HUNGARIAN LABOUR LAW
E - J O U R N A L

Free Movement of Labour – A Polish Perspective

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1. Introduction

An intention of the author is to highlight certain peculiarities relating to how the fundamental freedom of movement of persons within the European Union is understood by the Polish jurisprudence and labour law doctrine. A potential legal problem may result from non-conformity of the regulations of the Polish Labour Code (*Kodeks Pracy*) with the European laws. In the Polish text of the primary European law the freedom of movement was guaranteed to employees and not to persons employed on other legal basis regulated under civil laws. The term "labour" used in the title of this article is a synonym of: "work", "toil", "service". It is used to denote a work for wages as opposed to the work for profits.[1] It may be expected that the European Union defined in the second subparagraph of the Charter of Fundamental Rights of the European Union of 30 March 2010[2] as the "area of freedom, security and justice, placing the individual at the heart of its activities" should be perceived by the lawyers specializing in the labour law of the European Union as an international organization which guarantees a general freedom of movement of persons within the administrative borders of the EU Member States. However, in the Polish legal literature on the European law, in particular on the European labour law, the above freedom is clearly and explicitly identified only with the freedom of movement of employees within the European Union.[3] Title IV of the Treaty on the Functioning of the

* Jean Monnet Professor of European Labour Law and Social Security Law, Kraków, Poland. Paper inspired by the risk which might be created by a national ultra legalistic method of argumentation.

1 H. C. Black: *Black's Law Dictionary.* St. Paul (Minn.), West Publishing Co., 1983. 452.

2 OJ. EU C No. 83, 389.

3 L. Mitrus: *Swoboda przemieszczania się pracowników po przystąpieniu Polski do Unii Europejskiej.* [Freedom of movement of workers after accession of Poland to the European Union] Warsaw, LexisNexis, 2003. 15 ff.; J. Barcz (ed.): *Prawo gospodarcze Unii Europejskiej.* [Economic law of the European Union] Warsaw, Instytut Wydawniczy EuroPrawo, 2011. II-1 ff.; A. Wróbel (ed.): *Karta Praw Podstawowych Unii Europejskiej. Komentarz.* [Charter of Fundamental Rights of the European Union. Commentary.] Warsaw, C. H. Beck, 2013. 854 ff.

European Union (TFEU) of 30 March 2010[4] guarantees, just like the previous Community legislation and the primary EU laws,[5] the free movement of persons, services and capital. It means that the above fundamental right may be exercised not only by employees, persons applying for work (Article 45 TFEU, ex Article 39 TEC), but also by persons providing services under contracts not governed by labour laws (civil-law contracts) and by self-employed persons (sole entrepreneurs). The right/freedom to move within the European Union is granted also to entrepreneurs who hire employees (Article 56 TFEU, ex Article 49 TEC). The Union, as the area of freedom, security and justice respecting fundamental rights (Article 67 (1) TFEU, ex Article 61 TEC, ex Article 29 TEU) ensures no control of persons on the internal borders of the Member States (Article 67 (2) TFEU), which means that the freedom to move within the Union may be exercised by the citizens of the Member States and the citizens of third countries who are residents in the territory of particular EU Member States. Therefore, the fundamental nature of the freedom of movement of persons covers not only workers but also all individuals who legally reside in the EU Member States. The broadly understood freedom of movement within the common market was borrowed by the primary and then secondary EU laws, and adjusted to their own needs, from the regulations adopted by the Council of Europe. International treaties of that oldest regional organization, established on 5 May 1949 in London to protect the human rights and fundamental freedoms: Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, European Social Charter (ESC) of 18 October 1961 and the Revised European Social Charter (RESC) of 3 May 1996 pursue a uniform and common respect for human rights to which these international treaties refer. One of them is the right of migrant workers and their families to protection and assistance guaranteed by Article 19 (1-12) ESC and RESC.[6]

The Polish texts of all the above mentioned European treaties do not use the word "labour". However, it must be emphasized that all persons who are economically active play various social roles: the employees, the workers, the self-employed, the employers/entrepreneurs. For that reason, the expression "free movement of labour" from the Polish perspective as used in the title of this study must be considered not only as a freedom of movement of employees but also of other persons employed within so called "non-employee" legal relationships.[7] The work performed by those persons is not included by the Polish legislature in the category of "employee" employment which is governed by the provisions of the Polish Labour Code – the act of 26 June 1974.[8] Article 2 of the Labour Code

4 OJ. EU No. 83, 89.

5 The Treaty Establishing the European Community (TEC), OJ. 2004, No. 90, 864/30; The Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, signed in Lisbon on 13 December 2007, OJ. UE No. 306, 1.

6 A. M. Świątkowski: *Labour Law: Council of Europe*. AH Alphen aan den Rijn, Wolters Kluwer Law & Business, 2014. 20 ff., 49 ff.

7 For the specifics of the freedom of movement of entrepreneurs to perform services in the common EU market and the related guarantee of legal protection for posted workers or national labour markets in so called „old" Member States, see: A. M. Świątkowski: Regulating Temporary Work: Protection of the National Labour Market or the Individual Worker? In: R. Blanpain – F. Hendrickx (eds.): *Temporary Agency Work in the European Union and the United States.* [Bulettin of Comparative Labour Relations, Vol. 82.] 2013. 29 and following.

