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

Everyone who works should be guaranteed decent working conditions

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The definitions of employees and employers in the Polish system (Articles 2 and 3 of the Labor Code) eliminate the possibility of guaranteeing professionally active persons the right to work in a decent manner. The above statement applies to work performed within the framework of employment platforms. The specificity and challenges created by employment platforms are expressed in negating the existence of individual parties to employment relationships. In the vast majority of cases, platforms do not act as employers. So they do not treat the vast majority of those working on the platforms as employees. They consider them to be persons conducting economic activity consisting in the provision of services consisting in the performance of specific tasks for the benefit of persons or entities indicated by the platform. The distinctive features of employment within the platform are the existence of a tripartite legal relationship between the platform, employees and clients. According to the platform's managers, none of the ties established between the platform and its clients, the platform and the employees and employees and clients are a legal bond regulated by labor law. None of the parties to the legal relationship established by the platform with the employee, which is manifested in the provision of services consisting in the performance of work for third parties, remains – according to the platform – in individual employment relationships. Platforms also do not consider themselves intermediaries in establishing employment relationships with persons or entities to whom they provide services consisting in work. The author tries to establish who are the participants of these legal ties for each of the persons or other entities involved and participating in triangular legal relations on the platforms. In his opinion, it is therefore necessary to make far-reaching changes to the provisions of the Labor Code. The amendment to the binding labor protection standards should take the form of an autonomous definition of parties to employment relations: employees and employers, used twice in the history of the labor law of the European Union. It is possible, and even necessary, because the norms of Polish labor law do not contain a legal definition of human work and – apart from employees – people who perform it, commonly considered and recognized as professionally active. The use of European Union labor law models in this matter will be a unique proof of the full knowledge,

innovation and progressiveness of the authorities of the Member State in applying legal concepts in the construction of models in the national labor law systems of the EU Member States.

1. Work and the labor market today

The term "today" means the times of global post-industrial economy. A hallmark of the post-industrial era are two mega trends: the globalisation of economic, financial, information and cultural markets and the possibility of almost unlimited direct communication between people using mass communication tools: mobile phones and the Internet[1].

One of the most important structural elements of the post-industrial society is the labor market where – according to economists – goods and work are exchanged for a fee. Continuous human work conquers everything[2]. It is not only the source of wealth, the father of pleasure, the first duty, the road to salvation, the foundation for finding oneself and defining one's own identity and the element that binds people together, as great philosophers, scholars and writers used to say and write. It is the most important thing – one may complain about work but one cannot live without it. For some people work can be a form of an escape and for people who have nothing better to do work only takes away three great misfortunes: boredom, vice, and poverty. In this article about fair working conditions for all working persons, an optimistic statement must be emphasised – that a person can achieve anything with his own, honest work and effort. Work has been and will continue to be seen as professional activity carried out on the labor market. The professional term "labor market" covers all legal and organisational forms and employment processes for those who provide work - the "employed" for the "employers", not only under the concluded contracts for the performance of work. The components of the legal concept of "labor market" include also institutions, conditions, factors which, together with the legal and organisational elements and relations between the parties to employment relationships, form an employment platform. It is an activity governed by the provisions of various fields of law, not only labor law. It involves any processes including efforts aimed at: 1) taking up employment; 2) by the parties to employment relationships (the employed and the employers) of their obligations and exercising powers regulated by relevant laws governing the rights of working persons; 3) social security benefits due to working persons who cannot perform work as a result of temporary or permanent inability to work. The provisions of law governing the above institutions, processes, factors and conditions related to work have been called by some specialists in the field of labor law and social policy the "labor market law". On the other hand, the actions and plans of public authorities on the labor market in the initial

1 Prawo i polityka rynku pracy w epoce postindustrialnej, Część I: Przyszłość pracy. [(Labor Market Law and Policy in the Post-industrial Era., Part I: The Future of Work.) *Horyzonty Polityki,* vol. 10., n. 30. (2019) 295–313.

2 John Naisbitt: *Megatrends. Ten New Directions Transforming Our Lives.* New York, Warner Books Inc., 1982.; Daniel Bell: *The Coming of Post-industrial Society: A Venture in Social Forecasting.* New York, Basic Books, 1999.

phase of the post-industrial era in Poland are considered to be important elements of social policy as one of the public policies. A characteristic feature of this market in the post-industrial era is the domination of atypical forms of employment. However, the term "post-industrial era" is too narrow to represent the extent of the changes that have occurred in labor and employment relations. In the post-industrial era, the fourth industrial revolution is taking place, consisting in the increasing use by the employers of electronic devices, software and technological processes: machines and machine learning systems, neural networks, artificial intelligence, automation, digitisation, robotization and information technology. In the professional environment discussions are currently held what may be the consequences for working persons of using modern devices, tools, processes and programs by entrepreneurs, not only among those employed in the service sector, but also in enterprises holding a leading position in the past "industrial era". The fourth industrial revolution and the changes it has forced apply to all people and entities related to work.

2. The future of labor in the post-industrial era

2.1. Diversification of forms of employment

The labor market in the post-industrial era is characterised by a far-reaching diversification of legal and organisational forms of employment. More and more often a "typical" open-ended contract of employment, guaranteeing employees full-time employment, stability of employment and limiting the freedom of employers to terminate it with notice, is replaced by "temporary", fixed-term contracts and civil law contracts concluded with temporary work agencies[3]. They provide employers with a high degree of flexibility of employment (flexible work). Usually these are contracts for a probationary period, apprentice contracts and fixed-term contracts. According to entrepreneurs, the above-mentioned employment tendencies allow the employers to verify the professional skills and the attitude towards work of the newly employed persons. Under these contracts, regulated by labor law, the employed persons provide work in part-time employment. As "fixed-term" workers, they are not covered by the general protection of durability of the employment relationship, because the applicable labor law allows employers to end the legal relationship established on the basis of "fixed-term" employment contracts. The situation of persons employed under civil law contracts is even worse. This is because they can exercise practically no rights granted by the legislature to employees within the meaning of the provisions of the Labor Code. It is not without reason that the new, "fixed-term" and civil-law forms of employment promoted by employers are considered "junk" and criticised by trade unions. It is characteristic that in the present, initial stage of the post-industrial era, employers take advantage

[3] Daniel Pennell: Is portfolio working the future of work? December 21st, 2017. www.adapt.it

of the "flexible" forms of employment to a much greater extent in relation to young people who have no life and work experience and who are just starting their first job. More experienced people, used to working full-time, are employed on the basis of employment contracts concluded for an indefinite period. These contracts in the previous (industrial) era in many cases guaranteed employment until acquisition of pension rights. The elderly, still professionally active, are critical of the current model of employment. In the post-industrial era, the employment policy pursued by employers does not provide the employed persons with a guarantee of stable, long-term employment. On the other hand, young people making their debut on the labor market show a different attitude towards the new forms of employment, popular in the post-industrial era. This holds true in particular in the case of representatives of the generation expecting a greater adjustment of work to personal ambitions, individual preferences and needs. *Millennials*, born between 1993 and 2001, already account for 75% of all workers in the world[4]. Characteristic of their model of life is the striving for self-development and combining two separate spheres of activity: professional and private (*work-life blend*).

