International Seminar on Comparative Labour Law

EU Directive 2019/1152 on Transparent and predictable working conditions

National report – POLAND

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EWL seminar Leicester 2021

EU Directive 2019/1152 Transparent and predictable working conditions

Introduction

The EU Directive on transparent and predictable working conditions was adopted in 2019 as a direct result of the European Social Pillar. Its aims are to provide casual workers with clarity about their working conditions, understanding about their status and information about what rights they have access to. New rights have also been granted to those precarious workers who may belong to the gig economy. Member States have until summer 2022 to implement the Directive. The questionnaire below is intended to explore the state of national law on this topic and what sort of amendments will be needed in the legal system in order to comply with the Directive.

Questions for the national reports:

1. Describe what kind of casual or precarious working exists in your country (for example zero hour contract; platform workers or on demand) and how widespread it is.
2. Which type of legal relationship exist in your national law ("employee", "worker", self-employed, other)? Explain whether these national categories fit with the definition of worker given by the Court of the European Union (see preamble 8 of the Directive). Can you name typical instances of precarious working in which the type of work contract has been questioned and/or created conflicts (eg zero hour contract, platform worker)?
3. The Directive requires in articles 4 and 5 that specific information are provided to the workers within a specific period of time. To what extent does your national law already comply with those requirements? If the employer does not provide the relevant information or not on time, what are the remedies available to the worker or other actors? Would the workers described in question 1 qualify to receive this information?
4. Does your national law (statutes or collective agreements) have rules on probation? If yes, what are they and is there a maximum? Is it possible to deviate from that by collective agreement or individual contracts? (see article 8 of the Directive)
5. Are there rules in your national law preventing employees from having more than one job in the context of precarious work? If yes, on what grounds? (see article 9 of the Directive)
6. When workers have fluctuating hours, is there a time limit whereby they should be made aware of their shifts or working hours? If this is not done, is the employee allowed to refuse to work or entitled to compensation? (see article 10 of the Directive)
7. If your country allows on demand contract. is there legislation which specifically tries to avoid abuse of this form of casual working (such as limitation on the use and

duration of on demand contract or presumption that there is an employee relationship / contract of employment)?(see article 11 of the Directive)

8. Do the rules on probation, having more than one job, time limit for changing working hours and avoid abuse of on demand contracts address the core problems of the atypical workers?
9. Can temporary, on demand or casual workers request a transfer to a more secure or permanent form of working? If yes, what are the conditions and types of contracts available? (see article 12 of the Directive).
10. What changes do you anticipate from your national legislator in order to comply with the Directive?

Questions I and II.

Types of working relationship

1. The specificity of the EU internal labour market

1.1. Preliminary remarks

We are currently living in the period of the fourth industrial revolution and we are witnessing significant changes taking place in the labour market, the emergence of new forms of employment and work, as well as a strong shift in the structure of the workforce. Throughout the European Union's labour market, we can observe the phenomenon of a switch from traditional forms of employment to different, more flexible and less secure ones. Due to the rapidly changing market and demand for goods and services, a permanent job based on an employment contract is sometimes not desirable – by both sides of the labour market - and maladjusted to new realities. Instead, young people in particular, are increasingly opting for more flexible forms of employment relationships. However, this phenomenon seems to have many advantages, there are also some drawbacks involved. This is primarily about the risk to workers of taking jobs that do not provide them with basic rights, guarantees and benefits, hence the need to introduce the provisions of this EU Directive.

1.2. The status of a worker in EU legislation and the Polish perspective

Over the years, wherethrough perpetual evolution, the labour market and relevant aspects have significantly evolved. In view of demographic developments as well as the eternal process of digitalisation, presently the creation of new forms of employment might be observed. Consequently, the Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (hereinafter referred to as: "the previous Directive") has become obsolete, as it does not cover all categories of workers active on the internal EU market that should be placed under legal protection in the sphere of transparent and predictable conditions.

So far, neither the Treaty on the Functioning of the European Union nor any other EU secondary legislation has created a universal and relevant legal definition of a worker. Consequently, Member States have been unable to reach a common understanding of the concept of a worker that could be implemented at a national level. As it turns out, the activities of the Court of Justice of the European Union have been partially helpful in this matter. However, one needs to remember that the case law of the CJEU can be used only as a nonbinding guideline for national legislators that can be used as a suggestion of personal criteria to be taken into account irrespective of the name of the work relationship on which it is based.

To provide workers with predictable rights and sufficient social protection, it was crucial to establish new minimum requirements about informing on the principal aspects of the working relationship. The Directive (EU) 2019/1152 of the European Parliament and of the Council Of 20 June 2019 On Transparent and Predictable Working Conditions in the European Union (hereinafter referred to as: "the Directive") adapts the employer's obligation of informing workers about the essential sides of their working relationships, irrespective of the legal form of working activity.

At this point, to understand the dilemma of implementing the Directive into the Polish legal order, it is necessary to indicate that the Directive – under Article 1 § 2 - refers to a worker within the meaning of national law, collective agreements and practice present in a given Member state and

with consideration to the case law of the Court of Justice. In the case of the Polish legal system, the main problem is that there is no uniform legal concept of a worker, as the Labour Code and other relevant labour law regulations are limited only to a formal concept of an employee. As a result, from the perspective of our legal system, the Directive seems to be a repetition of the previous directive, since only persons employed on the basis of one of the grounds expressly listed in the Labour Code remain under the protection of Polish labour law.

2. The variety of legal forms of performing work in the case of the Polish labour market

2.1. Preliminary remarks

In the case of the Polish labour market, work can be performed in various legal forms, of which an employment relationship based on a contract of employment is clearly dominant. This form of employment is fully regulated within the area of labour law, where the Labour Code of 26 June 1974 (as amended) is the most important and comprehensive source. Working within the concept of an employment relationship based on a contract of employment ensures that workers engaged in this type of working activity enjoy a broad spectrum of rights, privileges, and competences, implementing the idea of decent, stable, transparent and predictable work.

In the meantime, a specific feature of the Polish labour market is its inconsistency in terms of available legal forms in which the same or similar working activities can be performed. Under a consensual decision of parties to a contract or by imposing will of the stronger party of a contract, a given relationship may be subject to the area of civil law. As a result, a potential worker loses the possibility to enjoy the legal status of an employee and a commissioning/hiring party gains the ability to impose such contractual terms that would be recognised as unlawful in the case of an employment relationship based on a contract of employment. Such employment relationships are referred to as non-employee atypical forms of employment and can be associated with the issue of casual or precarious work. Working contracts based on civil law – due to its relative lack of permanence and security - are commonly described as 'junk contracts'.

Civil law contracts are concluded on the basis of the Civil Code of 23th April 1964 (as amended). Consequently, any legal relationship based on this legal source is governed by a fundamental principle of contractual freedom. In that case, the overwhelming majority of rights and obligations of the parties to the contract depends only on their consensus and negotiating position. In the context of an employment contract, it often means that a hiring party imposes conditions favourable to him/herself. From a practical point of view, in the case of the Polish legal and economic system, civil law contracts exploiting the labour force most frequently take a legal form of a contract for services (mandate contracts and contracts of specific work). Workers engaged in such a form of employment are commonly described as 'contractors' or 'mandatory'. Furthermore, apart from non-employee atypical forms of employment associated with civil law, in many cases the same or similar work can be performed in the form of self-employment, in which both commissioning and performing parties act as equal partners and entrepreneurs.