8 Consolidated text: *Journal of Laws Dz.U.* of 1998, No. 21, item 94 as amended.

includes a legal definition of an employee. An "employee" within the meaning of Article 2 of the Labour Code is a person employed under a contract of employment (*umowa o pracę*), appointment (*powołanie*), election (*wybór*), designation (*mianowanie*) or a cooperative contract of employment (*spółdzielcza umowa o pracę*). Legal limitation of the term "labour" to include employment only within a narrowly interpreted employment relationship defined in Article 2 of the Labour Code, eliminates from the broad category of economically active persons the "workers" and the "self-employed" who intend to exercise the freedom to move freely within the Union as guaranteed in the primary and secondary EU laws. If it were accepted that the right of free movement in the European Union is granted only to employees and persons applying for work under an employee employment relationship, the percentage of illegal immigrants would be drastically reduced. The great majority of the Polish immigrants, economically active in the labour markets of the European Union, are not employed as employees. Therefore they do not qualify to be treated as employees within the meaning of Article 2 of the Labour Code. *De lege lata,* one of the key issues of the EU freedom of movement of labour between Poland and other EU Member States is recognition by the Polish legal system, as compatible with the national law, of the labour migration of Polish citizens performing work in the common labour market not under contracts of employment but under civil-law contracts. Legalisation of the free movement of persons in the European Union requires recognition that the above freedom is granted not only to employees but also to other persons who perform work under non-employee employment.

2. Worker within the meaning of the labour laws of the European Union[9]

By the time of enlargement of the European Union, the Court of Justice of the European Union (CJEU) considered that the above right may be exercised by persons who enjoy the legal status of employees under the national labour laws in force in the particular Member States. An employee under the EU labour laws was an individual in an employment relationship governed by labour laws of the Member State from which he/she migrated in order to take up employment in other Member State.[10] While the English text of the TFEU and the TEC guarantees the right of free movement to workers, in the French and Polish texts the above right is granted to employees (*travaillers*). In the English language the term *worker*, as opposed to the term *employee*, includes the employed persons who are not in the employment relationship but perform work personally on a basis other than a contract of employment. Therefore, the English term *worker* includes every person who personally

9 See. A. M. Świątkowski, Autonomiczna definicja pracownika. [Autonomous definition of worker] *Monitor Prawa Pracy* [Labour Law Gazette], No. 11, 2014. 8 ff.

10 Judgments of the CJEU of: 14 July 1976, C-13/76, Donà v. Mantero [1976] ECR 1333; 5 October 1988, C-196/87 Steymann v. Staatsecretaris van Justititie [1988] ECR 1612; 15 December 1995, C-415/93 Union Royale Belge de Société de Football Association v. Bosman [1995] ECR I-4921; 20 November 2001, C-268/99 Aldona Malgorzata Jany and Others v. Staatsecretaris van Justititie [2001] ECR I-8615.

performs work for other person or entity, regardless of the legal basis of the employment.[11] The English language, as the *lingua franca* of the European Union, gave the CJEU an opportunity to change the standpoint as regards definition of the scope ratione personae of Article 45 TFEU to include persons employed, performing work personally, not qualified to be treated as employees by the national systems of labour law of the EU Member States. It is a significant new approach proving development in the jurisprudence of the European labour law of an autonomous definition of worker. The Polish Labour Code defines only the term "employee", although several provisions of the Code, such as for example Article 22 § 1^1, use the terms "work" and "employment" interchangeably, and the personal provision of work by the employee under management, on behalf and at the risk of the employer is called "employment". The interchangeable use of the terms "work" and "employment" is compatible with the freedom of choice of the basis of employment expressed in Article 10 § 1 of the Labour Code.[12] In the national systems of the labour law, in which - just like in Poland - a differentiation is made between work performed under employment relationship and work performed under civil law contracts, the protective function of the directives mentioned above applies only to employee employment. Within the meaning of the EU labour law, an employee is only a person performing work to whom the national labour laws of a particular Member State in which the work is performed granted the legal status of the employee. Crossing of the criteria applied by the legislators establishing the legal standards in the EU Member States: place of performance of work, with the national labour laws regulating the type of legal relationship under which the work is performed and specifying the scope and contents of the rights and obligations of the persons employed and the persons or entities who are employers, underpin the differentiation of the legal status of the employed persons. The above differentiation is most visible in the case of employees and self-employed persons. The employees, who traditionally are the "weaker" party to the employment relationship, enjoy the legal protection which is not granted to the self-employed. Although both the employees and the self-employed exchange certain professional skills for remuneration, only the employees enjoy the social and employment rights and the protection of permanence of the employment relationship. It is because their status is regulated by the labour laws which, apart from the exceptions explicitly specified by the legislature, do not apply to self-employed persons. A classic example illustrating the above argument is Article 303 § 1 of the Labour Code, legal provision including a statutory delegation for the Polish government to specify the scope of application of the labour laws to the self-employed outworkers. Still applicable, enacted on 31 December 1975, regulation of the Council of Ministers on the employee rights of outworkers,[13] does not grant an employee status to an outworker. Employees within the

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11 M. Terry – L. Dickens: *European Employment and Industrial Relations Glossary: United Kingdom*. London–Luxembourg–Dublin, Sweet and Maxwell – Office of Official Publications of the European Communities, 1991. 221–222, point 794.

12 See: A. M. Świątkowski: Prawo wyboru podstawy zatrudnienia. [Right of choice of the basis of employment] In: A. Kosut (ed.): *Księga Jubileuszowa Profesor Teresy Liszcz.* [Anniversary Book of professor Teresa Liszcz] Lublin, 2015. 253 ff.