1.2. The Millenials philosophy

In the post-industrial era, the interests of entrepreneurs and young people employed or just preparing to enter the labor market converge with the changing views and demands for work. The previously dominant, traditional full-time employment – five days a week, eight hours a day and forty hours a week, from nine to five, with an hour-long lunch break – misses the goals of the economy in the 21st century. According to the Managing Director of the World Employment Confederation[5], professionally active young people are much more looking for a job that guarantees autonomy both at work and in life. Being individualists, they require that the work they are to perform for profit should not involve subordinating the employed person to the employer or persons representing employer's interests in any "employee" employment and "non-employee" employment relationships. Therefore, in the post-industrial era, more and more popular is the performance of work as an independent party and not the work performed according to the 19th century *Master and Servant* model. The model of employment as an "independent contractor", an own-account self-employed person, appeals to the imagination of young people much more than the perspective of a lifetime work performed under the direct control of an employer. Nowadays, freedom of work is more and more often associated with the possibility of taking up employment in any legal and organisational form, other than an employment relationship. This

4 Daniel Pennell: The rise of online platforms reflects the changing nature of work. April 27th, 2018. www.adapt.it

5 Michele Tiraboschi, ADAPT – Association for International and Comparative Studies in the field of Labor Law and Industrial Relations is a non-profit organization set up by Marco Biagi in 2000 with the aim of promoting research in the field of Industrial and Labor Relations from a comparative and an international perspective.The main purpose of ADAPT is to provide an innovative method of carrying out academic research, while developing long-term relationships with businesses, organizations, institutions and other institutes for advanced studies. Adapt, www.adapt.it

applies not only to professional projects that are of interest to young workers, but also to employment in teams consisting of people with a similar attitude to work, involved in the implementation of a project that is of interests to them. Unlike the older generations of workers striving to balance their professional and family interests *(work and family life balance)*, the life philosophy of the *Millenials* is expressed in the slogan *"work to live"*, and not *"live to work"*. *Millennials* do not consider work as the main goal in human life. They do not look for a job "for life". They do not plan their own professional career. They believe that it is easier to find a client than an employer[6]. Such attitude to work and life is based on the assumption that people of working age may be professionally active without having a permanent, "full-time" job, and thus not remaining in employment relationships based on employment contracts concluded for an indefinite period. A distinction between "full-time" work of industrial era, performed collectively in separated workplaces (factories), organised and managed by an entrepreneur, regulated by the provisions of law called "factory legislation" and the "freelance" employment consisting in provision of paid work by own-account self-employed persons, is a reference to the experience of the pre-industrial era. Nowadays, in the post-industrial era, it can be argued that the employment model similar to that prevailing in the pre-industrial era is promoted by specialists in the field of employment in services. However, it is difficult to imagine that the form of employment referring to the old models could create earning opportunities for all specialists seeking employment in the services sector. It is impossible without creating specialised platforms that perform the function of go-betweens between service providers and recipients of services consisting in performance of various types of work. Therefore, the chances of achieving individual life goals by three-fourths of people of the productive age interested in working in services are to depend in the near future on the portfolio of professions accumulated by individual specialists and the marketing efficiency of specialised digital platforms acting as intermediaries between individuals and/or other entities requesting specific services. Convinced of the success of the new form of employment in services supported by the *Millennials*, human relations management specialists reserve that its success depends on a thorough reform of not only the social security system, but also of employment itself.

2.3. Conclusion

Therefore, there is an absolute necessity to modernise the existing legal systems in all countries where employee and social rights are not vested in individual employed persons but are related to entities employing the persons providing work under employment contracts and to the work itself as the basic form of professional activity of every person. Thus, the employment and social rights of workers treated in employment relations as "employees", and thus enjoying respective rights and financial benefits, should be vested in individual employed persons, and not their "employers". Therefore, the proposal

6 Daniel Pennell: The time has come to set work free and embrace hybridization, September 29th, 2017. www.adapt.it

to modernise legal systems by granting rights and entitlements to these benefits to "individuals" (employees or workers) and not their "employers" is not irrational. Today, more than ever, there is a need to cover working persons with legal protection regardless of the basis and legal framework of employment. I submitted a proposal that "non-employee" employment should be covered by labor and social security protection laws almost ten years ago, at the beginning of the post-industrial era and the fourth industrial revolution 4.0 closely related to it[7]. I re-submitted it in 2018. However, it was not included in the 2018 draft Labor Code rejected by the Ministry of Family, Labor and Social Policy. Fragments of this proposal concerning the guarantee of equal rights to all working persons are presented in this study. I am doing this bearing in mind the phenomenon that we are witnessing during the 4th industrial revolution - the blurring of the boundaries between different forms of employment.

3. Hybrid forms of employment

3.1. Non-employee employment

The above process results in the formation of a new form of employment, which can be described as "hybrid" employment.[8] Instead of harmonising the legal situation of workers, the authorities of some EU Member States are extending the catalogues of employment contracts included in legal acts governing "employee" employment. The 2018 draft Labor Code, which was not used by the authorities, regulated five types of fixed-term employment contracts: for a probationary period, for a specified term, for a period of occasional employment, for seasonal work, and for "contract" work. In other EU countries, legal regulations take the form of employment contracts or "non-employee" employment with independent contractors economically dependent on the recipients of their services – entities for which they permanently and systematically provide work. The phenomenon of hybridisation and the resulting consequences – hybrid forms of work combining individual elements of the work processes performed by workers and creating new "molecular orbitals" meaning connections between workers and employers – have become ubiquitous. The existing, clearly defined boundaries between employees and employers, global and local labor markets, are blurring. In employment relations, the demarcation lines between work and private life, work at the office and work at home, leisure time and working time, become obsolete in many professions and specialties for which working persons receive remuneration. Businesses and pleasures overlap. They create a phenomenon called *"bleisure"*

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7 Andrzej Marian Świątkowski: Przedmiot stosunku pracy. Rozważania de lege lata i de lege ferenda. (Subject of the employment relationship. Considerations de lege lata and de lege ferenda.) In: Ludwik Florek – Łukasz Pisarczyk (ed.): *Współczesne problem prawa pracy i ubezpieczeń społecznych.* (The contemporary problem of labor and social security law.) Warsaw, LexisNexis, 2011. 4759.

8 Jeremias Prassl: *Humans as a Service. The Promise and Perils of Work in the GIG Economy.* Oxford, Oxford University Press, 2018.

in professional literature on human work management[9]. Young people who have the ability to reconcile work and private life, treating work as pleasure are defined as "fast", "agile", and therefore efficient and entrepreneurial. A term *"slasher"* is used to describe this type of people present on the labor market in the United States. Such people are able to engage in various types of professional activity (for example, work as a lawyer) and/or paraprofessional activity, which is also a hobby and consists in improving skills in a certain domain (for example, a kite surfing instructor during summer and a ski instructor during winter) that provides certain earnings, and at the same time they can derive satisfaction and financial benefits from this specific skill. The *slasher generation*, functioning thanks to Internet platforms, enabling them to develop various professional activities, allows the performance of several different types of work to the extent that the working persons consider most appropriate[10].

3.2. Non-standard forms of employment

The blurring of the boundaries between the forms of employment makes lawyers encounter more and more difficulties in defining the status of persons employed under civil law contracts, which constitute an equally useful legal framework for the performance of work as those provided by employment contracts. It is estimated that the "grey zone" of employment between full-time employees, subordinated to one employer (salaried workers) and own-account self-employed and other professionally active persons accounts for almost a half of atypical forms of employment. Thus, a significant number of working persons can neither exercise the universal right to work in safe and healthy conditions nor benefit from other employee and social rights. Non-standard forms of employment in labor law result from the demand for the development of a so called *Gig Economy*, a concept defined in the Polish language as employment on the basis of short-term employment contracts or performance of work under contracts for specific work or service[11]. *Gig Economy* weakens the position of workers trying to negotiate terms of employment and remuneration with their "employer"[12]. According to the terms such as the *Platform Economy*, and even more precisely *Digital Platform Economy*, also called *creative economy*, modern forms of employment consist in organising – using modern technologies (algorithms, computers, *Cloud* and the Internet) forming a complex and comprehensive combination of software, hardware and components, procedures, coordinated operations and broadcasting,

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9 Andrzej Marian Świątkowski: Digitalizacja prawa pracy. (Digitization of labor law.) *Praca i Zabezpieczenie Społeczne,* 2019/4. 11–18.