The legal chaos in the discussed area may be also associated with the issue of platform work, zero-hour contracts, and on-demand contracts. Contrary to employment contracts governed by definitive standards of labour law, in the case of civil contracts or self-employment, there are no major legal contradictions to engage such forms of work. The only condition is to obtain the worker's distinct consent. Such a specificity of the Polish labour market seems to be exploited by

many popular platforms that – due to the lack of relevant legislation – constantly develop its professional activities in Poland outside of the area of labour law.

Table 1.
Number of employed, self-employed persons and specific civil contractors in the years 2012-2015 in Poland (in millions)

Specification	2012	2013	2014	2015	Average
Employed persons (total)	14,20	14,20	14,60	14,80	14,45
Self-employed persons[1]	1,10	1,10	1,10	1,10	1,10
Mandate and specific work contractors	1,35	1,40	1,30	1,30	1,34

[1]Self-employed persons without employees (own-account workers).

Source: J. Gołaś, *Non-employee atypical forms of employment in Poland: sociological and legal perspectives*, Economics and Law 2017, Volume 13, Issue 3, p. 312.

Table 2.
The percentage of persons performing work in non-employee atypical forms of employment by type of contract and sex (in %)

Specification	Male	Female
Mandate contracts	56,7	75,9
Self-employment[1]	18,8	13,4
Specific work contracts	14,2	4,9
Other civil-law contracts	10,2	5,8

[1] Self-employed persons without employees (own-account workers).

Source: J. Gołaś, *Non-employee atypical forms of employment in Poland: sociological and legal perspectives*, Economics and Law 2017, Volume 13, Issue 3, p. 312.

2.2. The legal status of an employee

In case of the Polish legal system, the legal definition of an employee is laid down in Article 2 of the Polish Labour Code (hereinafter referred to as: "PLC") and should be interpreted together with article 22 § 1 PLC, which speaks about the essence of employment relationship. It is important to note that the legal definition of an employee is characterised by strong formalism and a narrow scope of impact.

Accordingly, by the term 'employee' we mean a person employed on the basis of an employment contract, an appointment, election, nomination or a cooperative employment contract, who performs work of a specified type for the employer, under his/her direction, at a place and time place specified by the employer and for specified remuneration. In the case of the Polish legal system, the term 'employee' should refer only to the situations mentioned above. As a result, the status of an employee cannot be enjoyed by such categories of workers as civil contractors, self-employed, or platform workers.

By contrast, the concept of a worker to which the Directive relates in Preamble 8 that is based on the ruling of the CJEU is much broader than the definition of an employee adopted in the Polish legal system. That difference is increasing in importance after realising that in the Polish legal system there is no legal definition of a worker. In fact, it is a grey area of legislation.
As we can see from the relevant case law, the CJEU tries to expand the legal concept of a worker and stresses that it should not be limited only to obvious – employee-like-cases. There is a

common understanding between the CJEU and EU legislator that the concept of a worker developed for the needs of the Directive 2019/1152 should cover every individual performing work on the various legal basis of the relationship (not only employment contracts). At the same time, in the case of Poland, without developing the own concept of a worker under the national legal system, the implementation of the Directive will be limited only to a narrow group of employees.

Finally, it is also important to note that in the case of a person formally enjoying the status of an employee - due to the formal approach and explicit wording of the PLC – such concepts as zero-hour contract or contract on demand should be dismissed as contrary to labour law. This is because Article 29 PLC obliges the employer to inform the employee about working time and type of work in the contract of employment.

2.3. The inconsistent legal status of a worker

Contrary to the legal status of an employee, in the case of the Polish legal system, there is no legal definition of a worker. While there is no doubt that the concept of a worker is much broader and that the term 'employee' is included within this broader concept, there is no decisive legislative action to develop a univocal definition of a worker that would be based on a common ground for every category of working people. The common characteristic of all workers is the fact of performing work under certain conditions. The distinctive feature of various categories of workers is a specific basis of employment. In the case of employees, it is a contract of employment. In the case of non-employee workers, there are various bases like contracts for services (e.g., mandate or specific work contracts) or self-employment.

The contract for services is a collective name for various civil law contracts under which one party agrees to perform a specified work for a commissioning party. While mandate and specific work contracts are the most popular, it should be also noted that there are also other unnamed types of contracts that serve as an alternative to a contract of employment governed by the area of labour law. Workers engaged in civil-law-based contracts are known as mandators or independent contractors. This category of workers operates outside of the area of labour law and - thus – is not able to enjoy basic and fundamental labour rights and protective measures. In that context, the main problem is that in many cases the same or similar work can be performed alternatively under a contract of employment or a civil law contract. On the other hand, not every case of civil law contract should be considered as a form of work that should be covered by the Directive and domestic regulations focused on predictable and transparent working conditions. This is because no every contractor acts in circumstances characteristic for the employment relationship.

Similar conclusions can be reached in the case of the status of self-employed. Firstly, there is no legal definition of self-employment in the Polish legal system. From the practical point of view, it can be said that a self-employed person is essentially a person who has decided to act on its own account, in its own name and at its own risk, instead of working for someone else. In simple words, self-employment can be explained as running an own business without employing other persons. Secondly, in many cases self-employment is exploited as an alternative to a contract of employment as the self-employed individual is able to perform the same of similar tasks. Thirdly, this form of work remains outside of labour law regulations and – thus – prevents the self-employed form enjoying basic labour rights and guarantees. Fourthly, this form of work is often

imposed by a hiring party and it is often performed by former employees whose contracts have been transformed to self-employment despite keeping the same tasks.

2.4. The vulnerability of non-employee workers to precarious and casual forms of work

The main problem related to the phenomenon of working in atypical non-employee forms is that not every case of civil-law-based contract of self-employment should be considered as an example of an employment relationship that engages a worker within the meaning of the CJEU case law. Operating as a mandator, other contractor or a self-employed does not automatically imply that a given individual should be treated as a worker. Such conclusion is reserved only for the cases when work is performed under specific conditions. It should be remembered that labour law regulations generally should not intervene within different (civil) areas of law.

As the areas of labour law and civil law operate in parallel, it is difficult for the legislator to develop a reasonable concept of a worker. Such intractability and inconsistency have a severe effect on the legal status of non-employee workers that remains unsettled. Consequently, this specific category of working individuals are deprived of basic rights and protective measures and – thus – are particularly vulnerable to precarious and casual forms of work.

It is important to note that the Polish legislator tries to address this issue, but the adopted instruments seem to have limited effectiveness and scope of application. Under Article 22 § 1^2 PLC, it is forbidden to replace the contract of employment with a civil law contract under working conditions specific to an employment relationship in the meaning of labour law. A person circumventing labour law with the use of a civil law contract is liable to a fine from 1 000 up to 30 000 PLN. A worker exploited in such illegal form of employment is entitled to bring an action to establish the existence of an employment relationship and – as a result – may gain the legal status of an employee.

