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An entrepreneur as an employer in the Polish legal system

Przedsiębiorca jako pracodawca w polskim porządku prawnym

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Summary In the Polish legal system there are definitely strong correlations between the legal notions of an entrepreneur and an employer, though they rarely occur jointly in specific normative solutions. Unfortunately, the far-reaching imprecision of specific regulations often raises serious doubts of an interpretive nature. It is fundamental to answer the question whether it is currently acceptable to recognize individual employing employees for a purpose other than in connection with conducted business as an employer. In-depth analysis is also required to distinguish between the notions of an entrepreneur-employer and an enterprise. The article also describes the concept of an internal employer, as well as the issue of the scope of differentiation of labour law provisions due to the characteristics of an entrepreneur-employer.

Keywords: entrepreneur, employer, Poland, enterprise.

Streszczenie W polskim porządku prawnym pomiędzy prawnymi pojęciami przedsiębiorcy oraz pracodawcy, choć rzadko występującymi wspólnie na gruncie konkretnych rozwiązań normatywnych, z całą pewnością zachodzą silne korelacje. Niestety, daleko idąca niedookreśloność konkretnych uregulowań niejednokrotnie rodzi poważne wątpliwości o charakterze interpretacyjnym. Zdaniem autora za fundamentalne należy uznać udzielenie odpowiedzi na pytanie, czy dopuszczalne jest obecnie przyznanie przymiotu pracodawcy osobie fizycznej zatrudniającej pracowników w innym celu aniżeli w związku z prowadzoną przez zatrudniającego działalnością gospodarczą. Pogłębionej analizy wymaga także kwestia odróżnienia przedsiębiorcy-pracodawcy od przedsiębiorstwa. W artykule opisano również m.in. koncepcję zarządczą pracodawcy (koncepcję pracodawcy wewnętrznego) oraz poruszono problematykę zakresu dyferencjacji przepisów prawa pracy ze względu na właściwości przedsiębiorcy-pracodawcy.

Słowa kluczowe: przedsiębiorca, pracodawca, Polska, przedsiębiorstwo.

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Introduction

Pursuant to Article 431 of the Polish Act of 23 April 1964 — Civil Code (unified text: Journal of Laws of 2019, item 1145 with amendments, referred to as Civil Code) an entrepreneur is an individual, a legal person or an organizational unit with no legal personality, but which is granted legal capacity under the law, conducting business or professional activity on its own behalf. However, in accordance with Article 4 (1) of the Act of 6 March 2018 — Entrepreneurs Law (Journal of Laws of 2019, item 1292 with amendments, referred to as Entrepreneurs Law) applicable in Poland "an entrepreneur is an individual, a legal person or an organizational unit with no legal personality, but which is granted legal capacity under the separate law, performing business activity."[1] At the same time, Article 3 of the Polish Act of 26 June 1974 — Labour Code (unified text: Journal of Laws of 2019, item 1040 with amendments, referred to as Labour Code) states that "an employer is an organisational unit, even if it has no legal personality, or an individual, provided it employs employees." Even from the very wording of the quoted provisions, in particular considered through the prism of trading practice, the interpenetration of the conceptual ranges of an entrepreneur and an employer is noticeable.

Due to the location of the above-mentioned statutory definitions in the Polish legal system and, therefore, also due to their broad application, they will constitute a reference point for further analysis here. However, those regulations are not the only existing statutory definitions of an employer and an entrepreneur.[2] Unfortunately, that fact combined with the lack of sufficient unification of relations between the concepts in question, seems to indicate the weakness of legal solutions adopted in Poland, often causing serious doubts of an interpretative nature.

For a long time, the Polish labour law science has been conducting intensive research in order to develop such proposals for legal solutions that would be able to adapt the provisions of labour law to the modern needs of business transactions and the dynamically developing labour market (Florek, Pisarczyk, 2011; Stelina, Tomaszewska, Wypych-Żywicka, 2010; Matey-Tyrowicz, Zieliński, 2006). Undoubtedly, the opportunity to develop those analyses comes with the recently introduced, as well as planned, changes to the law that interfere directly or indirectly with the problems of entrepreneurs as employers in the Polish economic trade, in particular as regards the differentiation of the legal situation of entrepreneurs-employers.