10 Andrzej Marian Świątkowski: *Elektroniczne technologie zatrudnienia ery postindustrialnej.* (Online employment technologies of the post-industrial era.) Kraków, Wydawnictwo Naukowe Ignatianum, 2019.

11 Jeremias Prassl – Martin Risak: Uber and TaskRabitt, & Co.: Platforms as Employers? Rethinking the Legal Analyssis of Crowdwork. *Comparative Labor Law and Policy Journal,* vol. 37., iss. 3. (2015) 604–619.

12 Cristiano Codagnone – Fabien Abadie – Federico Biagi: *The Future of Work in the 'Sharing Economy', Market Efficiency and Equitable Opportunities or Unfair Precarisation?* Brussels, Joint Research Center UE Science Hub, 2016.

information, distribution, computer and commercial networks – platforms enabling conduct of professional activity in various spheres of economic and social life and in politics[13]. Platform owners have a serious chance of gaining more power than factory owners gained in the first period of the Industrial Revolution of the Industrial Age. This is because they do not manage a specific type of production, but carry out economic activity in various, interrelated spheres of activity, fundamental for states and societies: economic (services and production), political and social. The success of platform operators depends not only on how the types of specific jobs that can be offered to jobseekers are defined and labelled, but on the ability to define and classify job offers. Nowadays, proposals for the performance of work are subject to segmentation and specification. They do not refer to the types of work, but to individual tasks that can be performed by individual people, traditionally classified as those specialising in the provision of work within a specific profession or professional activity. In the *Gig Economy* system there is no shortage of jobs. What is reduced is the number of jobs created on the basis of employment contracts concluded for an indefinite period, i.e. jobs that guarantee employment until retirement. The above system of professional activity does not provide any guarantee of work in decent conditions. The issue of employment in the post-industrial era is of decisive importance for answering the question whether employment can be treated as the main test of the implementation of the idea that is nowadays perceived as a dystopia of fantasies about replacing human work with the activity of intelligent machines. The answer depends on whether it is possible to develop a catalogue of jobs that will be digitised. While it is possible to assume with a certain degree of probability that repetitive, i.e. routine jobs will be digitised, at the moment it is hard to imagine that something similar could happen to professional activities strongly dependent on the systems of values prevailing in individual societies. Most likely, they will still be performed by people. Only the legal status and the protection of health and life of people employed in this type of work are unclear.

3.3. Conclusion

It is therefore important to get used to and then accept the idea that contemporary labor markets, international, national and local, are varied and diverse. In the post-industrial era, it is therefore necessary to work out a formula that would make it possible to balance two universal values closely related to work: freedom and safety of workers. However, it is much easier to express and propagate the above relationship than to implement it. In the post-industrial era, the International Labor Organization and its Member States will be forced to develop an innovative model of a new social order in diversified "employee" and "non-employee" employment relations. Hybrid forms of employment should ensure

[13] Valerio De Stefano: The rise of the "just-in-time" workforce: On-demand work, crowdwork, and labor protection in the gig economy. *Comparative Labor Law and Policy Journal*, vol. 37., iss. 3. (2015) 461–471.

for workers economic and social rights equal to those enjoyed by employees in the industrial sector. However, the above-mentioned postulate cannot be implemented without a comprehensive, in-depth reform of legal, organisational and financial guarantees of the exercise by all workers, including non-employees, of employee and social rights. The first, well-thought task is the implementation of the concept formulated in Article 66 (1) of the Constitution of the Republic of Poland - the right of "every" working person to work in safe and healthy conditions.

4. The need to guarantee to "everyone", including non-employees, fair employment conditions

The current Constitution of the Republic of Poland, adopted by the National Assembly on 2 April 1997 and accepted on 25 May 1997 in a general constitutional referendum, expressly grants everyone, employed on any legal basis, regardless of the legal framework and content of legal relations, safe and healthy conditions of work (Article 66 (1)). The provisions of the Polish Constitution attempted to adopt a Scandinavian concept of protection of work and workers. A characteristic feature of this broad concept of protection of work and workers is the attitude to the work environment. The EU and national regulations of some Member States governing the broadly understood protection of work, regulate not only the obligations of state authorities in matters relating to the protection of health and life of workers against hazards in the workplace, but also deal with the work atmosphere and interpersonal relations between working persons during and in connection with the performance of work. Scandinavian concept of protection of work emphasises physical, social and psychological aspects of employment, and even relations between former employees and employers. Already in the 1980s and 1990s, the highest body of the EU judiciary, now known as the Court of Justice of the European Union (CJEU), used the term "working environment" instead of the term "health and safety at work" (C-316/85[14], C-326/88[15], C-84/94[16]) . It was already established then that the above definition covers not only the physical conditions and risks of the working environment for the employee. This term should not be narrowed to include only the safety of workers and the protection of their health. Therefore, the legal provisions issued by the competent authorities and legislative institutions in Europe include, apart from health and safety regulations, the legal regulation of working time, days off, holidays and other paid breaks from work. The above model was partially adopted in the Polish Constitution. The provisions of article 66 (1) and (2) of the Polish Constitution governing the safe and healthy working conditions guarantee to certain protected persons – employees – the right to the statutory days off and annual paid holidays as well as maximum working hours. Thus, a distinction

14 Judgment of the Court of 18 June 1987, Centre public d'aide sociale de Courcelles v Marie-Christine Lebon, ECLI:EU:C:1987:302.

15 Judgment of the Court of 10 July 1990, Anklagemyndigheden v Hansen & Soen I/S, ECLI:EU:C:1990:291.

16 United Kingdom of Great Britain and Northern Ireland v Council of the European Union, ECLI:EU:C:1996:431.

has been made between working persons who are in employment relationships established on the basis of employment contracts and on other grounds and frameworks of employment listed in the Labor Code (Article 2) and persons providing services consisting in work whose legal status is governed by the provisions of the Civil Code. However, other workers were forgotten. The legal concept of "work" presented by the legislature in the Constitution of the Republic of Poland, which guarantees the freedom and economic and social rights of working persons, cannot be interpreted in various ways and used in different contexts. The guarantee of work in safe and healthy conditions must apply uniformly not only to employees or other workers, but to all professionally active persons. It should be a knowingly used expression that is unambiguous in Polish and in all other languages in the world, implying that it refers to people, objects or phenomena of a given group and including all of them. In the case of the first sentence formulated in Article 66 (1) of the Constitution of the Republic of Poland, the above term conveys the fundamental entitlement of every working person in the Republic of Poland. The aforementioned legal norm communicates "to all and every entitled person" his rights to develop professional activity considered to be work, in safe and healthy conditions.

The EU concept of protection of work and people providing it is to some extent related to the standards introduced into the global legal order by the ILO Convention No. 155, adopted on 3 June 1981 on safety, health of workers and the working environment. Article 1 (1) provides that it applies to all branches of economic activity. "Health" in a broad sense (Article 3 (e)), which is a key legal term related to "work" which is understood to mean all professional activity of every person, has also been formulated very broadly. It indicates not merely the absence of disease or infirmity. It also includes the physical and mental elements affecting health which are directly related to safety and health at work. Other definitions of legal concepts are not as broad. The analysed provision stipulates that work can be performed by workers. Therefore, the wording used in the provisions of the Labor Code, which restricts the concept of a worker to a person employed on the basis and within legal framework established by the Polish legislature, should be abandoned and an autonomous definition of a working person should be introduced into the labor law. Apart from employees, volunteers employed under civil law contracts, persons who perform certain professional activities not voluntarily such as on the basis of court judgments and decisions of administrative bodies, this term covers everyone, that means all working persons referred to in Article 66 (1) of the Polish Constitution.