13 *Journal of Laws Dz.U.* of 1976, No. 3, item 19 as amended.

meaning of Article 2 of the Labour Code are exclusively the persons employed under a contract of employment (*umowa o pracę*), appointment (*powołanie*), election (*wybór*), designation (*mianowanie*) or a cooperative contract of employment (*spółdzielcza umowa o pracę*). They perform work under employee employment relationships, legal relationships governed by the labour laws. The labour laws do not include outwork contracts (*umowa o pracę nakładczą*) as a legal basis for the employee employment relationship. Although the "outworkers" perform work exclusively for a specified employer, called the "outwork employer" (*nakładca*), they transfer to the latter not their skills but a finished product. The outwork contracts belong in the category of contracts for the provision of services which include also civil-law commission contract (*umowa zlecenia*), task-specific contract (*umowa o dzieło*), agency contract (*umowa agencyjna*), the subject-matter of which is work, identical or similar to this performed by employees in so called employee employment. The Polish labour laws divide between two types of employment: employee employment and non-employee employment.[14] The latter, classified as a civil-law employment, is nowadays considered a secondary form of employment. It is because the provisions of the civil law regulating this form of employment do not guarantee legal protection equal to this guaranteed to employees by the labour laws. But what is the difference in the method of performance of work which is decisive for the completely different legal and social status of the employee, the worker or the self-employed? It is the easiest to distinguish between the self-employed and the worker. The first term, the "self-employed" is used to denote a person who is economically active and whose work consists in provision of services within his/her activity as a sole entrepreneur. A characteristic feature of the self-employment is performance of work under civil law contract for provision of specific services. Such characteristics of the self-employment allows distinguishing a self-employed from an employee. However it does not allow distinguishing between the self-employed and a person employed under one of the civil-law contracts. For that reason the Polish law provides for an additional criterion for differentiation of workers which is the fact that the self-employed may employ other persons who enjoy the legal status of employees. However, the above additional criterion for distinguishing one category of economically active persons who conduct business activity with their employees changes the level of legal analysis. A self-employed conducting business (service) activity in which he hires employees changes his legal status from the employed into the employer. Therefore he cannot be taken into account in legal considerations on the dependencies between the economically active persons, including employees, workers and self-employed who are not employers. What remains relevant is the legal status of the self-employed. The most frequent cases classified as misuse of the law are situations where upon demand of an entrepreneur who acts as the employer in employment relations, the persons who were previously employees now register as sole-

[14] See: A. Musiała: *Zatrudnienie niepracownicze*. [Non-employee employment] Warsaw, 2011. 99 ff.; M. Gersdorf: *Prawo zatrudnienia*. [Employment law] Warsaw. 2013. 75 ff.; A. M. Świątkowski: Niepracownicze (cywilno-prawne) stosunki zatrudnienia. [Non-employee (civil-law) employment relationships] In: K. W. Baran (ed.): *System prawa pracy.* [Labour law system] Warsaw, Wolters Kluwer, T. VII, 2015. 47 ff.

entrepreneurs and change their legal status to self-employed. The Polish laws do not set out an official definition of worker. In the Polish case-law[15] and doctrine[16] the criterion for distinguishing between a worker and a self-employed has been subordination of an employee to the employer. The legal basis for such differentiation is Article 22 § 1 of the Labour Code. However its interpretation does not sufficiently reflect the intention of the legislature. According to the prevailing opinions presented in the case-law of the Polish Supreme Court and argumentation in the professional labour law literature, subordination is interpreted first of all as an obligation of an employee to perform work for and under the supervision of the employer. Article 22 § 1 of the Labour Code emphasizes mainly the powers of the employer to specify the place and time of performance of work.

In fact, the legal situation in the employee and non-employee employment relationship of a worker is not significantly different from the legal situation of the self-employed person. The scope and level of subordination of an economically active person, considered by the legislature an employee, is not significantly different from the situation of other person obliged to provide a specific service consisting in performance of work. This follows, among others, from historical background where a contract of employment was classified in the Code of Obligations[17] as a contract for the provision of services still used today to establish non-employee (civil-law) employment relationships. In my opinion, analysis of Article 22 § 1 of the Labour Code should focus on the mutual obligation clearly expressed in this provision and imposed on the parties to the individual employment relationship included in the category of employee employment: employee's obligation to perform work and employer's obligation "to hire an employee for remuneration". In the contemporary labour relationships there is a gradual withdrawal from the typical form of employment of employees on a full-time basis, under a contract of employment of indefinite duration, in a "closed" establishment allowing the employer to directly supervise the particular activities falling within the type of work specified in the contract of employment. The views presented in the Polish case-law in matters relating to fundamental rights and obligations of the parties to individual labour relationships are well established. Upon establishment of an employment relationship the employer's duty is to provide work agreed upon by the parties to the contract of employment and to pay remuneration for the performed work or for readiness to perform work. On the other hand, the employee's duty is to perform the work earnestly and diligently under the supervision of the employer. Failure to fulfil the above mutual obligation of the parties to the individual labour relationship entitles the employee to claim performance (permission to perform work, payment of remuneration)[18] or bring an action for determination of existence of the employment

15 See: judgments of the Polish Supreme Court referred to by A. M. Świątkowski in Kodeks pracy. *Komentarz*. [Labour Code. Commentary] Warsaw, 2012. 114 ff. [Świątkowski (2012)]

16 Gersdorf op. cit. 41 ff.

17 Regulation of the President of the Republic of Poland of 27 October 1933, *Journal of Laws Dz.U.* No. 32/33, item 598. Title XI "Umowy o świadczenie usług" *["Contracts for the provision of services"]*. Chapter I. "Umowa o pracę" *["Contract of employment"]* (Article 441–476).