In judicial practice, the action to establish the existence of an employment relationship is relatively common. There are numerous cases when the Labour Court declared that a contract of services or an event of self-employment should be recognised as an employment relationship based on labour law regulations. Such considerations are based on the nature and essence of an employment relationship. It is important to note that employers often opt for precarious and casual forms of work to reduce their operating costs. They do not even mind the risks connected with it, such as a control of the National Labour Inspectorate and possible imposition of a fine. In accordance with Article 22 § 1^1 PLC and as it was raised in the thesis of the judgment of the Court of Appeal in Szczecin of 6 October 2015. Ref: III AUa 971/14 " It is not the name of the concluded agreement, but its actual subject matter, and above all the circumstances of its execution that testify to the type of agreement". This means that both the National Labour Inspectorate and the worker himself working under a civil law contract or being self-employed could bring the proceedings to establish the employment relationship. Unfortunately, due to the dominant "employer's market" in recent times, employees, often unaware of their rights and scared of losing their jobs, do not decide to take legal action to fight for their rights.

As the same time, the real problem is much broader and should not be limited only to the issue of circumventing labour law. It is worth bearing in mind that forms of work based on grounds other than the employment contract governed by the Labour Code have been developed to enable

people to work also under flexible conditions which can be adapted to both the needs of contracting parties and the changing realities of the internal market. The problem arises when such forms of work are abused and – thus – take the form of precarious or casual work. In the case of the Polish labour marker, this issue may be associated with a relatively widespread practice of a commissioning party (potential employer) to take advantage of its dominant position in order to impose on a second party a specific (civil) type of contract instead of a contract of employment. Such practice is often motivated by an intention to exploit a more flexible and cost-less form of labour that works mainly for the benefit of an employing party.

Table 3.
The percentage of persons voluntarily or involuntarily performing work in non-employee atypical forms of employment by type of contract and sex (in %)

Specification	Voluntary			Involuntary		
	Total	Male	Female	Total	Male	Female
All civil law contracts	19,8	20,9	18,6	80,2	79,1	81,4
Mandate contracts	15,7	13,7	17,2	84,3	86,3	82,8
Self-employment[1]	48,7	52,9	41,9	51,3	47,1	58,1
Average value	28,1	29,2	25,9	71,9	70,8	74,1

[1]Self-employed persons without employees (own-account workers).
Source: J. Gołaś, *Non-employee atypical forms of employment in Poland: sociological and legal perspectives*, Economics and Law 2017, Volume 13, Issue 3, p. 312.

Comparing the definite character of labour law regulations and flexible provisions of civil law that are based on contractual freedom encourages potential employers to exploit alternative forms of work. In turn, a dominant position in combination with civil contractual freedom enables the hiring party not only to choose a specific type of contract, but also to impose favourable (prejudicial to a worker) conditions of a contract. Importantly, such practice is formally legal as long as it is not contrary to the ban defined in Article 22 § 1^2 PLC. This is a reason why non-employee forms of employment based on civil law are becoming more widespread and why non-employee workers are less protected. Such legal and practical specificity may have a severe effect on non-employee workers and enables potential employers to exploit any legal form permitted under civil law. Within the area of civil law, there are no major legal contradictions to exploit zero-hour contracts, on demand-contracts or any other contract related to platform work.

In conclusion, there is a fundamental difference between an employee and a non-employee worker. The former is well protected by labour legislation, as well as various other national and EU regulations - an employer must comply with these regulations, otherwise he/she may face negative legal consequences. On the other hand, regarding the group of people who can be defined as non-employee workers - their employment relationships are based on the freedom of contract and in fact everything depends on the bargaining position.

Question III.

Information obligations

1. Preliminary remarks

The Directive in Articles 4 and 5 requires Member States to *ensure that employers are required to inform workers of the essential aspects of the employment relationship*.

As the outset, it is worth to point out that the Polish legal system already complies with the abovementioned obligation in terms of mandatory information provided to employees under labour law regulations. Part of such information are mandatory elements of employment contract mandatory elements, while other information shall be provided by an employer during the employment relationship.

As in the case of the concept of a worker and an employee, the main problem concerning the Polish legal system is that only employees within the understanding of the PLC are entitled to receive information about the essential aspects of the employment relationship. At the same time, non-employee workers remain outside of the scope of domestic labour law regulations.

2. Obligatory information in the employment contract

2.1. Obligatory information in the text of an employment contract

The key provision of the Polish legal system related to the employer's informational obligation is Article 29 PLC. It particularises not only the form and the content of an employment contract but also obligatory information on the work order. At this juncture, to be more precise, the article mentioned above regulates:

I. form of the contract in which the arrangement should be made,
II. main body of a contract, including:
    1. parties to the contract,
    2. the type of contract,
    3. the date of its conclusion
    4. work and remuneration conditions, and in particular:
        - the type of work,
        - the place of performing work,
        - the remuneration corresponding to the type of work with a specification of the remuneration components,
        - the length of working time and
        - the date of commencing work.

2.2. Main body of a contract of employment

First of all, taking into account several elements of the main body of a contract, an employment agreement must state parties to the contract. The information about the identities of the parties

is crucial to designate who is tied into a contract, and - as a consequence – to identify and assign the obligations of the parties. Furthermore, an employment contract should state the date of its conclusion and a specific type of contract (fixed-term, for an indefinite period of time or for a trial period). Employment contract for a limited period of time is concluded for a predeterminate period. As regards an employment contract for a trial period, it has to state the duration of the trial period.

Moving on to work and remuneration conditions, based on the standpoint of the representatives of Polish labour law doctrine, the type of work should be defined by work station, performed functions, occupation, or just descriptively - by pointing out work tasks, as a matter of employment relationship, an employee is obliged to fulfil.

Another significant element of an employment contract is the place of performing work. It should be determined in a way that comprehensibly reflects the place where an employee performs his work. The Supreme Court recognised that the parties to a contract of employment have the discretion to take a decision how to define the place where a particular work is performed. For that matter, an employment contract must also determine an employee's compensation, simultaneously being mindful of the fact that it cannot be lower than the statutory minimum remuneration.

As regards other compulsory elements of the employment contract, parties also need to set down the amount of working time – if the employment provides full-time or part-time job. It is also essential to settle the date of beginning work, as on that date the employment relationship is formed.

Conclusively, information concerning the identity of the parties, the place of work, the type of work (in the Directive labelled as: *the title, grade, nature or category of work for which the worker is employed or a brief specification or description of the work*), the date of commencement of the employment relationship, the end date or duration of a fixed-term employment relationship or the duration and conditions of the probationary period must be specified in a contract of employment. Therefore, it can be assumed that such labour law regulation fulfils the obligations set out in Article 4 of the Directive.

3. The obligation to inform an employee in writing

In accordance with Article 29 § 2 PLC, an employment contract should be concluded in writing. However, concluding a contract in verbal of implied form does not mean that such a contract is not valid and binding. In such a case, a new informative obligation becomes binding as the employer shall – before the admitting of an employee to work - confirm in writing arrangements that concern the parties, the type of a contract, and working conditions.