5. The need for an autonomous definition of work in fair, safe and healthy conditions

The definitions of employees and employers in the Polish system (Articles 2 and 3 of the Labor Code) eliminate the possibility of guaranteeing to professionally active persons the right to work in safe and healthy conditions. Therefore, it is necessary to make far-reaching amendments to the

provisions of the Labor Code. The amendment to the applicable labor protection standards should take the form of an autonomous definition of parties to employment relationships: workers and employers, used twice in the history of labor law of the European Union. It is possible and even necessary, because the provisions of Polish labor law do not contain a legal definition of human work and (apart from employees) of people who perform it, generally considered and recognised as professionally active. Using the European Union labor law models will be a unique proof of the full knowledge, innovation and progressiveness of the authorities of the Member State applying the legal concepts in the construction of models in the national labor law systems of the EU Member States.

In the European and Polish labor law systems, the necessary condition for creating an autonomous definition is the express authorisation of the legislature. The autonomous definition consists in creating concepts that have not been previously defined by the legislature. Extending the material scope of the term "employee" consists, for example, in authorising the legislature to treat as an employee a person employed to provide services consisting in work, previously regulated by civil law. The scopes of the legal terms – employee, worker and self-employed – overlap. An employee always has the status of a worker. On the other hand, a self-employed person is classified, depending on the independence in making decisions in legal relations governed by the provisions on non-employee employment, into one of two categories of dependent or independent workers. The creation by the CJEU of an autonomous definition of worker consists in including all employed persons in the sphere of the EU labor law system: employees and self-employed workers linked by legal relationships based on mutual obligations regarding allocation of work by the employer and the obligation to perform it by a working person. When defining a worker, the CJEU does not follow the national provisions of labor law in force in EU Member States, but believes that regardless of the basis and legal framework of employment, working time, amount of remuneration and employment period, each work performed by a natural person has the characteristics of employee employment[17]. The autonomous definition of worker in the EU labor law was established by the CJEU in its judgment of 14 October 2010[18]. In its opinion, in cases concerning the organisation of working time the concept of worker cannot be derived from national legislation, but should have an autonomous meaning specific to European Union law. While applying this concept, the CJEU considered that a worker is also a person dependent in economic terms, self-employed[19]. The CJEU supplemented the classification of workers formulated in the case-law and legal writings and included in it dependent employees and self-employed persons. It was

17 Judgment of the Court of Justice (CJEU) of 4.06.2009, C-22/08 Joined Cases and C-23/08, 2009, ECR I-4585.

18 Judgment of the Court of Justice (CJEU) of 14.10.2010, C-428/09, 2010, ECR I-4585. The legal concept of current "autonomous employer" was introduced into the legal order of the European Union in the CJEU judgment of 3 July 1986 – Deborah Lawrie-Blum v Land Baden-Württemberg, Case 66/85, ECLI:EU:C:1986:284. That social security case suggested that the 'essential characteristics' of a worker is that he/she: *performs services for and under the direction of another (a subordinate relationship); * for a certain period of time; *in return for remuneration (salary or fee received for the work).

19 Judgment of the Court of Justice (CJEU) of 13 January 2004, Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment, C-256/01,ECLI:EU:C:2004:18.

based on the following criteria: the possibility of choosing the time and place of work and the method of its performance. It ruled that the distinction between employee and non-employee employment is determined not by the name of the concluded contract (employment contract or contract for the provision of services), but the scope and depth of dependence of the employee to the employer[20]. The above-mentioned judgments were usually made in matters related to social security law. This was because the provisions of the European labor and social security law do not define an employer. On the other hand, some legal acts containing provisions of European law refer interested parties to the definition of an employer formulated in the labor law systems of the EU Member States. Therefore, in matters not regulated by EU labor law, an autonomous definition of the concept of employer applies. It was established by the CJEU, similarly to an autonomous definition of worker expressed in cases C-22/08[21] and C-23/08[22] confirmed in the judgment issued by the same EU Court in case C-428/09[23]. In the case analysed in this study, the Court acted in a similar way as its predecessor a decade earlier. Referring to the obligation of uniform application of European labor law and the principle of equal treatment of parties to labor relations, established in the EU judicature, it stated that within the EU, an autonomous, uniform interpretation of the legal term "employer" should be used. In order to guarantee the most effective equal treatment for all persons working in the territory of each Member State[24], the CJEU also found that due to the fact that this concept is not defined in EU law, the obligation to formulate a commonly used legal definition of the "employer" rests on the supreme institution of the EU judiciary. The author of this idea is the Advocate General of the CJEU – Priit Pikamäe, who proposed in case C-610/18[25] that in the process of constructing an autonomous definition of an employer, the CJEU should take into account the context of the provisions of EU law in which the autonomous term "employer" is used and the purpose to which a definition of this term is to be used[26]. He relied on the available previous case law of the CJEU[27]. While analysing the case-law of the CJEU, he presented the elements characteristic of an employment relationship (the worker's subordination

20 Judgment of the Court of Justice (CJEU) of 11 November 2010,Dita Danosa v LKB Līzings SIA,C-232/09, ECLI:EU:C:2010:674..

21 Judgment of the Court (Third Chamber) of 4 June 2009, Athanasios Vatsouras (C-22/08) and Josif Koupatantze (C-23/08) v Arbeitsgemeinschaft (ARGE) Nürnberg 900, ECLI:EU:C:2009:344.

22 Judgment of – 04/06/2009 – Koupatantze Case C-23/08, (Joined Cases C-22/08, C-23/08), ECLI:EU:C:2008:201.

23 Judgment of the Court (Second Chamber) of 14 October 2010, Union syndicale Solidaires Isère v Premier Minister and Others, ECLI:EU:C:2010:612.

24 See recital 17 of the Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security system (Text with relevance for the EEA and for Switzerland), (OJ L 166, 30.4.2004, p.1).

25 Judgment of the Court (Grand Chamber) of 16 July 2020, C-610/18, AFMB Ltd and Others v Raad van bestuur van de Sociale verzekeringsbank (Issues of: social security – regulation (EEC) No 1408/71 – article 14(2)(a); concept of 'person who is a member of the travelling personnel of an undertaking'; regulation (EC) No 883/2004 – article 13(1)(b) – concept of 'employer').

26 Andrzej Marian Świątkowski: Autonomiczna definicja pracodawcy w europejskim prawie zabezpieczenia społecznego. Rozważania na tle wyroku Trybunału Sprawiedliwości UE w sprawie AFMB (Autonomous definition of an employer in European social security law. Considerations against the background of the judgment of the Court of Justice of the EU in the case AFMB.) *Praca i Zabezpieczenie Społeczne,* 2021/3. 15–23.

27 Two judgments in Polish cases of: 17.06. 2008, Kozłowski, C-66/08, EU:C:2008:437, para 42; 24.05. 2016, Dworzecki, C-108/16 PPU, EU:C:2016:346, para 28); and the later judgment of the CJEU Grand Chamber of 18.10.2016 in *Nikiforidis*, C-135/15, EU:C:2016:774, para 28 and a judgment of 21.09.2017 Commission vs. Germany, C-616/15, EU:C:2017:721, para 43.

to the employer and the employer's obligation to pay the remuneration for work[28]). He listed the criteria resulting from the case-law of the CJEU – the true position of a worker in the workplace[29] and employment relationships in the EU – supervision and control of the employer over the worker[30], the possibility and admissibility of employment without the need to conclude an employment contract[31]. All the above-mentioned circumstances apply to every working person performing work, and not only to the person employed under a contract of employment in an "employee" employment relationship.