18 Świątkowski (2012) op. cit. 119 ff.

relationship. A precondition for the efficient examination of the case based on Article 189 of the Code of Civil Procedure is that the claimant concerned convinces the court that the action for determination of existence of the legal relationship or right guarantees to the greater extent the protection of the rights of the claimant.[19]

In the continental labour law system, including in Poland, a precondition for creation by the case-law of an "autonomous" definition of a legal term is an explicit authorisation of the legislature. A classic example illustrating the above statement are judgments of the Polish Court of Justice which explained that Article 8 (2a) of the Act of 13 October 1998 on the social security system[20] extended the concept of an employee for the social security purposes beyond the employment relationship.[21] The extension of the scope ratione materiae of the term "employee" consists in incorporation in that term of an employment based on a commission contract (*umowa zlecenie*) performed for the employer with whom the worker remains also in the employment relationship, as well as under a task-specific contract (*umowa o dzieło*) concluded with a third party if under that contract the worker performs work for a person or an entity with whom he remains in employment relationship. For the social security purposes, performance of work under civil-law contracts concluded both with an employer and a third party where the work is performed for the employer, is treated as provision of work under employment relationship between the employee and the employer.[22] The Polish legislature extended, for the social security purposes, the concept of "employee" to include certain examples of non-employee (civil-law) employment, as it intended to limit the use by the employers of civil-law contracts concluded with their own employees for the performance of identical tasks performed under the employment relationship. Combination of the employee and non-employee employment between one and the same parties to the legal relationships governed by labour laws and by civil laws allows the employer (*pracodawca*) who is at the same time a principal (*zleceniodawca*) to avoid the burdens on account of social security contributions and compliance with protective standards of the labour law. Despite the extension of the term "employee", the concept of employee in the Polish social security system does not correspond with the statutory definition of this term in Article 2 of the Labour Code. The Polish labour law system and civil law system still distinguish the three categories of economically active persons providing work: employees, persons employed under civil-law contracts and self-employed.

The notions: "employee", "worker" and "self-employed" overlap. An employee is always a worker subordinated to the employer. On the other hand the self-employed, depending on whether he is dependent on the employer or he is an economically active person independent from a person or entity

19 Judgment of the Polish Supreme Court of 10 April 2014, II PK 179/13, *Monitor Prawa Pracy* (MoPr) [Labour Law Gazette], vol. 9, 2014. 478 ff.

20 Consolidated text: *Journal of Laws Dz.U.* of 2013, item 1442 as amended.

21 Judgments of the Polish Supreme Court of: 18 October 2011, III UK 22/11, OSNP 2012, No. 21-22/2012, item 266; 11 May 2012, I UK 5/12, Orzecznictwo Sądu Najwyższego Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych (OSNP) 2013 *[Case-law of the Polish Supreme Court, Chamber of Labour, Social Security and Public Affairs, 2013]*, No. 9-10, item 117.

22 Judgment of the Polish Supreme Court of 23 May 2014, II UK 445/13, *MoPr* vol. 9, 2014. 493.

to whom he provides services is included in one of the two categories: dependent self-employed or independent-self-employed.[23] With the use of the English legal terminology, the case-law of the CJEU extended the term "employee". As opposed to the Polish legal system under which the legislative decision resulted in extension of the term "employee" only in one area of the social security law, in the EU labour laws the interpretation of the case-law resulted in dichotomic division between dependent and independent employment. Regardless of the legal basis and legal framework of the first form of employment, economically active persons who perform subordinated work were treated as employees performing work under employment relationship. Establishment by the CJEU of an autonomous definition of worker consists in including all the workers, employees and self-employed persons bound by legal relationships based on mutual obligations of provision of work by the employer and performance of work by the employed person, in the sphere of influence of the European labour law. Nowadays, in defining the term worker, the CJEU does not follow the national labour laws of particular EU Member States but takes the view that regardless of the legal basis of employment, working time, amount of remuneration, duration of employment, each work performed by an individual is considered employment relationship.[24]

The dichotomic division of persons performing work into two basic categories: "employee employment" and "non-employee employment" as introduced by the case-law of the CJEU necessitates revaluation of the legal definitions still used in the Polish labour laws. The above postulate is not as far reaching as the proposal, recently presented by M. Gersdorf, to replace the Labour Code with a Code of Employment and change the name of the branch of law governing the labour relationships from the "labour law" to the "law of employment".[25] It refers to the previously presented proposals to include under the scope of the labour law all the categories of dependent employment, regardless of the name, legal basis of the concluded contract and legal framework of the legal relationship based on mutual rights and obligations of the parties: the person performing work and the employer.[26] The future of the labour law, in Poland and in other EU Member States, as a branch of law separate from the civil law, depends on the ability to bring the fundamental national legal terms and employment concepts in conformity with the EU standards.[27] Deviation by the CJEU from the previous definition of employee and replacing it with an autonomous definition of worker which includes also a "dependent self-employed" proves incompatibility of the Polish individual labour laws with the contemporary Union

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23 C. Barnard: *EU Employment Law*. 4th edition. Oxford, Oxford University Press, 2012. 148.

24 Judgment of 4 June 2009, Joined Cases C-22/08 and 23/08 Vatsouras v. Arbeitsgemenischaft [2009] ECR I-4585, § 30.

25 Gersdorf op. cit. *passim*.

26 A. M. Świątkowski: Przedmiot stosunku pracy. Rozważania *de lege lata* i *de lege ferenda*. [Subject-matter of the employment relationship. De lege lata and de lege ferenda deliberations] In: L. Florek – Ł. Pisarczyk (eds.): *Współczesne problemy prawa pracy i ubezpieczeń społecznych.* [Contemporary problems of labour law and social security law] Warszawa, 2011. 47 ff.