Furthermore, under Article 29 § 3 PLC, the employer is also obliged to inform an employee in writing - not later than within 7 days of the date of concluding the employment contract - about the standard daily and weekly working time, the frequency of payments, the length of annual leave, the length of notice periods and about any collective agreement that covers an employee, which correspond to respectively points l, k, i, j and n of Article 4 sec. 2 of the Directive.

4. Information in view of predictable and unpredictable work pattern

Referring to the distinction made in the Directive, that is to say for predictable and unpredictable work patterns, it must be said that the Polish labour law legislation does not allow to organise work in the manner unpredictable for employees.
Comparing Article 4 sec. 2 Point l of the Directive to relevant national legislation, it must be pointed out that in the case of the Polish legal system the work pattern is entirely predictable as an employer must inform employees in writing - not later than within 7 days of the date of concluding the employment contract - about the standard daily and weekly working.

Regarding overtime work, the PLC does not establish any legal obligation to inform an employee about arrangements and remuneration for working overtime. In the case of overtime, it is usually unpredictable to determine a specific time when an employee could be bound to perform work. Thereby, an employer is not required to inform an employee earlier of the reference hours and days within which the employee may be required to work. The compensation due to overtime work is well defined in the PLC and the employer is not required to pass this message on to employees. Therefore, as a matter of nonregulation of the unpredictable work pattern, there is no obligation of informing of the minimum notice period to which the employee is entitled before the start of a work assignment as well as the deadline of cancellation work assignment without compensation.

5. Non-compulsory information

5.1. Training entitlement

In respect of other information referred to in Article 4 of the Directive, a worker should be informed if there is any training entitlement provided by the employer. The PLC does not consider this information as one of the essential aspects of the employment relationship. Thereby, Poland does not meet this obligation defined in the Directive.

5.2. The identity of the social security institutions

In virtue of the Directive, an employer is also responsible for informing workers about the identity of the social security institutions receiving the social contributions attached to the employment relationship and any protection relating to social security provided by the employer. In the case of the Polish legal system, the social insurance scheme - including retirement, disability income, sickness, and accident insurance - is obligatorily provided to employees. On the basis of Act on the Social Insurance System, the Social Insurance Institution guarantees the implementation of the tasks in hand from a range of social insurance. Thereupon, the legislator does not oblige employers to indicate the identity of the competent social security institutions.

6. Other forms of employment

While assessing compatibility of the Polish legal system with the requirements defined in the Directive, it is also worth to refer to other (atypical) forms of employment.

6.1. Delegating to work in a country that is not a EU Member State

Starting from the regulations included in the PLC, the employer, based on the employment contract, who posts an employee to work in a country that is not a UE Member State for a period exceeding one month must notify an employee about further information.

In the content of such an employment contract, the duration of performing work abroad and the currency in which the remuneration will be paid to the employee while performing work abroad must be determined.

Moreover, prior to delegating an employee to work abroad, the employee must be informed in writing about the benefits to which an employee will be entitled in respect of being delegated to that work, including the reimbursement of travelling costs and the accommodation as well as the conditions of an employee's return to the country. Employer may also inform about these conditions by indicating relevant provisions of law.

6.2. Employment in the form of telework

It is important to note that the PLC provides for the possibility to perform work away from the premises of an employer by means of information and communication technologies, which is known as employment in the form of telework. This is a specific type of contract of employment that and – due to its specificity – it must regulate specific information.

If the telework is agreed upon between the parties when concluding the employment contract, apart from those additional information which the employer is obliged to pass on to an employee, the employer must include also the identity of an organisational unit of an employer within the structure of which the job position of the teleworker should be found and the identity of a person or authority responsible for co-operation with the teleworker and entitled to conduct inspections in the place where the telework is performed.

If the parties agree to perform telework subsequently during the employment, the employer provides a teleworker written information about the conditions at the latest on the day that the teleworker starts work in the form of telework.

6.3. Temporary work

As concerns other-than-PLC regulations, it is also essential to characterize temporary work depicted in the Act of 9th July 2003 on the employment of temporary agency workers. To begin with, it is important to state that an employment contract concluded between a temporary work agency and a temporary agency worker mostly fulfils requirements of the Directive.

Firstly, such a contract should identify the parties to a contract, the type and date of a contract. Moreover, it should specify the user-undertaking (which corresponds to Article 4 sec. 2 point f of the Directive) and the agreed period in which temporary work is to be performed.

Other conditions binding parties should conclude: the type of work to be entrusted to the temporary agency worker; the qualifications required for the temporary agency worker to be assigned to perform the work; the anticipated period of temporary work; the working hours of the temporary agency worker and the place of performing the temporary work. In the case of remuneration, information about the date and method of payment should be also indicated.

Moreover, a temporary agency worker needs to know specific information susceptible of direct contact with representatives of the temporary work agency, that is the address to make contact with each other, telephone number, e-mail address, days, time slot when there is possible communication. The information may be conveyed by the written form or electronically.

In principle, a temporary work contract is concluded in writing. Otherwise, the temporary work agency must provide written confirmation of the type of employment contract that has been concluded, and its terms, not later than the second day of performing temporary work.

7. Timing and means of information

The Directive in Article 5 sets a specific deadline for providing information to the worker, which are – respectively - the first working day and no later; the seventh calendar day and within one month of the first working day.

Legal standards concerning the timing and means of information that are presented in the PLC are compatible with the requirements defined in Article 5 of the Directive. In the case of the Polish legal system, the majority of information shall be provided individually to the worker in the contract of employment on the day of establishment of an employment relationship, while other information should be provided within 7 days since concluding the contract.

The same conclusion can be referred to the required means of information, as under the PLC, relevant information should be provided individually to the worker in the written form (in the text of an contract; as an information note or as a written reference to relevant collective agreements or rules). So far, the legislator has not developed templates and models for the relevant documents. However, competent authorities assure public access to the laws, regulations, and administrative provisions by Online Database of Polish Legislation or Journal of Laws.

8. Employer's liability and remedies available to the employee

It is important to note that the PLC provides for liability to be imposed on an employer failing to comply with the form and the scope of the informative obligation. Firstly, failing to confirm in writing the content of a contract of employment prior to admitting the employee to work is punishable by a fine from 1 000 up to 30 000 PLN (approximately – 200 euros to 7000 euros).

Secondly, an employee may always claim compensation by virtue of the employer's tort or employers default on employment contract terms, providing that employee proves the damage suffered. However, in the case of defaulting on the responsibility to inform an employee about essential aspects of the employment relationship, employees may have difficulty in proving the damage suffered.

Finally, an employee has also legitimation to bring an action against an employer to establish the existence of an employment relationship. This type of action is often associated with the relatively widespread practice of circumventing labour law regulations and contracts of employment by a use of civil law contracts, for which there are no informative obligations imposed on a hiring party.

9. The informative obligations and casual or precarious workers

Presently, mandatory labour law provisions do not qualify casual or precarious workers to receive information on the essential aspects of their working relationship. Contract of mandate, contract for specific work, contract for services et al. are civil law agreements that are regulated exclusively in the Civil Code, thereby such workers are not considered as employees. As a consequence – this category or workers is not able to enjoy basic guarantees presented in the PLC and there are no alternative regulations that could be applied in the process of implementing the Directive. Thus, to fully implement the Directive, it is necessary to draft a new act that will cover all categories of workers in the sphere of the employer's informative obligation.