The analysed case-law of the CJEU proves the possibility of creating legal concepts commonly used during the fourth post-industrial revolution. The above observation applies to cases of legal protection guaranteed by the provisions of labor law on health and safety at work to all working persons, and not only the people employed under "employee" employment relationships as is the case in the Polish labor law system. The constitutional formulation of the subjective scope of working persons, referring to "every" professionally active working person has also been formulated in EU legal acts. The term "every worker" used in Article 31 (1) of the Charter of Fundamental Rights of the European Union should – in my opinion – apply to fair and just conditions of professional activity. The aforementioned provision on fair and just working conditions refers to the fundamental, universally applicable standards of protection regulated in both treaties of the Council of Europe (Article 3 of the European Social Charter and Article 26 of the Revised European Social Charter), paragraph 19 of the Community Charter of the Fundamental Social Rights of Workers, Framework Directive 89/391/EEC and Article 156 of the Treaty on the Functioning of the European Union. Nowadays, guarantees of work that protect the health and life of those who perform it should apply not only to employees in the old sense of the term, but to all working persons. It is required by the new, modern working conditions imposed by the fourth industrial revolution.

6. Need for legal protection of persons working on the so-called digital labor platforms

6.1. The specificity of work on labor platforms

The specificity and challenges created by labor platforms are manifested in negating the existence of individual parties to employment relationships. In most cases, platforms do not act as employers. So they do not treat the vast majority of those working on the platforms as employees. They consider them to be persons conducting economic activity consisting in the provision of services including

28 Judgment of 4.12.2014, C-413/13, EU:C:2014:2411, para 34.

29 Judgments of: 17.1.1970, 35/70, UE:C:1979:120, para 17–18;14.10.2010, C-345/09, EU:C:2010, para 52; 4.10.2012, C-115/11, EU:C:C:2012:606, para 45–46; 16.05.2013, , C-589/10, EU:C:2013:303, para 52.

30 Judgment of 11.11.2010, C-232/09, EU:C:2010:674, para 46–47.

31 Judgments of: 21.10.2010, C-242/09, EU:C:2010:625, para 21 and 31; 11.04.2019, EU:C:2019:310, para 27.

the performance of specific tasks for persons or entities indicated by the platform[32]. Characteristic of the platform employment is the existence of a tripartite legal relationship between the platform, the workers and the clients. According to the platform's operators, none of the relationships established between the platform and its clients, the platform and the workers and the workers and clients is the relationship regulated by labor law. None of the parties to the legal relationship established by the platform with the worker, which involves the provision of services consisting in the performance of work for third parties, remains – according to the platform – in individual employment relationships. Platforms also do not consider themselves intermediaries in establishing employment relationships with persons or entities for whom they provide services consisting in work. So who are the parties to these relationships for each of the persons or other entities participating in the triangular relations? From the perspective of a potential client (the person using the service involving the performance of work by a person engaged for this purpose by the platform) the worker is a service provider, and the platform is a contractor. This means that the legal relations between them are subject to commercial law. On the other hand, for a person or entity for whom the service ordered on the platform was performed by worker employed by the platform, the legal relationship is regulated by civil law or labor law. The central point of reference in the tripartite legal relationship between the parties to the relationship regulated by law is the labor platform. The persons or entities managing it shape the legal relations between the platform, acting in each case as a moderator of the actual relations between the service provider (worker) and its beneficiary (client). It is a relationship different from that of job placement or temporary employment agency. The platform indicates to the own-account self-employed worker the persons or entities for whom the work will be performed. Remuneration for the work performed is paid to the service provider who is obliged to transfer all or part of the amount received to the platform organising the work and indicating the provider of this service to the client ordering its performance. Having the formal status of self-employed, the service provider does not benefit from any protective provisions of labor and social security law. He is not recognised by the labor platform as an employee, but as a self-employed.

6.2. Labor platform as an employer

The situation is somewhat different for those workers who are in employment relationships and who provide services involving the performance of work for third parties. For them, the platform is an employer, fully entitled to decide what (type of work), where (place of work) and when (working time) the workers indicated by the employer (the platform) should do in return for remuneration that will

[32] Valerio De Stefano – Antonio Aloisi: *European legal framework for digital labor platforms*. Luxembourg, Publications of the European Union, 2018.

be paid to them not by the employer but by the client ordering the service. In this case, the employed service providers have the status of "quasi" employees, enjoying certain rights governed by the provisions of labor law, individual and collective, and social security law. So what are the differences in the tripartite legal relations in which the workers act either as providers of specific services or as "quasi" employees performing professional activities consisting in the performance of identical tasks as self-employed workers. Both provide paid work. In none of these cases the service provider receives remuneration for work from the person ordering the service. In each case, the payment for a one-off service or recurring activities is transferred by the ordering party to the labor platform. The platform, in turn, pays to the worker an amount agreed with him. The name of the payment depends on the nature of the relationship between the platform and the service provider – whether the latter is an employee or a non-employee worker this will be remuneration for work or fee for the service. The amount of this payment for the same work is usually not the same, because the labor platform acting as an employer is obliged to pay social security contributions and other – legally regulated – public levies from which self-employed entrepreneurs providing services are exempt. Therefore, by negating the employee status of platform worker in the provision of services the platform, which is both the organiser and the operator, does not have any obligations set out in labor law towards the workers performing the services. Neither does it employ any employee, nor does it act as an employer within the meaning of the labor law. Also, it does not pay for the services performed on its recommendation by the providers whose activities are coordinated within labor platforms. So what is officially the subject of legal transactions in which participants related to the labor platform are involved?

6.3. A labor platform as new legal entity?

In the post-industrial era of employment, modern technology is a value which, apart from the labor platforms, cannot be provided by any other *sui generis "*intermediaries"[33] between persons and entities, where ones demand a certain work, task or activity to be performed and the others are able to perform it. A labor platform has available electronic technologies which allow meeting the needs of both of these groups. It does so without paying attention to limitations or obstacles established in the legal systems of the EU and individual EU Member States. A labor platform as a new legal and organisational entity creates an almost unlimited possibility for the parties to use many different types of factual, legal and non-legal relationships under which work may be performed. The above

[33] In the professional literature, there is no term that would accurately reflect the role of a labor platform. This is due to the informal relations between the platform, the service provider and the service recipient interested in the performance of work. Dictionaries offer various terms, most of them originating in the English language and used to denote the specific role of the platform in employment relations. These are (in alphabetical order): agent, broker, dealer, distributor, factor, go-between, interceder, intercessor, mediator, middleman, plenipotentiary. Some of them, in particular those used in commercial law, are synonyms of the term "intermediary".

conclusion is too far-reaching, as the report *on working conditions of platform workers* [34] for the EU does not mention the forms of employment other than those presented in the previous studies on digital employment technologies[35]. One of them is governed by the provisions of civil or commercial law. The other one is the form and basis regulated by the provisions of labor law. And it includes employee employment relationships. A certain novelty of the report is highlighting the third form of employment called by the parties "false", "sham" or "bogus self-employment", which at the request of the interested platform worker may be transformed into a contract of employment under a judgment of the labor court. In Poland, this function is performed by Article 2 of the Labor Code, to which § 2^2 was added in 2002. If the labor court finds that the legal relationship has features characteristic of an employment relationship, the above provision automatically transforms the civil law contract into an employment contract[36]. Particularly interesting are the deliberations on the legal and actual consequences of the lack of legal framework for platform employment and the unclear status of the parties to legal relations established by platforms with highly qualified workers, usually specialists in specific domains, performed remotely (online). The situation of people employed for simple works at the platform's location *(on-location)* is clear. Therefore, in most cases, a demand by a person employed on-location to change the basis of employment from a civil law contract to an employment contract is justified. In fact, workers called self-employed by the platform are typical examples of the "bogus self-employment". The situation and terms of employment of highly specialised workers is much more complicated. They charge high fees for specialised services, but do not benefit from labor and social rights guaranteed by EU standards and national labor laws in the EU Member States. The essence of the report is included in the conclusion that platform work consists in the exchange – in various legal forms – of services consisting in performance of work under the conditions set by the platform – the organiser and manager of the work performed by workers.