27 A. Świątkowski: Przyszłość prawa pracy. [Future of the labour law] In: *Polskie prawo pracy w procesie przemian*. [Polish labour law in transformation] Warszawa–Kraków, 2001. 9 ff; Idem: Ponownie o przyszłości prawa pracy. [Once again about the future of the labour law] In: Z. Góral – Z. Hajn (eds.): *Przyszłość prawa pracy. Księga Jubileuszowa Prof. Michała Seweryńskiego*. [Future of the labour law. Anniversary book of professor Michał Seweryński] Łódź, 2015. 297 ff.

standards. The legal deliberations presented in the following, III part of the study, prove that there are no significant differences between the work performed under employment relationship and non-employee employment justifying a potential threat that the fundamental freedom of movement in the European Union would be limited for Polish citizens seeking employment under civil law contracts in other EU Member States.

3. Common features of the employee employment and non-employee employment[28]

Voluntary nature, personal provision of work in a continuous manner, subordination, performance of work for the employer bearing risks associated with the employment and performance of work for remuneration, were considered by the Polish Supreme Court the fundamental features of the employment relationship, distinguishing it from other legal relationships under which work may be performed. The reasoning of the said judgment does not include any deliberations on the mentioned elements of the employment relationship decisive for distinguishing that legal relationship from other legal relationships governed by provisions of the civil law under which the work may also be performed. All the features listed by the Supreme Court in the first argument of the judgment issued on 23 October 2006 in case I PK 110/06[29], which constitute the foundation of the legal relationship governed by labour laws, exist also in civil-law contracts under which the work may also be performed. The first argument of the quoted judgment of the Supreme Court in case I PK 110/06 almost completely quotes the classic, textbook definition of work governed by individual labour laws.[30] One of the characteristic features of that definition is that the doctrine and case-law imposed on the employer the risks resulting from entering into legal relationship governed by labour laws. The general belief has been that the employer bears the personal, social, technical and economic risk. It is because he is obliged to hire employees and remunerate them. The above duties of the employer should correspond with employees' rights to demand provision of work and payment for the work performed or for the readiness to perform the work. This is how the employer's risk is perceived by the legislature as Article 81 § 1 of the Labour Code provides for the right to remuneration for the employees ready to perform the work for the time on non-performance of work if the failure to provide the work to the employees was caused by reasons attributable to the employer. The Polish Supreme Court in its judgment in case I PK 110/06 associates the risk of the employer with the subordination of the employee to the employer under whose supervision the employees are obligated to perform work. The standpoint presented by the Supreme Court may possibly be interpreted to mean that the essence of the work performed under a contract of employment in the employment relationship determines different position of each

28 Świątkowski (2015) op. cit.

29 *Monitor Prawa Pracy* [Labour Law Gazette], No.1, 2007. 43–44.

30 See: A. M. Świątkowski: *Polskie prawo pracy.* [Polish Labour Law] Warsaw, 2014. 24 ff. [Świątkowski (2014)]

of the parties to the individual employment relationship. The employer should show an initiative and entrepreneurial competences in seeking and organizing work for employees. He should manage the employees, meaning that he should tell them what work they should do, when they should do it and how they should do it in compliance with standards of diligence and due care applicable in the establishment. The legislature granted to the employer the right to apply disciplinary measures to the employees violating regulations of the employer enacted to ensure proper organisation and order of the working processes. On the other hand, the employees' duty is to remain at the disposal of the employer and to earnestly and diligently fulfil the instructions of the employer relating to the work they have undertook to perform at the time of conclusion of the contract of employment. The above presented division of roles in the individual labour relationships made by the legislature and accepted by the case-law indeed was based on the concept of subordination of the employee to the employer. In the view of the presented concept of the individual relationship, the employee who is formally equal to the employer, seems to be a party fully dependent on the employer during working hours, obliged to be present in the place and during the working hours indicated by the employer and to earnestly and diligently perform the work provided by the employer. Any obstacles not resulting from employee's failure to fulfil the two fundamental duties: to show readiness to work and to earnestly and diligently perform work, are for the account of the employer. The legislature treated the employer as an entity exclusively liable for the legal and financial consequences of employer's failure to fulfil his two fundamental duties to the employees. The first is provision of work and enabling performance of the work and the second – remunerating the employee for the performed work or for the readiness to perform the work. The above ideal model of the relationship which should exist between the parties to the individual labour relationships was disturbed by the legislature. The model in which the risk of employee's failure to properly fulfil his duties, not caused by the employee, should be borne by the employer who failed to fulfil his statutory obligation to perform formal control and supervision over the employee obligated to remain at the disposal of the employer, was replaced with the practice according to which the employer, because of his powers to control his employees granted by the legislator, should bear any direct and indirect consequences of disturbances in the ideal, based on subordination, model of the individual employment relationship. The principle of full risk of the employer means that the employees will not bear the consequences of events which are completely beyond control of the entrepreneur hiring the employees. On the part of the employee, the principle of the full risk of the employer should be treated as an assurance that the employee may bear the negative consequences relating to not obtaining the remuneration agreed upon in the contract of employment by the parties to the individual employment relationship only where for the reasons attributable to such employee the latter failed to observe diligence and due care in the performance of work. This is how the previously mentioned provisions of chapter five of the Labour Code regulated liability of the employee for the damage caused by the latter in the employer's or third party's property. The

employer fully bears the personal and social risk resulting from wrong selection of an employee, the unintentional faults and errors of the latter and random events preventing time-limited performance of work.

