or licenses.

The permissibility of such a large differentiation of forms of the employment and the lack of effective mechanisms against evasion of the employment under an employment contract by means of the self-employment may make it significantly more difficult for entrepreneurs employing staff to compete in the free market. A certain exception is the discussed requirements resulting from the Polish Public Procurement Law; however, it has a limited subjective scope of application. The current Polish solutions, from the perspective of market competitiveness, do not encourage hiring employees.

Taking into account the public law aspects of the discussed issue, it should be concluded that the issue of a fictitious self-employment is one of the most significant problems of the contemporary labour and economic market in Poland.

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