6.4. Algorithmic or autonomous processes of decisions-making ?

Another characteristic of platform employment is an autonomous process of decision-making by electronic devices that assess the productivity of all workers, strongly emphasised by the labor platform operators[37]. According to the authors it is the algorithm, not people that decides on the way and methods of entrepreneurial activity by labor platforms. Electronic devices not only monitor and

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34 Zachary Kilhoffer – Willem Pieter De Groen – Karolien Lenaerts – Harald Hauben – Willem Waeyaert – Elisa Giacumacatos – Sophie Robin-Olivier – Ine Smits – Jean Philip Lherould: *Study to gather evidence on the working conditions of platform workers*. Luxembourg, Publication Office of The European Union, 2020., Quoted later as "The '2020 Kilhoffer' report".

35 Andrzej Marian Świątkowski: Przegląd warunków pracy na platformach zatrudnienia. Raport dla Unii Europejskiej. (Review of working conditions on employment platforms. Report for the European Union.) *Polityka Społeczna,* vol. 47., 2020/7. 1–11.

36 *Journal of Laws* [Dz.U.] of 2002, no. 135, item 1146.

37 Mirela Ivanova – Joanna Bronowicka – Eva Kocher – Ann Degner: The App as a Boss? Control and Autonomy in Application-Based Management. *Arbeit/Grenze/Fluss – Work in Progress in Progress interdiszipliaerere Arbeitsforschung,* nr 2, 2018.

record individual fragments of tasks, activities and work processes performed by workers, but also assess the efficiency of workers, and even automatically assess their involvement. The ongoing process of dehumanisation of decisions made by superiors towards employees and the self-employed workers is a significant facilitation in the process of making significant decisions by platform operators, especially negative decisions, in personnel matters[38]. The following factors determine the scope and degree of interference of electronic devices in platform employment matters: 1) type of work (complex or simple); 2) the place of performance of work, important from the point of view of maintaining contact and the selection of tools and other electronic devices between the platform and workers and vice versa as well as workers and clients (activities performed online or on-location and indication of the person or entity deciding about these matters); 3) requirements for workers (high, average or low).

6.5. Size, prevalence and expected development of digital labor platforms in the European Union

The authors of the other report Control and Autonomy in Application-Based Management have dedicated relatively little attention to the scale of the phenomenon of labor platforms in the EU and some EEA countries (Norway, Iceland). The authors of the report did not conduct independent research on these issues. They used data collected by OECD[39] and other research teams. Comparable data on the number of people aged 16 to 74 are provided by the OECD. A maximum of 18% of workers in Spain and no more than 6% in the Czech Republic work "through" labor platforms. According to this calculation, the European average employment on platforms is 11% of workers. The authors of the above statistical study admit that the above calculation is not sufficiently accurate. Indeed, it differs quite radically from the number of economically active people mentioned in the analysed report – 0.6% in Finland, 2.7% in the Netherlands. The presented statistical data refer to employed persons for whom work consisting in the provision of services in various legal forms is the principal source of employment. In all EU Member States, the occasional provision of services through labor platforms – less than 10 hours a week – accounts for 1.2% (Slovakia) to 4.2% (Portugal). The vast majority (75.7%) of platform workers have an employee status. Only 7.6% of workers perform services as self-employed. Most of them (42.3%) are employed as employees and communicate with platforms and clients via electronic devices. Specialists in employment policy note that employment in transport (Uber and other transport companies) and courier services, food supplies, such as Uber Eats and others is close to the peak. The above prediction depends on the continued existence (Uber) and sustained demand for such services in the EU. It can be assumed that due to the need to make the

38 Miriam Kullmann: Platform Work, Algorithmic Decision-Making and EU Gender Equality Law. *International Journal of Comparative Law and Industrial Relations*, vol. 34., iss. 1., 2018.

39 Gig Economy Platforms: Boon or Bane? *OECD, Economic Department Working Paper*, 1150 (Paris, 2019) https://www.oecd.org//officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2019)19&docLanguage=En

legal regulations governing platform work more flexible, the existing standard forms of employment will not adapt for their own needs some modern inventions, such as remote control of workers by employers, introduced by the fourth industrial revolution and the Covid-19 pandemic.

6.6. Contemporary challenges arising from the forms of digital platform employment

The employment model adopted in Europe and applicable in the EU is based on seven foundations formulated in the standards of European law. These are: social dialogue, transparency of employment conditions, equal treatment, protection of employee and social rights, job security, work - rest balance, opportunities for education and development[40]. This article presents the most interesting concepts aimed at the unification of working conditions from the perspective consistent with the provisions of EU labor law and the possibility of their implementation. Based on the relatively rich case-law of the CJEU deviating from the provisions in force in EU countries, which 1) in a slightly broader context than national regulations interprets in a similar way the autonomous concepts of "worker" and "self-employed" and 2) using the same term "worker" to persons providing economic services and performing subordinated work for remuneration, the authors of the report accurately present, in line with the spirit of EU law, the admissibility of reclassification of these terms when national labor law systems and/or case-law in individual EU Member States allow such a transformation of concepts. The '2020 report' prepared by *Kilhoffer et al.* emphasises that most EU directives regulating employment conditions do not apply to the self-employed. The authors of the report indicate, however, that the latest Directive (EU) 2019/1152 of the European Parliament and of the Council on transparent and predictable working conditions in the European Union allows including the self-employed into the category of workers. Within the meaning of the provisions of EU labor law to which the provisions of the directive apply, workers also include independent self-employed, included in the category of active persons who in fact are not self-employed. Bogus self-employment occurs when a person is declared to be self-employed while fulfilling the conditions characteristic of an employment relationship, in order for the platform to avoid certain legal or fiscal obligations. It is subordinate to the employing person or entity.

6.7. Importance of objective facts - the role of *work performance*

When assessing the legal nature of work, in order to answer whether there is an employee or non-employee employment situation, the way in which the parties concerned describe the legal relationship

40 The '2020 Kilhofer et al.' report op.cit.

they have established should not be taken into account. It is not the name, but the objectively verified facts relating to the actual performance of work which play a decisive role in the legal classification of the type and category of professional activity in which the work is performed (paragraph 8 *in fine*). This directive will enter into force on 1 August 2022[41]. The second directive mentioned in the report – Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers[42] and repealing Council Directive 2010/18/EU is clearer than Directive 2019/1152. It applies to all workers who have employment contracts or other employment relationships, including contracts relating to the employment or the employment relationships of part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency (recital 17). In Article 2, the personal scope of that directive is somewhat limited, as this provision does not mention "contracts relating to the employment". Most likely, for these reasons, the personal scope of their application was not developed in the fragment of the report devoted to the material and legal scope of application of the two directives. The further deliberations on the scope of legal and social protection provided by EU directives clearly provide that self-employed are excluded from the scope of "non-standard" employment, since such directives regulate the working conditions only of "workers" within the meaning of EU law. However, in the summary of their arguments on atypical forms of employment, the authors of the report state that at least in theory, non-standard directives have some significance for platform employment. In practice, however, the impact of these Directives is very limited; they only apply when platform workers are classified as subordinated and not self-employed. Even then, the directives may not be applicable to subordinated self-employed, as their working conditions cannot be compared with those of other workers who perform identical or comparable work under employment relationships for employers other than labor platforms. Hence, persons providing subordinate work services on labor platforms cannot be compared with part-time or fixed-term contract workers. Such comparisons are not known to the parties to the legal relationships established and implemented within labor platforms. They are not of a permanent nature and the parties to these relations do not have regulated obligations. And a person who previously performed work is not obliged to continue it. On the other hand, the platform as an employer is not obliged to allocate work or admit a worker to it. Parties to the legal relationships under which work is performed on labor platforms do not have long-term obligations. They are not obliged to work for any certain period of time. For the parties to the legal relationship, work on the labor platform is not associated with the obligation to allocate work (on the employer's side), nor with

41 Andrzej Marian Świątkowski: Dyrektywa 2019/1152 – przejrzyste i przewidywalne warunki pracy w Unii Europejskiej (część 1). [Directive 2019/1152 – Transparent and predictable working conditions in the European Union (part 1).] *Europejski Przegląd Sądowy,* 2020/4. 15–21; Andrzej Marian Świątkowski: Dyrektywa 2019/1152 – przejrzyste i przewidywalne warunki pracy w Unii Europejskiej (część 2). [Directive 2019/1152 – Transparent and predictable working conditions in the European Union (part 2).] *Europejski Przegląd Sądowy,* 2020/7. 22–28.