The principle of equivalence of considerations in the labour law contradicts the argument that the full liability for technical and economic risks is borne exclusively by the employer. The legal and economic consequences of inability to perform work, adversely affecting the employee, although beyond the control of the latter, were shared by the legislator between the parties to the individual employment relationship. The employer's duty is to pay to the employees the remuneration for the performed work. For the time of readiness to work, when due to reasons not attributable to the employer the employee cannot perform work, the latter will not be remunerated. Even where the obstacles in performance of work were caused by the reasons for which the employer may be responsible, the employee is not guaranteed, for his readiness to work, the average remuneration calculated according to the rates paid during a settlement period specified by the legislature but only the remuneration according to the employee pay grade specified at the hourly or monthly rate. In the currently widespread practice where employers determine the pay grade at the minimum wage level and use other wage components as incentive instruments, the work stoppage for the reasons beyond the control of the employer must be considered an event the negative consequences of which will be borne by both parties to the individual employment relationship and not exclusively by the entrepreneur as would be the case if the principle of full risk of the employer applied.

A contract of employment is considered a best effort agreement and not the result-based agreement. The remuneration for the earnestly and diligently performed work should be paid to the employee regardless of the performance and work results achieved by other employees of the same employer. However, making the remuneration of the employees who are part of a staff of an enterprise or of teams of employees dependent on the effects of the business activity of larger units whose members are individual employees, constitutes a deviation from the principle expressed in Article 78 § 1 of the Labour Code, namely the principle of individual nature of remuneration for work, the principle of determining the amount of the remuneration so that is corresponds to the type of work performed by an individual employee, his qualifications required for that type of work and the quantity and quality of work performed by that employee.

The fragment regarding the risk of the employer – inspired by the standpoint presented in the case-law which associates risk of the employer with the submission of the employee to the management of the employer in the work process and considers liability of the employer one of the fundamental features distinguishing work performed under employee employment relationship established under a contract of employment from the work performed under civil-law contracts in other legal relationships – must end with a conclusion that both of the parties to the individual employment relationship bear,

however to different extent,[31] the technical and economic risk of limitation of ability or inability of the employer to provide work and the resulting inability of the employee, ready to work, to perform such work. Therefore, it cannot be held that the principle of risk of the employer adopted in the labour law is characteristic only for the employee employment relationships.

Under the non-employee employment the risk is also shared – however differently than in the employment relationship – between the principal and contractor, ordering party and the service provider. A person who performs work under a civil-law contract is liable pursuant to the principles specified in the provisions of chapter II "Consequences of non-fulfilment of obligations" of the third part "Obligations" of the Polish Civil Code (Article 471–486).[32] Conditions for contractual liability of a debtor for damage caused by non-performance or improper performance of an obligation include: 1) breach of an obligation consisting in non-performance or improper performance of the obligation; 2) occurrence of damage; 3) a causal link between condition one (non-performance or improper performance of an obligation) and two (damage). In particular, a debtor is liable for his own wrongful act and for the acts of third parties whom he used to perform the obligation. Parties to a civil-law contract may limit or extend the scope of contractual liability of a debtor. In order to rebut the presumption established in Article 471 of the Civil Code, a debtor must prove that the damage occurred as a result of events for which he is not responsible. The above obligation shows a significant difference in the share of risk in the civil-law relationships and that in employment relationships. Article 116 of the Labour Code obligates the employer, *expressis verbis,* to prove the circumstances justifying the financial responsibility of the employee and the amount of the damage sustained.[33] The second difference between the regime of liability for damage caused by the employee and damage caused by a person performing work under a civil-law contract follows from the scope of liability. An employee who is not bound by a contract on financial responsibility for the entrusted property concluded with an employer, has limited liability for the damage. Liability of the person performing work under a civil-law contract is full. It falls within the actual limits of damage caused (*damnum emergens*) and includes lost profits of the injured party (*lucrum cessans*). The same is the extent of liability of employees who caused damage intentionally. According to the third argument of the above mentioned resolution of the full Chamber of Labour and Social Security of the Polish Supreme Court of 29 December 1975 (V PZP 13/75), where the Labour Code provides for the full liability of an employee, it shall mean liability for loss and loss profits. The Labour Code does not specify the criteria according to which the amount of damage should be determined, however under Article 300 of the Labour Code it is possible to apply provisions of Article 363 § 2 of the Civil Code which

31 More about the continuing disproportion in the employee's share and employer's share of risk in the employment relationship: Ł. Pisarczyk: *Ryzyko pracodawcy.* [Employer's risk] Warsaw, Wolters Kluwer, 2008. 355.

32 Act of 23 April 1964, *Journal of Laws Dz.U.* No. 16, item 93 as amended.

33 Resolution of the full Chamber of Labour and Social Security of the Polish Supreme Court of 29 December 1975, V PZP 13/75, Orzecznictwo Sądu Najwyższego Izba Cywilna i Pracy (OSNCP) 1976 *[Case-law of the Chamber of Labour and Social Security of the Polish Supreme Court]*, No. 2, item 19.

provide for application of objective criteria in determining the amount of compensation. It means that the amount of damage should be determined according to retail prices and not wholesale prices.[34] An employee is also obligated to pay interest, upon demand of the injured party, from the date when the damage was caused.[35]

The system of liability of employees[36] who concluded with the employer a contract on financial liability for the damage caused to the employer as one of several contracts which may be concluded by the parties to the employment relationship and which are thus treated in the legal literature as contracts "accompanying employment relationships"[37], is very similar, almost identical with the system of civil-law contractual liability of debtor to the creditor resulting from non-performance or improper performance of an obligation.