An entrepreneur as an employer under the Polish Labour Code

An entrepreneur-employer as a party to the employment relationship. The statutory definition of an employer, included in the aforementioned Article 3 of Labour Code, covers all entities employing an employee or employees, regardless of their organizational and legal form.[3] The literature emphasizes that the analysed provision regulates the question of the ability to work, and thus answers the question of who can act as an employer (Rączka, 2008, p. 16).[4] Two basic groups of employers should be distinguished: individuals and organizational units, even if they do not have legal personality (Kaczyński, 1998, p. 38; Rączka, 2015, p. 16).

The concept of an employer must necessarily be interpreted from the perspective of Article 22 of Labour Code, which primarily defines the characteristics of the employment relationship.[5] Employment of an employee by an employer, in order to fulfil minimal requirements specified in Article 22 of Labour Code should be characterized by the personal and voluntary provision of paid work under conditions of functional subordination (Baran, 2016, 34).

While determining the degree of mutual interpenetration of the conceptual ranges of an entrepreneur and an employer, it should be pointed out, first of all, that already in Polish pre-war literature, it was emphasized on the basis of the then-binding labour law regulations, that "it is not necessary for an employer to be an entrepreneur or to run industry or craft, because everyone can be an employer, e.g. in relation to domestic servants, chauffeurs, etc. Hence, the difference between the concept of an employer and an entrepreneur. (...) Usually the same person is simultaneously an employer and an entrepreneur, but it is not necessary. There are employers who are not entrepreneurs — like a rentier, having a servant, or a private teacher for children, and there are entrepreneurs who are not employers — the ones who run a company without workers" (Raczyński, 1930, p. 65). That view should be properly transposed to the existing provisions of the Polish Labour Code. Also, nowadays the prevailing opinion is that the definition of an employer under Article 3 of Labour Code covers all entities employing employees, regardless of the purpose of that employment, be it an economic or non-commercial goal (Rączka, 2015, p. 16; Baran, 2016, pp. 39–40). K. Baran emphasizes that the indicated interpretation is justified in the argument *lege non distinguente* (Baran, 2016, p. 39).

At the same time different views should not be ignored. According to A.M. Świątkowski, "a natural person who employs employees for any purpose other than in connection with the economic activity conducted by the employer, for example in order to meet his own needs or the needs of the employing family, may not be regarded as an employer" (Świątkowski, 2016, p. 16).[6]

An entrepreneur-employer and an enterprise. The Polish Labour Code distinguishes the terms "employer" and "workplace" (Świątkowski, 2016, 14). The judicature holds the opinion, on the basis of Article 3 of Labour Code, that an employer is an entrepreneur and not an enterprise run by him as a set of organized tangible and intangible assets intended for conducting activities (the judgment of the Supreme Court of 22 August 2003, I PK 284/02, LEX No. 119663; the judgment of the Supreme Court of 29 October 2014, I PK 64/14, LEX No. 1663145). In the justification of the judgement of 22 August 2003, the Supreme Court indicated that an enterprise (within the meaning of Article 55^1 of the Civil Code) cannot be treated as a subject of rights and obligations (I PK 284/02, LEX No. 119663). In that regard, an enterprise "may be at most a work establishment in the sense of an object, i.e. not in the sense of an entity employing employees, but a technical and organizational unit being an employment facility."[7]

At the same time, despite the normative distinction between an employer and a workplace and an enterprise interpretation doubts remain in the literature as to what the conceptual scope of the workplace with some of the code regulations is (Korus, 2015, p. 8).[8]