42 Andrzej Marian Świątkowski: Publicznoprawne obowiązki państw członkowskich Unii Europejskiej w sferze spraw prywatnych – dyrektywa 2019/1158. (Public-law obligations of European Union Member States in the sphere of private matters – Directive 2019/1158) *Przegląd Prawa Publicznego*, 2020/2. 13–37.

the obligation to perform it (on the worker's side). In the opinion of the authors of the report, the lack of a permanent obligation of allocation and acceptance – performance of work, is one of the main characteristics of this atypical employment. This is because in most cases services consisting in the performance of work are of a one-off nature. Their organisers (platforms) and providers (workers) do not treat the tasks entrusted to them in terms related to the organisation of work and working time. Not without significance, platform work is commonly identified with occasional jobs in the economy and services, and in the field of on-line employment relations, that means i.e. with terms such as *crowdwork* and *gig-work*[43]. However, according to the authors of the report, some provisions of the directives should apply to platform work, because they guarantee a minimum level of protection against discrimination, unjustified dismissals, modifications consisting in unilateral reductions in salary rates and simultaneous increase of obligations by the employer (platform). The report also includes postulates for legal protection of platform workers against abuses such as refusal of employment for an indefinite period and only systematic renewal of fixed-term contracts, lack of access to vocational training and failure to inform about vacancies.

6.8. Usefulness of the definition of an autonomous worker

Some directives do not define the term worker. The authors of the report conclude from this that it is necessary to use the term "autonomous worker" as defined in the case-law of the CJEU. A classic example of such a situation is the Directive 2003/88/EC[44] of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time. Platform workers enjoy, at least in theory, the right to choose the hours of service provision. Their working hours are not officially recorded by the employer. Therefore, it is in their interest to introduce an obligation to record the times when work begins and ends. It is also important due to the fact that the law does not specify whether the time of worker's readiness to perform work may be counted as working time - and if so, under what conditions. The recording of working time by platform workers has become more attractive since the publication of the CJEU judgment of 14 May 2019, in which it was decided that the lack of recording of working time makes it impossible to determine the number of working hours, and thus deprives the worker of overtime pay[45]. Platform workers who are self-employed do not have set daily and weekly working time limits. Therefore, they cannot demand payment of remuneration for additional work. However, the aforementioned judgment raised their interest in whether the time of readiness to work on-location of the employer or at another place where the worker is on stand-by for

43 https://pl.glosbe.com/en/pl/crowd%20working [accessed 17.06.2020].

44 OJ L 299 of 18.11.2003, p. 9.

45 Judgment of the Court (Grand Chamber) of 14.5.2019, C-55/18, ECLI:EU:C:2019:402.

professional reasons may be considered the time for which the remuneration agreed by the parties to the legal relationship is due. According to the CJEU, the time during which a worker can start working immediately is treated as working time[46]. Working time is therefore any period in which the employee is ready to perform work[47]. The situation of a worker on standby time is similar. The difference between the readiness to work and stand-by depends on the place where the worker, informed by the employer about the necessity to perform work, stays at the time he is called upon to perform work. At a place agreed with the employer or at a place of potential work. If the labor platform as an employer instructs a person employed under a contract of employment to be ready at the platform area or at another area designated by the platform's operator, such time is treated by the EU case-law as working time, regardless of whether the worker performed any activities for the platform or not[48]. In the case of platform workers employed not under an employment relationship but under contracts for the provision of services, involving work performed by the worker himself, the state of readiness or standby does not matter, unless the employee has concluded a fictitious contract with the platform for the provision of services. Such division is very important for all platform workers, regardless of the basis and legal framework of employment, in particular those working in goods and passenger transport and couriers.

6.9. The working time of workers and bogus employed

In the judgment of 10 September 2015 in *Federación de Servicios Privados del indicato Comisiones obrerac (CC.OO) vs. Tyco Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA*[49] CJEU ruled that the time spent by workers travelling each day between their homes and the premises of the first and last customers is treated by the platform as working time. This is how travelling between premises of clients of a driver or courier is treated. It is very likely that the above liberal practice of uniform treatment of certain categories of workers is caused by the introduction into the provisions of Directive 2003/88 EC (Article 17 (1)) of an authorisation for the authorities of individual EU Member States to apply derogations from the above principle of treating working time and rest periods in matters regulated by the provisions of Article 6 (maximum weekly working time not exceeding 48 hours), Article 8 (length of night work, not exceeding an average of eight hours a day). The reference periods for derogations from the binding weekly time standards may not exceed four months (Article 16 (b)). It is not clear whether the above standards apply to persons who are considered workers by the CJEU, following the autonomous concept of worker established in the

46 Judgment of the Court of Justice (CJEU) of 21.2.2018, Ville de Nivelles v. Rudy Matzak, C-518/15, para 59, ECLI:EU:C:2018:82.

47 Ibid, para 59.

48 Judgment of the Court of Justice (CJEU) of 9.9.2003, Landeshouptstadt Kiel vs. Norbert Jaeger, C-151/02, ECLI:EU:C:2003:437.

49 C-266/14, ECLI:EU:C:2015:578.

case-law dealing with categories of matters regulated by EU labor law other than working time. The European Commission issued an interpretative communication on the scope of application of Directive 2003/88/EC, in which it highlighted the lack of case-law in matters relating to the organisation of working time[50]. According to it, it is not clear whether the "autonomous worker" definition created by the CJEU could apply to workers in new forms of employment such as the digital platform economy. The authors make only a general conclusion that it is not known how the authorities of individual EU Member States will act, whether or not they will exercise the option set out in Article 17 (1) of Directive 2003/88. In my opinion, the working time of employees and bogus self-employed workers directly subordinated to the labor platform can be measured. The above applies in particular to people providing uncomplicated services, obliged to perform simple activities at the place of the platform operation (*on-location*). Far more complicated is the ongoing and permanent control over the self-employed who provide complex services on labor platforms. In most cases, the platform operators can contact these persons only via electronic devices. The common characteristic of work consisting in the provision of complex services is the most frequent settlement of the parties who are usually in a legal relationship not regulated by labor law but by civil law - for the ordered work results, achieved by a highly qualified specialist. In such cases, the prevailing form of contracts are civil law contracts for specific work based on the specialist knowledge (know-how), experience, intuition and luck. This type of involvement cannot be – and usually is not – settled as part of the working time devoted by the specialist.

The arguments presented so far show that the EU laws only indirectly regulate the terms of employment of non-employees working on labor platforms. True self-employed have no chance to apply for entitlements and enjoy employee and social benefits of workers working for certain labor platforms that recognise them as employees. These include employed persons who, due to the tendency of the vast majority of entrepreneurs to reduce employment costs, were induced or even forced to set up one-person self-employed businesses. In the context of the economic and social policy based on avoiding the obligation to pay public levies, the EU made the first, very important exception to the current social policy. On 8 November 2019 the Council adopted a Recommendation (EU) 2019/C 387/01 on access to social protection for workers and the self-employed[51].