In both of those systems of liability: limited, governed by the provisions of the Labour Code and applicable to employees who did not conclude with the employer a contract on financial liability for the damage caused to entrusted property, and full liability regulated in the Civil Code, a fault (*culpa*) is considered the only, common basis for *ex contractu* liability.

The effect of convergence of the principles of liability for damage caused by persons performing work under comparable legal relationships, the employee relationship and civil-law relationship exists in case of liability for damage caused by an employee to a third party in the course of fulfilment of his employee duties. The exclusive obligation of the employer, stipulated in Article 120 of the Labour Code, to satisfy the damage caused by the employee corresponds to the liability imposed on persons who entrust performance of work to a person under a civil-law contract, for the damage caused by the contractor (Article 429 of the Civil Code). More rigorous regime of liability for tort is defined in Article of the Civil Code. According to this provision, a person who entrusts, on its own account, performance of an activity to another person subject to its management, shall be liable for damage caused by the contractor obligated to follow the instructions of the party ordering performance of a specific work or task.

Performance of work under a civil-law contract by a person running an enterprise, that is – within the meaning of the previous provisions of the Labour Code applicable prior to the amendment

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34 Świątkowski (2012) op. cit. 639.

35 Resolution of 7 judges of the Polish Supreme Court of 22 September 1970, III PZP 18/70, OSNCP 1971, No. 1, item 5.

36 Argument: "The parties to the civil-law contract for the provision of services may, according to the freedom of contract, establish the scope of liability of the service provider by reference to the provisions of the Labour Code on the financial liability for the property entrusted subject to return or settlement (Article 124 of the Labour Code)"– ruled the Polish Supreme Court in the judgment dated 9 December 1999, I PKN 434/99, Orzecznictwo Sądu Najwyższego, Izba Administracyjna, Pracy i Ubezpieczeń Społecznych (OSNAPiUS) 2001 *[Case-law of the Polish Supreme Court, Chamber of Labour, Social Security and Public Affairs, 2001]*, No. 9, item 311. In the reasoning of the said judgment no substantial arguments were presented. The Supreme Court merely stated that "there are no legal obstacles for regulating liability of a contractor in the civil-law employment relationship in accordance with the rules applicable in the employee employment relationship. Moreover, it is functionally justified". Please note that there is an inconsistency between the arguments of the quoted judgment and its reasoning in the part relating to a person or an entity with whom such contract can be concluded: "the service provider" or a "contractor".

37 Świątkowski (2014) op. cit. 104 ff.

introduced by the act of 2 February 1996[38] – establishment in the material sense, meaning buildings, equipment, raw materials and tools used in the working process, makes the person performing the work, also alone, an entrepreneur to whom provisions of Article 435 of the Civil Code apply. The said standard is commonly applicable, also where a personal injury or damage to property was caused by the contractor to the principal or by the service provider to the ordering party. The basis of liability of a person performing work under a civil-law contract is a threat of damage resulting from use – in the physical sense, regardless of the legal title – in the process of performance of work, of the contractor's enterprise or establishment powered by the forces of nature (steam, gas, electricity, liquid fuel, etc.). A condition of liability for damage is operation of an enterprise and not particular activities undertaken by the person performing work under a civil-law contract, damage, and a causal link between the operation of an enterprise or establishment powered by the forces of nature. The risk regulated in Article 435 of the Civil Code is not absolute. For the reasons listed in the analysed provision: *vis major*, exclusive fault of the injured party or of a third party – liability of the contractor is excluded. Exclusive fault is where the fault may be attributed solely to the injured party.[39] If the fault may be attributed exclusively to the injured and/or the third party, the jointly and severally liable for the damage is the injured and/or the third party and the entrepreneur.

Risk as a legal basis of liability for damage caused to the parties to legal relationships under which work is performed is uniformly regulated in the civil laws which apply also to the employment relationships where damage was not caused exclusively by an employee or person performing work under one of the civil-law contracts running an enterprise or an establishment powered by the forces of nature. The point is that subject to comparison in this study are persons performing work under employment relationship (employees) and persons employed under civil-law contracts. The latter, if they hire employees or are assisted by other persons whom they employ under civil-law contracts, may act – as previously mentioned – as employers or entrepreneurs. Therefore, while highlighting the similarities regarding the share of risk of the employees and non-employees, it is not possible to maintain a comparable comparative level since the former may only play one social role of employees while the latter, apart from the role of contractors may also play the role of entrepreneurs if, for the performance of the entrusted work, they use separate organisational, technical, property and financial resources. The risk, considered by the jurisprudence a characteristic feature of the employee employment is therefore, as a rule, equally characteristic for the non-employee employment. Comparisons of risk which, under different private law systems: civil law and labour law, is attributed to the parties to legal relationships under which work is performed, make sense only where the risk is compared from the perspective of one and the same party to two different legal relationships. In case of employment

38 *Journal of Laws Dz.U.* No. 24, item 110.

39 W. Warkałło: *Odpowiedzialność odszkodowawcza. Funkcje, rodzaje, granice.* [Liability for damages. Functions, types, limits] Warsaw, 1972. 269 ff.

relationship it means an employee. In case of a civil-law relationship established by one of civil-law contracts under which work may be performed a reference point for the above comparison may only be a contractor – the employed who in the course of his work does not use an enterprise or an establishment powered by the forces of nature.