Employer's managerial concept (concept of an internal employer). The Polish jurisprudence has formulated an opinion that "a natural person can run a business without employing employees or at the same time employing employees to carry out various economic undertakings, even of a distinctly different nature, such as a doctor's office and transport services. Then, a natural person is a "separate" employer for employees employed in separate workplaces that such natural person runs" (the judgment of the Court of Appeals in Katowice of 26 April 2018, III AUa 159/18, LEX No. 2507706). At the same time, however, serious doubts about the interpretation are raised by the question of what specific organizational units without legal personality (mentioned in Article 3 of Labour Code) can be considered as an employer. Certainly due to Article 33^1 paragraph 1 of Civil Code, an employer may be the so-called "defective legal person" — organizational units which are not legal entities, but are granted legal capacity by law). What is controversial however, considering the content of Article 3 of Labour Code, is whether an employer can also be an organizational unit that does not have civil-legal

capabilities, but is appropriately organisationally separated.

Both in doctrine as well as in judicature, the managerial concept of an employer is widely accepted (Łaga, 2016, p. 158; judgement of the Supreme Court of 14 March 2001, II UKN 274/00, LEX No. 48494, judgement of the Supreme Court of 22 August 2003, I PK 284/02, LEX No. 119663, judgment of the Supreme Court of 9 August 2006, III PK 42/06, LEX No. 303827, judgement of the Supreme Court of 28 October 2010, I PK 95/09, LEX No. 577853). According to that concept, to recognize an organizational unit as an employer such an entity, in addition to the right to employ employees independently, must be properly separated in terms of organization. At the same time, it is emphasized that organizational separation necessary for the existence of an organizational unit as an independent employer must concern the organization and financing of that unit. To the same extend to which the right to hire employees independently should result from internal regulations governing the creation and organization of an entity, which includes a unit that is a separate employer, the required organizational separation must result from those provisions (judgment of the Supreme Administrative Court of 3 March 2016, II FSK 233/14, LEX No. 2036462; judgment of the Supreme Administrative Court of 3 March 2016, II FSK 81/14, LEX No. 2036806). Only "if on the basis of binding regulations an entrepreneur creates an organizational unit, which is legally, organizationally, financially and materially separated, and also has the ability to employ employees, has its own management (separate from the entrepreneur-owner), then that organizational unit is an employer, not an entrepreneur" (judgment of the Supreme Administrative Court of 3 March 3 2016, II FSK 232/14, LEX No. 2036461). In that way, a separate entity is referred to in the literature as an "internal employer" (Wąż, 2007, pp. 121–122).

According to the managerial concept of an employer, an employer may be a branch of a foreign entrepreneur (Article 14 of the Act of 6 March 2018 on the Rules for the Participation of Foreign Entrepreneurs and Other Foreign Entities in the Course of Trade on the Territory of the Republic of Poland, Journal of Laws of 2019, item 1079 with amendments).

The jurisprudence states that adopting the managerial concept of an employer does not prevent the implementation of certain competencies of an employer (within the framework of the division of competences adopted in a larger organizational structure) by external entities with respect to the employment relationship, although in principle functionally and structurally related to the employer. That construction is also applicable to corporations (capital groups), gathering entities with a separate legal personality, but related in terms of capital and creating larger organizational structures within which there are certain subordination of some companies (acting as an employer within the meaning of Article 3 of Labour Code) to other companies. It is possible, within those capital and structural ties, that some decisions regarding the employment relationship are actually taken by an entity to which an employer is subordinate, which does not affect the employer's liability to an employee resulting from the employment relationship (judgment of the Court of Appeals in Kraków of 19 April 2016, III APa 3/16, LEX No. 2044322). In such a situation, an employer does not lose its legal status, and employees' claims resulting from the decisions of the parent entity, which the employer accepts under the division of competences, should still be directed towards an employer. An organizational unit designated only as a place of work is also not considered an employer (judgment of the Supreme Court of 23 February 1999, I PKN 594/98, LEX No. 37482).