Question IV.

Rules on probation

1. Preliminary remarks

In the Polish legal system, we can distinguish between the three types of contracts of employment. Those are:

1. a contract for an indefinite period,
2. a fixed-term contract,
3. a contract for a probationary period – the subject of the question presented.

Therefore, the question whether there are any regulations regarding a probationary period in the Polish legal system should be answered in the affirmative.

Please note: The above distinction refers only to a formal category of employment relationship based on a contract of employment. Thus, statutory regulations relating to a contract for a probationary period are not applicable to casual or precarious workers who fall outside the scope of a formal statutory definition of an employee. As a result, in the Polish legal system there are no formal rules regarding the probationary period or work of non-employee categories of workers.

2. The objective of a contract of employment for a probationary period

According to Article 25 § 2 of the Polish Labour Code (hereinafter: PLC), a contract for a probationary period is concluded to verify the employee's qualifications and suitability for a specific type of work. The probationary period should be considered as the time when the parties to the employment relationship get to know each other. During this period, the employee must not only be subjected to observation, but also be able to thoroughly familiarize employee duties and competences.

The employee should be provided with the help and care necessary for adaptation to the new environment. Such an environment should provide an opportunity to showcase one's own abilities and skills. It is also a period during which both parties enjoy facilitated access to the possibility to terminate the employment relationship. This is due to shorter notice periods, the lack of an employer's obligation to justify the termination, and the lack of need to consult termination with trade unions before doing so.

3. Duration and maximum range

In accordance with Article 25 § 2 PLC, the trial period in a case of the discussed type of contract of employment **shall not exceed a maximum period of 3 months.** The parties may agree on a shorter trail period or extend it (event several times) up to the statutory maximum[1].

The Labour Code also defines rules related to the renewal of the contract of employment for a trial period with the same employee. Under Article 25 § 3 of the PLC, it is possible only in two situations. Those are:

1. employing the same employee for different type of work,

[1] Wagner B. (2002), *O swobodzie umowy o pracę raz jeszcze*, [w:] M. Matey, L. Nawacki, B. Wagner (red.), *Prawo pracy a wyzwania XXI. Wieku. Księga jubileuszowa Profesora Tadeusza Zielińskiego*, Biuro Rzecznika Praw Obywatelskich, Warszawa.

2. employing the same employee for the same type of work, but after at least 3 years from the date of termination of the previous employment contract.

In that respect, it is noteworthy that the legal admissibility of concluding a second contract for a probationary period with the same employee for the same type of work is inconsistent with Article 8 sec. 2 of Directive 2019/1152, which states that in the case of the renewal of a contract for the same function and tasks, the employment relationship shall not be subject to a new probationary period.

4. Statutory rules for a probational period vs. individual and collective agreements

The rules regarding a contract of employment for a probational period are the subject of the mandatory provisions of the Labour Code. It simply means that the maximum statutory trial period shall not be exceeded under individual or collective agreements. This is because the statutory limit in a given case should be considered as the minimum standard of legal protection of employees, which – under Articles 9 § 2 and 18 § 2 PLC – shall not be altered to the detriment of the employee. Consequently, less favourable arrangements of individual contracts or collective agreements are null and void.

Question V.

Having more than one job

According to the principles of the right to work and the freedom to work, in the Polish legal system, there are no general restrictions on taking up more than one job (regardless of whether it is a precarious work or not). This general rule may be referred to both employees and non-employee categories of workers. The only major exception in this regard concerns the construct of non-compete agreement, which is present in employment relationships, civil contracts, and corporate relations.

In the case of employment relationships based on a contract, there is relatively extensive regulation on the non-compete agreement in the Labour Code. While the provisions of the PLC do not explicitly define what a competitive activity means, the doctrine broadly assumes that it is an activity of the same type as that carried out or planned by the employer.[2] The specification of the scope of competitive activities from which the employee declares to restrain should be clearly defined in the contract concluded between the parties.

It is important to note that the non-compete agreement shall not prevent the employee from taking up any other concurrent working activity, as its sole objective is to protect the employer from unfair competition.

According to Article 101[1] PLC, the employee's obligation to refrain from competitive activity may be based only on the contractual base. The non-compete agreement shall be null and void unless made in writing. Refusal to conclude the non-compete agreement shall not be used by the employer as a justification for termination of a contract of employment or for refusal for establishing an employment relationship with a specific candidate. However, on the other hand, any breach of a legally concluded agreement may be a basis for a disciplinary action and compensation claim of the employer.

[2] Kuczyński T. (1997), *Wybrane zagadnienia regulacji prawnej zakazu konkurencji w stosunkach pracy*, „Praca i zabezpieczenie społeczne" nr 5/1997.

Question VI.

Fluctuating hours

According to Article 129 § 3 PLC, the working time pattern of a given employee may be made in writing or electronically – for a period shorter than the applicable settlement period, but including at least one month. It can also cover the entire settlement period. The employer is obliged to provide the employee with the pattern at least one week before starting work in the period for which it was prepared. This general rule applies to all work time patterns, including all sorts of flexible working time models, fluctuating hours, shift work, etc.

The consequences of the employer's failure to provide the employee with the working time pattern within the aforementioned period remains a questionable issue. Polish labour code does not establish any clear employee rights like the right to refuse work assignment in the case when the employer does not fulfill the discussed obligations.

It seems that the managerial prerogatives of the employer and the associated employee's obligation to comply with the employer's instructions should be used to draw the thesis that the working time pattern presented to the employee after the deadline is still binding on the employee. On the other hand, based on general rules in case of litigation, one would expect a labour court to release the employee from the consequences of refusing to accept a late delivered work assignment.

The employee is not entitled to receive any kind of cash benefit on this account, unless the evidences of the employee's material detriment are delivered. The employer may, however, be exposed to criminal liability as a result of an infringement against employee rights.

The only form of protection of an employee against the presented working time pattern is the regulation of Article 129 § 5 PLC, which provides that if in a given month, due to the working time pattern in the adopted settlement period, the employee is not obliged to perform work, he / she is entitled to remuneration in an amount not lower than the minimum wage.

Finally, it is important to remember that labour code regulations, including those discussed above, are applied only to employees in a narrow meaning, not to all workers in general. Therefore, while considering the scope of workforce covered by directive 2019/1152, it has to be said that in Poland platform workers and other people performing precarious jobs as self-employees or individual contractors are not covered by any legal rules on working time schedule information. Their situation depends only on the contract they work upon.

Question VII.

On-demand contracts

The occurrence of contracts on demand in the Polish legal system can be examined from two perspectives: in the context of labour law addressed solely to employees and in the context of civil law, which can be linked to non-employee categories of workers, including the majority cases of casual workers.

In the case of labour law, the concept of work on demand shall be dismissed as contrary to the fundamental legal rules governing an employment relationship. In that context, work on demand is incompatible with the statutory definition of an employment relationship, by the establishment of which *the employee shall oblige himself/herself to perform specific work for the employer, under his/her supervision, at the place and time specified by the employer, and the employer - to employ the employee for remuneration* (Article 22 § 1 PLC). Furthermore, specific statutory rules related to the issue of working remuneration make the concept of work on demand unprofitable for employers, who are obliged to provide employees with remuneration for the sole fact of being ready to perform agreed work.