[50] European Commission, Interpretative Communication on Directive 2003/88 of the European Parliament and the Council of 24 May 2017, concerning certain aspects of the organization of working time, 24.5.2017, OJ EU, C 156/1, p. 45.

[51] 15.11.2019, OJ EU C 397/1.

7. Another step of the EU institutions towards the unification of working conditions on labor platforms

7.1. Significance of the European Pillar of Social Rights

On 17 November 2017, the European Parliament, the Council and the Commission proclaimed the European Pillar of Social Rights. Principle 12 of the Pillar provides that "regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed have the right to adequate social protection"[52]. Social protection systems facilitate participation in the labor market. They support the movement of people of the working age in the labor market. They contribute to competitiveness and sustainable economic growth. In these aspects, the unification of social working conditions on labor platforms is of major importance, because apart from standard employment contracts in the EU labor markets, non-standard forms of employment are also applied. On-demand work, voucher-based work and platform work have developed more recently and increased in importance since the 2000s (recital 3, 4, 8 and 11 of the Council Recommendation 2019/C 387/01). Unification of social protection systems in the EU is necessary because in most EU Member States the legal regulation of contributions and the entitlement to benefit from social security systems are based on traditional full-time employment contracts of an indefinite duration, while other groups of workers and the self-employed are treated marginally by EU Member States. Only a few Member States have undertaken reforms to adapt social protection systems to the changing forms of employment. The EU institutions believe that the self-employed should be included in the category of persons entitled to benefit - on the same terms as other entitled persons - from provisions ensuring the actual access to full social protection for those in need. In some Member States the self-employed are completely excluded from formal access to key social protection schemes; in other Member States, they are able to join them on a voluntary basis (recital 19). Therefore, all employed persons, workers and the self-employed should have the right to social benefits to the extent guaranteed by the authorities of the Member States (paragraph 3.2. of the recommendation[53]). For this reason, Recommendation 2019/C 387/01 recognises that social protection systems in the EU Member States should be based on the following unified principles: universality (paragraph 9–10), adequacy (paragraphs 11–14) and transparency of social security (paragraphs 15–16).

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52 ec.europa.eu>european-pillar-social-rights [accessed 20.06.2020].

53 It mentions: unemployment benefits, sickness and healthcare benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits and survivors' benefits, benefits in respect of accidents at work and occupational diseases.

7.2. Involvement of EU institutions and its Member States

Certain expressions[54] in Recommendation 2019/C 387/01 suggest the hesitation of the EU institutions on issues related to the unification of social systems for workers in EU Member States. The above applies to: 1) the basis (compulsory or voluntary) of the functioning of these systems; 2) the rules of their application (identical or different) for those employed in standard and non-standard forms of employment; 3) conditions for acquiring and exercising rights to these benefits by workers changing the category of employment from standard to non-standard and vice versa (preservation, transfer or accumulation of rights or their loss). For this reason, it is difficult to criticise the initiators of the uniform and common concept of standardisation of access to security for the self-employed platform workers. The visible rush in action, aimed at covering all workers with social security, is reflected in the schedule of work on the unification of social benefits in the last part of the discussed recommendation entitled "Implementation, reporting and evaluation". The recommendation was adopted on 8 November 2019. A week later, on 15 November 2019, the relevant authorities of the EU Member States were obligated to collect and publish reliable national statistics on access to the various forms of social protection, broken down by such criteria as for example labor market status (employee/self-employed), type of employment relationship, gender and age (paragraph 17). More realistic assumptions were adopted in the further two stages of works on the strategy and tactics of unification of the social protection of all professionally active people operating on the EU labor markets, common and national. By 15 November 2020, the Commission should, jointly with the Social Protection Committee, establish a monitoring framework and develop agreed common quantitative and qualitative indicators to assess the implementation of this Recommendation, enabling its review. In the following year, the Member States are recommended to implement the principles set out in this Recommendation and submit by 15 May 2021 a plan setting out the corresponding measures to be taken (most likely immediately) at national level. The progress in the implementation of those plans should be discussed in the context of the multilateral surveillance tools in line with the European Semester and the Open Method of Coordination for Social Protection and Social Inclusion. The following year the Commission should review the progress made in the implementation of this Recommendation and report to the Council by 15 November 2022. On the basis of the results of the review, the Commission may consider making further proposals.

It is hoped that in the first phase of the social protection reform, the above schedule will be met and that the second phase of introduction of a uniform concept of social protection in the EU Member States will be brought to a stage where it can be expected to be formally and effectively implemented, ensuring the full and equal access of the self-employed platform workers to social protection. The

[54] Such as the freedom of each Member State to define the balance between security and flexibility on its labor market differently. See, Jeff Kennes – Izabela Florczak – Marta Otto (eds.): *Precarious work. The Challenge for Labour Law in Europe.* Cheltenham, UK – Northampton, Mass., Edward Elgar Publishing, 2019.

previous plan – based on Council Recommendation 92/442/EEC[55] – was limited to identifying commonly held objectives in the area of social protection and invited Member States to examine the possibility of introducing and/or developing appropriate social protection for self-employed persons. Those commonly defined objectives have opened room for the Open Method of Coordination for Social Protection and Social Inclusion. Authorities of the EU Member State were also encouraged to introduce and use relevant instruments to support the definition, implementation and evaluation of national social protection frameworks and to foster mutual cooperation among the Member States in this area. The mention of the second Council Recommendation 2019/C 387/01 in the report for the EU could mean a plan to build a common model of social protection for employees and self-employed workers on labor platforms.

8. Final Conclusion

The report on working conditions on labor platforms reveals significant disproportions in the legal position of the self-employed, who have not so far benefited from legal and social protection guaranteed by labor and social standards formulated in EU directives. The self-employed still have a different, much worse legal position than employees performing identical or comparable work on labor platforms. The report rightly argues that both of these groups employed on platforms for comparable jobs should be treated the same. The review of legal regulations shows the slow response of the EU judicial authorities and other, legislative and executive EU institutions, in matters relating to ensuring comparable employment conditions for all platform workers. In the case-law of the CJEU, steps have been taken to construct a uniform concept of "autonomous" worker. Regardless of the name of the concluded contract, the employed and self-employed persons who do not exercise the rights and benefits granted to employees in legal relations with the labor platform, should enjoy the employee status and be entitled to labor law employment benefits and social benefits. The main factual and legal criterion formulated in the case-law of the CJEU should be the scope and level of dependence of the employed person to the employer – the labor platform. The codification of this principle in EU regulations, namely the legal systems of the EU and individual EU Member States, is considered by the authors of the report to be of paramount importance. In my opinion, it is most important that the authorities of the Member States, together with the social partners, enter into a dialogue in order to enable employed persons who do not enjoy an employee status to benefit from protection guarantees that are at least similar to those granted to employees who work under labor law employment relationships. Covering persons in civil-law employment and self-employed with a constitutional guarantee, not implemented

[55] 92/442/EEC: Council Recommendation of 27 July 1992 on the convergence of social protection objectives and policies, 26.8.02, OJ No L 245/49.

by “ordinary” national legislation, according to which every professionally active person has the right to safe and healthy working conditions will constitute the first, serious step, a “milestone” on the way to universal standardisation of working conditions for all workers in the near future.

In my opinion, all professionally active people working on and within legally regulated and unregulated grounds and legal framework of any employment – employee and non-employee employment: such as: employees, workers, self-employed, volunteers, persons performing work on the basis of decisions of the judiciary and/or public administration and other persons performing professional tasks and/or activities related to employment on labor platforms should be guaranteed by the legislature the right to perform work in fair, safe and healthy conditions.