The concept of an internal employer in the science of labour law rightly attracts critical opinions. In Polish literature, it is argued that the main disadvantage of the managerial model is the recognition of an employer de facto dependent structure, deprived of its own subjective interests (Hajn, 2006, p. 440). The functioning of internal employers is also significantly impeded as they are unable to acquire rights and incur property liabilities on their own behalf and to be financially liable (Hajn, 2006, p. 440). M. Łaga rightly notes that currently courts of higher instance decide in extreme cases who are an employer in the circumstances of a given case (Łaga, 2016, p. 161). Difficulties in determining the "subject" of an employer also affect the difficulty in determining the "entity" for which the size of employment should be determined. In addition, in the private sector there is a noticeable problem of the avoidance of labour law obligations by some employers who use the so-called corporate veil (German: Durchgriff), i.e. "shaping the corporate structures of an employer to circumvent labour law provisions — to make it more difficult or impossible to report potential claims of employees" (Łaga, 2016, p. 161).

The managerial model of an employer is opposed to the ownership model, according to which an employer can only be a natural person, a legal person or an independent organizational unit, without legal personality and not constituting a legal entity (so-called "defective legal person"),[9] employing employees, being an owner of a workplace or having property rights to dispose of a work establishment on the basis of another legal title. In economic relations that concept is identified with the notion of an entrepreneur (Hajn, 2006, p. 440). Moreover, the employer's ownership model was in effect in the pre-war Polish labour law (which was then part of civil law), and is now widely accepted in many European Union countries (Hajn, 2006, p. 440).

Among supporters of the employer's ownership model, it is necessary to distinguish representatives of Polish labour law, who allow the adoption of that concept already on the basis of the current legal status and authors formulating *de lege ferenda* postulates in that respect.

L. Kaczyński indicated that *de lege lata* Article 3 of Labour Code can be interpreted in a manner that

excludes the employability of organizational units of legal persons governed by private law (Kaczyński, 1998, p. 159). That interpretation seems to have been confirmed by the Supreme Court in the justification of the judgment of 20 September 2005, indicating that "the view was presented that organizational units forming a legal entity could be separate work establishments (internal employers), if the managers of those units were provided for the right to make, change and terminate the employment relationship," nevertheless that view cannot be defended at present, because there are no obstacles or convincing reasons for identifying an entity with separate assets in the legal sense, capable of acquiring rights and contracting liabilities on its own behalf also included in Article 22 paragraph 1 of Labour Code (...) Concluding, an entity having legal personality on whose behalf a contract of employment was concluded is an employer, it cannot — in order to dismiss the employee's claims — defend itself with the claim of *locus standi* by indicating that an employer is that part of that entity which has not been equipped with legal personality" (II PK 413/04, LEX No. 188102).

At that point, it should also be noted that at present the managerial model of an employer is not consistently applied. Under collective labour law, even through the prism of Article 9 of Labour Code and the conclusion of collective agreements, the employer's ownership model is well established (resolution of the Supreme Court, 7 Judges of 23 May 2001, III ZP 25/00, LEX No. 47022, resolution of the Supreme Court, 7 Judges of 23 May 2001, III PZP 2/06, LEX No. 180651).

On the other hand, representatives of the labour law doctrine formulating *de lege ferenda* postulates regarding the introduction of the employer's ownership model in the Polish legal order (a view shared by the author of the study), point out that "changes aimed at linking the subjectivity of the employer with the civil law subjectivity and subjectivity in economic relations are required to radically heal the situation. The managerial model is (...) inconsistent with the very essence of the employment relationship and the current system of work, whose construction elements are property and contract" (Hajn, 2006, p. 440; also Gersdorf, 1997, p. 35).