4. Employment relationship as a legal basis of the Union area of freedom, security and justice

The latest tendency in the current Polish labour law doctrine is based on the assumption that employment governed by the labour laws is a foundation of social justice. As there is no acceptance for inclusion within the sphere of the labour law of the persons employed who are not employees, because of the costs to the employer, a proposal has been presented in the labour law literature to change the name of the branch of law regulating individual employment relationships and replace the term "labour law" with the term "employment law", and the term "Labour Code" (the act which is a source of rights and obligations of the parties to the employment relations) with "Employment Code".[40]

Inclusion of the non-employee employment in the employment relationships governed by the labour law will not significantly change the structure of employment in Poland, even if we take into account critical arguments of trade union organisations emphasizing that the percentage of persons employed in Poland under a task-specific contract (*umowa o dzieło*) is the highest in the European Union. Thus the Employment Code would still apply mainly to work performed under employee employment relationships. The non-employee employment was and will still be one of many forms of work where only some of them can be covered by the contract labour law.

The civil-law employment in the contemporary Poland is marginal, although it may be a serious political problem for the governing authorities. To eliminate the practices which adversely affect the state budget (avoiding payment of public levies on account of employment relationship), it is difficult to reform the long-established legal order. The specifics of the legal regulations applicable in Poland – the country where after the change of the political system the laws enacted during the first years of the interwar period were in force – is that the Labour Code enacted during the Polish People's Republic (PRL) is still in force. This proves a solid legal work which survived the political changes.[41]

In arguing for the necessity to adopt reasonable legislation, that is the Employment Code, M. Gersdorf[42] declares that she means not only inclusion in the sphere of the labour law (which will be named law of employment) of the civil-law contracts for the provision of work but also weakening the legal and social safety of workers guaranteed by the current Labour Code which would be repealed.

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40 Gersdorf op. cit. 169 ff.

41 A. M. Świątkowski: Kontynuacja i zmiana instytucji indywidualnego prawa pracy w Polsce. [Continuance and transformation of concepts of the individual labour law in Poland] *Studia z zakresu prawa pracy i polityki społecznej* [Studies on labour law and social polcy], Kraków, 1999/2000. 59 ff.

42 "It is about waiver of certain protective instruments adopted in the employment relationship and, somehow in exchange, granting certain protection to all workers." Gersdorf op. cit. 175 ff.

In the current situation such statement is of academic nature. However, a prelude of changes can be seen on the following pages of the quoted monograph. By emphasizing the "serious antagonisms" in the employment relations, the author first of all takes into consideration the current model of collective labour relations based on a conflict of interest. She does not take into account the necessity, resulting from EU membership, for the social partners to carry out a social dialogue.[43] She refers to more general issues relating to protective and organisational functions of the labour law. She only repeats the question whether the labour law should secure stability of the employment relationship (she refers to "permanent employment") or it should favour employability. By emphasizing the differences in interests between employees employed in the old protective system and "parvenus" - young workers employed under "atypical" (and now typical) forms of both employee employment and non-employee employment and between employers hiring employees under more or less favourable forms of employment, she gives foundation for the argument that the "law of working men should be extended to include the segment of the contracts of employment which refers to social security".[44] The author is aware of the consequences of the presented proposals. She is trying to assure the readers that her proposal is aimed at "more evolutionary" changes".[45] She assures that "revolutionary changes of law are not good". However she forgets that she proposed to change the name of the branch of law, the code and definitions of the parties to the employment relationship. She limits her postulate to extend the employment law "only to certain issues of civil-law contracts relating to the social status of workers". According to the above, the intention of the author is not to grant the workers the employee rights but merely the social rights. Considering the fact that the fundamental part of the case-law, under the applicable labour laws and social security laws, refers to sham contracts of employment, concluded with no intention to perform work under employment relationship but only to acquire rights to social security benefits (maternity allowances, sickness benefits, pensions), the legal concept established in Article 22 of the Labour Code allows the labour courts to distinguish between real contracts of employment and the contracts concluded only to obtain social security benefits under false pretences. Replacement of the labour law with the law of employment would imply the necessity to weaken the employment relationship considered a foundation of social justice.

Inclusion of the non-employee employment in the sphere of influence of labour law and replacement of the Labour Code with the Code of Employment would allay concerns of legalists who may feel concerned when the EU freedom of movement is exercised by non-employees employed under civil-law contracts. Lack of the legal definition of "worker" in the Polish labour law and defining in Article 2 of the Labour Code of the term "employee" does not justify the radical proposal to replace the labour law with the law of employment. The autonomous definition of worker developed by the case-

43 A. M. Świątkowski: Gwarancje prawne pokoju społecznego w stosunkach pracy *[Legal guarantes of social peace in the labour relations]*, Warsaw, C. H. Beck, 2013. 107 ff.

44 Gersdorf op. cit. 177.

45 Idem, 178.

law of the CJEU may be followed by the EU-oriented Polish case-law under the mentioned Article 22 § 1^1 of the Labour Code. There is no legal reason why the above provision should not be used (apart from the above distinction, for the protection of the national social security system, between the real contracts and sham civil-law contracts under which gainful work is performed) also to distinguish between workers enjoying the freedom to move within the Union under two systems of labour law: Polish (Article 2 of the Labour Code) and European (Article 45 TFEU, ex Article 39 TEC).