The same rules cannot be applied on a statutory basis in the case of civil law, where the concept of contractual freedom is dominant. As a consequence, the possibility to conclude a contract on demand with a non-employee worker depends entirely on the consensus of the parties of a given relationship. Thus, contracts of demand may be applied in the majority cases of contracts for services, which are governed under civil law.

Question VIII.

The core problems of atypical workers

1. Introduction – characteristics of the problem

When answering this question, it is first of all necessary to outline both the specificity and the complexity of the Polish labour market. From the viewpoint of the working population, the legal status of a worker is governed by different areas of law. In the case of the legal status of an employee, we may apply numerous constitutional, international, or statutory regulations (e.g., Labour Code) falling into the category of labour law. However, it should be remembered that the legal construct of an employee is formally defined in Article 2 PLC, according to which labour law regulation shall be applied only to individuals employed under an employment contract, appointment, election, nomination or cooperative contract of employment. Persons engaged in any working activity based on the above listed types of legal relationship enjoy full protection in terms of probationary periods, freedom of work, uncertain working hours, etc. In that context, such constructs as work-on-demand or zero-hour contracts should be dismissed as contrary to fundamental labour law principles.

Concurrently, apart from employees, there is also a broad personal category of non-employee workers, who do not fall under the scope of application of the majority of labour law regulations. As a consequence, this category of workers cannot enjoy basic statutory guarantees or means of legal protection, which are reserved only to employees. This problem affects many individuals engaged in working activities, such as self-employed or persons performing various services. Their legal status is governed mainly by civil law, where – as indicated before – the concept of contractual freedom is dominant. Thus, the parties to a given contract may agree on a number of issues, which at the same time are illegal in the area of labour law and employment relationships.

According to the study published by the Polish Central Statistical Office, in Poland in 2018, there were over 2.5 million people working on the basis of a legal relationship other than an employment relationship (self-employed individuals not employing other employees and persons working exclusively on civil law contracts)[3]. The total number of economically active population in Poland is about 16.5 million, which means that every sixth Pole works on the basis of a relationship other than an employment relationship. Moreover, workers often are not able to freely choose such "flexible forms" of working activity, as it is frequently imposed by a hiring party, looking for more profitable and flexible forms of employment. As shown by the relevant statistical data, about 80% of non-employee workers did not choose this form of employment of their own free will, and about 50% was forced to do so by the employing party[4].

This practice has a number of serious consequences. Circumvention of labour law and the formal construct of an employment relationship enables entrepreneurs – potential employers to fully enjoy the civil freedom of contract and – thus – to reduce significantly costs, burdens and limitations related to the area of labour law and employment relationships. The main reason for

[3] GUS (2019), *Wybrane zagadnienia rynku pracy*, https://stat.gov.pl/obszary-tematyczne/rynek-pracy/pracujacy-zatrudnieni-wynagrodzenia-koszty-pracy/wybrane-zagadnienia-rynku-pracy-dane-dla-2018-roku,9,7.html (06.02.2021).
[4] *Ibidem.*

this is the excessive differentiation of the financial burden on labour (i.e., the tax wedge) for various forms of employment, as the average wedge in an employment contract is almost three times higher than in the case of an average civil law contract[5].

It also seems that the tendency to circumvent the labour law through non-employee forms of employment is gaining more popularity due to COVID-19 pandemic, as entrepreneurs more often will look for potential opportunities to reduce the costs of their activities. It is worth noting that in the first half of 2020 – i.e., during the first lockdown – the number of people covered by social insurance on the basis of a civil law contract fell by approx. 6-7%. For comparison, the number of people insured under an employment contract decreased by 2 percent. This means that those workers who are not covered by the labour law suffered most from the pandemic. This is due – inter alia – to a less formal and easier process of terminating contracts for services.

This state of affairs also negatively affects the State's finances. The scale of abuses in the use of atypical forms of employment may even reach from PLN 20 to 30 billion annually compared to PLN 280 billion of budget revenues from the tax wedge in 2014[6].

2. Implementation of the Directive and current state of affairs

In general, the main aim of the EU Directive 2019/1152 on transparent and predictable working conditions is to improve the legal status of casual and precarious workers by obliging Member States to assure that such categories of workers have a certain field of legal protection against unstable and unspecified working conditions. It is perfectly clear that the category of casual or precarious workers is a broader category when compared to a formal category of employees within the meaning of PLC.

In the case of employees, the issues of probationary period, plural jobs, fluctuating working time, or work on demand should not be considered as a major challenge facing the national lawmaker. It can be assumed that the Polish legal system in the discussed field is relatively compatible with the standards identified in the Directive. Employees enjoy defined maximum probationary periods[7]. In the case of employees, the possibility to be engaged in concurrent working activities may be only limited to the non-compete contract. While there are some shortcomings and deficiencies related to the issue of transparency of fluctuating working hours of employees[8], none of them affects the core problem of the Directive. Finally, the construct of

[5] Wojciechowski P. (2015), *W poszukiwaniu kompromisu wokół problemu umów śmieciowych*, „Ubezpieczenia Społeczne. Teoria i praktyka.", nr 3/2015.
[6] *Ibidem*.
[7] There should some debate as to whether statutory provision allowing employers to reemploy the same for the same type of work individuals for a probationary period after at least 3 years from the date of termination or expiry of the previous employment contract is contrary to the provisions of the Directive, which states in Article 8 sec. 2 that "in the case of the renewal of a contract for the same function and tasks, the employment relationship shall not be subject to a new probationary period."
[8] For example, employees do not enjoy legal possibility to refuse to work after too short notice of changes in the working assignment or to obtain reasonable compensation due to such fact. It seems that the Polish legislator should also improve legal protection of employees in the field of on-call duties and overtime.

on-demand contract does not significantly affect employees, as such practise is clearly contrary to the basic regulations of labour law.

It seems that the core problem of atypical (non-employee) workers in Poland is that this personal category of labour force is not fully recognised. While there are numerous labour law provisions guaranteeing that employees shall enjoy relatively transparent and predictable working conditions, numerous workers engaged in non-employee and nonuniform forms of working activity operate outside the area of labour law, being deprived of any legal guarantees. As a consequence, in the case of the Polish legal system, relatively similar working activities may be governed by two different areas of law and two formally different categories of workers may enjoy different scopes of rights. There is no doubt that all categories of workers should enjoy the same legal guarantees of transparent and predictable working conditions. In the case of the Polish legal system, it is relatively easy to obtain through the extension of employees' rights to all categories of workers, including casual and precarious ones. However, it cannot be done without legal recognition of atypical (non-employee) workers in the first place. To start with, in order to achieve it, it is necessary for the Polish legislator to outline the appropriate determinants of the legal status of a worker and then to decide which rights should be reserved only to employees and which should be granted to all workers.

Question IX.

Transfer to a more secure or permanent form of work

1. General remarks

In the first place, it should be noted that the Polish legal system does not offer a wide range of possibilities to request for a transfer to a more secure or permanent form of working by temporary, on-demand, causal or other categories of non-employee workers. Furthermore, it should be borne in mind that in the case of non-employee workers there is only one more secure or permanent form of working available, which is the form of employment relationship based on the contract of employment.

In the light of the various regulations of the Polish legal system, it must be stated that there is only one essential legal basis for a possible request of non-employee worker to transform his/her working relationship into an employment relationship. To achieve such a goal, any non-employee worker has to bring an action to establish the existence of an employment relationship based on Article 189 in conjunction with Article 476 § 1 point 1^1 of the Civil Procedure Code. Importantly, the indicated action is not available to any non-employee worker, as it is reserved only for cases of bogus "employment" outside the framework of labour law. It should be remembered that in the present state of national law, such working forms as temporary, on-demand or casual work are legal as long as such economic activity is not performed under conditions specific to an employment relationship. Consequently, an action brought by a non-employee worker in order to transform her/his form of work into an employment relationship has to be based on the imputation that his/her contractual party circumvented labour regulations and that her/his work was carried out in conditions natural for an employment relationship. In any case, a court has a difficult task to identify the characteristics and dominant attributes of the examined relationship and compare them to a model construct of employment relationship.

It should be also emphasised at this point that the necessity of appropriate qualification of the relationship on the basis of which work is performed is known even from the pre-war period and despite many legal system changes throughout the years the essence of the problem has remained unchanged. Laconic and imprecise wording of Article 22 § 1 PLC[9], which provides a general definition of the employment relationship, has not been changed since the 1970s and leaves a considerable margin of interpretation for the common courts. Thus, the allocation to the employee category by labour law standards remains uncertain and variable. It is somehow a labour law paradox as it cannot define its own central structure with sufficient precision. Although the fact that the Polish legal system is an example of the continental legal system, the Supreme Court ruling, even in the form of decisions, highly influences the interpretation given by the labour courts in the discussed cases.

2. The characteristics of an action to establish an employment relationship

2.1. General considerations

According to Article 189 in conjunction with Article 476 § 1 point 1^1 of the Code of Civil Procedure, the claimant may bring an action to establish an employment relationship if the legal relationship

[9] According to Article 22 § 1 PLC, under an employment relationship the employee obliges himself/herself to perform specific work for the employer, under his/her supervision, at the place and time specified by the employer, while the employer obliges himself/herself to employ the employee for remuneration.

between the parties, contrary to the signed agreement, in reality has the specific features of an employment relationship. Such an action can be brought by any non-employee worker who in practice is often referred to as an individual service provider, independent contractor, or self-employed, which are the parties to most civil law-based working contracts operating in the Polish legal system. The goal of such a action is to determine whether a given legal relationship has characteristics of an employment relationship within the meaning of Article 22 § 1 PLC.
In that context, it must be noted that the Labour Code prohibits replacing the contract of employment with a civil law contract, while the conditions of performance of work maintains specific for an employment relationship (Article 22 § 1^2 PLC). Such illegal practices are often referred to as "bogus" non-employee forms of work or employment. The role of the Labour Court is to identify the dominant features of an examined legal relationship and establish which are dominant and specific for an employment relationship. Determining that the examined relationship has specific characteristics of an employment relationship and that a claimant was engaged in a "bogus" formula obliges the Court to establish the existence of an employment relationship. Such a judgement is of a declaratory nature and confirms that in fact the claimant-worker has had a status of an employee since the date of conclusion of the examined contract.

The claimant- worker has facilitated access to the procedure of establishing the existence of an employment relationship. It is a part of a legislative policy against the widespread practice of abusing non-employee forms of work. For instance, the claimant does not have to act alone, as under Article 63(1) of the Code of Civil Procedure, such an action can be brought by a competent labour inspector. Interestingly, the inspector is entitled to enter ongoing judicial proceedings or even act without prior approval of the worker and bring an action independently. What is more, the labour inspector cannot bring a claim to prove the nonexistence of an employment relationship.

It is also worth to note that – according to the already mentioned study of P. Grzebyk (2015) - judicial proceedings regarding an action to establish the existence of an employment relationship most frequently concern a specific category of workers – semiskilled individuals engaged in service. Moreover, the claims usually concern relatively short periods of work and often contested contracts have been renewed several times. Such regularities may suggest that labor courts in Poland within the procedure to establish the existence of an employment relationship often deal with unstable and unpredictable cases of working activities, which can be associated with casual or precarious work.

2.2. The subject of examination of labour courts

Resolving a claim to establish an employment relationship depends on conducting evidence. A positive outcome of the verification process leads to the acceptance of the claim and a verdict confirming that the parties to the contract have actually established an employment relationship. Whereas, determining by the Court that the examined relationship does not contain all constituent and natural features of an employment relationship leads to the dismissal of the claim. According to the statistic (P. Grzebyk, 2015), a claim to establish an employment relationship is declared justified in approximately 44% cases. Almost the same amount of claims (42%) is dismissed by labour courts and in about 14% of cases, a settlement is reached by the parties.

The examination conducted by a labour court is based on a certain criterion derived from a long-time observation of the practice and the evolving realities of the domestic labour market. It should be noted that such an examination is a real challenge requiring extensive knowledge, well-calibrated intuition, and awareness of subtle differences between an employment relationship and other non-employee working relations. To pass a judgement establishing the existence of an employment relationship, the court has to determine that the given legal relationship has specific characteristics of an employment relationship, while having in mind that the same working activity can often be legally performed within the framework of different legal formulas.

2.3. Factual criteria considered by labour courts

2.3.1. General remarks

Having regard to the above, it should be noted that the judgement passed in the analysed procedure is based on determining the factual characteristics of the working relationship in contrast to the model legal and practical characteristics of an employment relationship. Model legal characteristics of an employment relationship are indicated in Article 22 § 1 PLC and take the form of performing specific work for a specific party (employer), under his/her supervision, at the place and time specified by the employer and for remuneration. Such a formal construct is often inconclusive, opening a large number of practical questions. Consequently, labour courts are often forced to search for specific, precedential, and more practical criteria.

According to the study of the Institute of Justice (P. Grzebyk) from 2015, labour courts have developed a list of specific criteria that are taken into account in the analysed procedure. These are: exploiting the weaker negotiating position of the employed party; justified economic interests of the employing party; status of the employed party in relation to third parties; equal treatment; awareness and voluntariness of work in the given formula; absence or presence of legal institutions typical for an employment relationship; length and intensity of the relation and risk incurred by the parties. It must be stressed out that this catalogue remains open and there is no single decisive criterion determining whether the examined relation shall be declared as an employment relationship.

2.3.2. Exploiting a weaker negotiating position

One of the fundamental functions of labour law is to protect employees, who are often perceived as a weaker party to an employment relationship. In that context, labour courts often base affirmative judgements on the determination that the employed party to a non-employee contract had a significantly weaker negotiating position when the working relationship was established. It is often argued that lack of experience, young age, and crisis in the labour market could effectively force claimants to sign a civil-law contract, which was imposed by the employing party. Such reflection corresponds to the statistics suggesting that in most cases of contracts for services concluded in Poland, such form of work was imposed by the hiring party and against the will of the hired party.

2.3.3. Justified economic interest

On the other hand, it should be borne in mind that the protection of a weaker party shall not be absolute, as in certain cases the legitimate interests of the employing party should be taken into

account. Article 22 § 1^2 PLC prohibits replacing the contract of employment with a civil law contract, only when the conditions of performance of work maintain specific for an employment relationship. Thus, utilizing non-employee forms of work in legitimate circumstances shall not be contested. Such an explanation may be presented in cases where the employing party expresses the need for incidental and short-term work. Moreover, it shall be also indicated that sometimes a person providing services may also have the economic interest in signing a civil-law contract as it is associated with higher net income.

2.3.4. Third party assessment

Sometimes courts pay attention to the way in which the service provider is presented to third parties – as an independent entity (e.g., an partner) or as an individual fully integrated with the workplace and subordinate to the hiring party. For instance, an e-mail address with the employer's domain name and a business card with the principal's name may indicate a desire to present a service provider as a person integrated with the workplace who has the authority to conduct affairs for and on behalf of the employer.

2.3.5. Equality of treatment

Labour courts often indicate that performing the same work tasks within the same workplace should not be based on a different legal relationship linking the same employing party and different workers. The obligation to assure that all workers have equal working conditions can be extended also to the equal legal basis of employment. Thus, work based on an employment relationship should not be used as a privilege reserved only for the chosen ones.

2.3.6. Awareness and voluntariness

Courts also raise that the claimant's explicit acceptance of a civil-law contract as a legal basis of his/her work engagement may be a key issue in determining the true nature of the given relationship. Lack of distinct attempts of contesting the legal basis of the given relationship throughout the entire long-time contract may suggest that the employed party was never interested in establishing an employment relationship. This criterium shall be particularly helpful in cases where the employed party enjoys a higher education or a higher social status or where there is a lack of pressure to work in the given formula.

2.3.7. Length and intensity of the relation

In the case of the Polish labour law, an employment relationship is considered as a basic example of a long-term working relation. Thus, a history of long-term cooperation between parties may suggest that it should be based on an employment contract.

2.3.8. Risks incurred by the parties

In the case of an employment relationship, the major risks related to this form of work are mostly incurred by the employer. For instance, the employee is entitled to the remuneration for the sole fact of being ready to perform work and despite such circumstances as economic crisis, downtime or decreasing financial performance of a company. Attributing risks in a different way – especially

when the employed party's remuneration in dependent on his/her performance – may suggest that the examined case shall not be declared as an employment relationship.

2.3.9. Typical institutions

According to the case law of the Supreme Court, the adoption of institutions and mechanisms typical for labour law in a civil-law contract may suggest the existence of an employment relationship. Courts usually pay attention to whether the parties have agreed on the right to rest, additional compensation for overtime, and excused absences of the employed party.

Question X.

Future actions

The complexity of the Polish legal system in terms of various legal forms of performing work makes it difficult to anticipate the future action of the national legislator. Despite the fact that millions of workers are affected by a widespread practice of exploiting non-employee forms of work to circumvent labour law regulations, the Polish legislator has still not presented any reasonable solution to the problem.

The assessment of the possibilities of implementation of the EU Directive on transparent and predicable working conditions into the Polish legal system should be examined from two separate perspectives. The first perspective is focused on employees, who - due to the specific formal status - already enjoy the majority of rights and guarantees laid down in the Directive. The basic principles and regulations of labour law oblige employers to assure that their employees have mostly transparent and predictable working conditions. Thus, in the case of employees (within the meaning of Article 2 PLC), there is no need to implement a significant reform of labour law. In the case of the Polish legal system, employees are effectively protected against exploitation based on such precarious formulas as: zero-hour contracts, work on demand or platform work.

However, there is also other broader perspective focused on all categories of workers. It must not be forgotten that alongside employees, there is also another equally important category of non-employee workers, who usually operate outside the protective measures of labour law. It seems that in the case of the Polish legal system, to fully implement EU Directive 2019/1152, the legislator should focus mainly on this category of workers. In this context, there are numerous challenges that will be faced by the legislator.
Firstly, proper implementation cannot be effectively achieved without developing the relevant concept and definition of a worker. At the moment, in the case of the Polish legal system there is no such term like “worker” and – as a result – labour law regulations are addressed mostly to employees. It is not a simple task, as the working population operates within various areas of law. Thus, the adopted concept of a worker should reconcile the different interests and specificities present in both labour and civil law. In that context, the personal scope of future reform implementing EU Directive 2019/1152 should not be limited only to employees within the meaning of Article 2 PLC.

Secondly, the process of implementation should be adapted to the specificity of the Polish labour market. In that context, the attention should be focused particularly on the category of non-employee workers. Currently, in the case of this personal category, there are no legal provisions guaranteeing predictable or transparent working conditions. Strong ties with civil law and the dominant principle of contractual freedom cause that the issue of working conditions of non-employee workers engaged in contracts for services or in self-employment is subject only to the arrangements of the specific contract. At the same time, it is worthwhile considering whether each case of a contract for services of self-employment should be covered by provisions assuring predictable or transparent working conditions. This question cannot be asked without adopting a proper concept and definition of a worker under the national legal system. In this regard, it seems that the legislative efforts of the Polish legislator should be focused mainly on more fundamental questions related to the legal status of a worker rather than on addressing such specific issues like on-demand and zero-hour contracts or platform working. In the case of the Polish legal system, it is futile to address the issue of precarious and casual work in a gig economy without developing a

relevant concept and definition of a worker and deciding which labour law regulation should be extended to all categories of workers and not only to employees.

Thirdly, it is crucial to hold in-depth debate about implementing the concept of transition to another form of employment that is presented in Article 12 of the Directive. This is a fragile area of conflicting interests of workers and employers, which should be balanced within the final formula of legal remedy to-be implemented at the national level. The nature of the worker's request to transform his/her relation to more predictable and secure remains inconclusive in terms of its binding character. Biding force of such a request leading to the employer's obligation of transition shall be considered as significant legal interference with contractual freedom and certainty of transaction. On the other hand, non-binding character of such a provision would undermine the effectiveness of the whole reform, which – consequently - would not improve the actual and legal status of precarious and casual workers.

In conclusion, it may be stated that the Polish government gradually raises social standards to ensure decent and stable working conditions. Furthermore, Poland's actions are compatible with the general direction postulated by the European Commission, which is the improvement of employment conditions and counteracting in-work poverty. Unfortunately, the legislator does not fully recognize the current problematic status of non-employee workers. As a consequence, the majority of labour law regulations that could be effetely used to assure predictable and transparent working conditions is focused exclusively on a narrow group of employees. There is a cause for concern that a specific wording of Article 1(2) of the Directive 2019/1152 will be used by the Polish legislator to justify the superficiality of to-be implemented reform that will not be addressed to the majority of non-employee workers. There are no significant signs to consider gig-economy workers as employees in the near future. According to the statistics, only a negligible percentage of the working population in Poland uses online platforms for profit-making purposes. However, it does not mean that precarious and casual work is a problem only for western countries. In fact, the Polish labour market is struggling with a peculiar variation of precarious work that is associated with the widespread use of civil law contracts in place of an employment contract.

THE END