The necessity of approximating the notion of an employer to the notion of an entrepreneur was also recognized by the Labour Law Codification Commission established in 2002, which ended its work in 2006 and proposed the following statutory definition of an employer: "an employer can be a natural person, a legal person and other organizational unit employing an employee in their own name" (Labour Law Codification Commission 2007). The justification of that project indicated that the provision referred to Article 43^1 of Civil Code, which defined the entrepreneur. Thus, the project promoter strongly supported the employer's ownership concept. Unfortunately, the next Labour Law Codification Commission, established in 2016, in the draft of the new Labour Code of 2018, as regards the adopted concept of an employer reproduced the definition of an employer binding in the Labour Code. According to the new proposal (Article 5 paragraph 1 and 2 of the draft of the new Labour Code) "an employer is an organizational unit, even if it does not have legal personality, if it employs employees", (…) "a natural person is considered to be an employer, if he employs employees under companies run by him" (Labour Law Codification Commission 2018).[10]

An entrepreneur as an employer under other provisions of Polish labour law

An entrepreneur as an employer under the Act on Employment Promotion and Labour Market Institutions. Pursuant to Article 2(1) point 25 of Act of 20 April 2004 on Employment Promotion and Labour Market Institutions (unified text: Journal of Laws of 2019, item 1482 with amendments, referred to as EP), whenever the Act refers to an employer "it means an organizational unit, even if it does not have legal personality, and also a natural person, if he employ at least one employee." The definition therefore, in principle, coincides with the definition from Article 3 of Labour Code. The difference, however, is only verbal in meaning. Despite the style of Article 3 of Labour Code, it is assumed that an employer as understood by the code is an entity employing even one employee (Wratny, 2005, p. 8).

The Act on the Promotion of Employment and Labour Market Institutions applies the concept of employer also to other legal relationships. Some of the labour market services (job placement and vocational counselling), may also be used, to the extent specified for employers, by entrepreneurs (as defined by the Entrepreneurs Act), who are not employers, i.e. they do not have at least one employee (Article 39c of EP).

An entrepreneur as an employer under the Act on the Employment of Temporary Employees. Article 1 of the Act of 9 July 2003 on the Employment of Temporary Employees (unified text: Journal of Laws of 2019, item 1563 with amendments, referred to as ETE) formulates the rules of employing temporary employees by an employer being a temporary work agency and the rules of directing such employees and people who are not employees of a temporary work agency to perform temporary work for an employer-user. For the purposes of that Act, an employer-user is an employer or an entity which is not an employer as understood by the Labour Code, outlining tasks to an employee and controlling how they are performed (Article 2 point 1 of ETE). An employer cannot be an employer-user in relation to employees remaining with him in an employment relationship (Article 4 of ETE). In turn, Article 5 of ETE stipulates that "to the extent not regulated otherwise by the provisions of the Act and separate provisions for the temporary work agency, a temporary employee and an employer-user, the provisions of the labour law referring to an employer and an employee respectively are applicable."[11]

Without going into details here, which is not allowed by the nature of this study, it should be pointed out that in the context of the abovementioned differentiation between an employer and an employer-user in science and judicature, very serious doubts arise as to the application of labour law provisions. In some cases, it is uncertain whether specific labour laws relating to an employer should be applied to the temporary work agency or to an employer-user. In addition, the indicated duality raises doubts in the scope of those constructions, which cannot be attributed to only one of those entities (e.g. within the scope of the non-competition agreement). The provisions of ETE do not specify whether a bond and of what legal nature is created between a temporary employee and an employer-user. In particular, the Act does not explicitly specify whether, and if so, what kind of claims a temporary employee may direct against an employer-user (judgment of the Supreme Court of 10 April 2014, I PK 243/13, LEX No. 1486963).

The legislator does not specify whether an employer-user can only be an entrepreneur, although it should be noted that the third participant of temporary work was initially called a user entrepreneur on legal grounds (Article 1 of the Act of 20 December 2002 amending the Act on Employment and Counteracting Unemployment, and the Act on the Education System, Journal of Laws of 2003 No. 6, item 65). In the context of the different concepts of an employer presented in that report, it becomes urgent to define the conceptual scope of an employer-user.

On the other hand, the employment agency, which also includes a temporary work agency, can only be an entrepreneur within the meaning of the Entrepreneurs Law. Running a business in the provision of job placement services, personal counselling, career counselling, as well as temporary work is a regulated activity within the meaning of the Entrepreneurs Law and requires to be listed in the register of entities running employment agencies — Article 18 (1–3) of EP. Pursuant to Article 19j of EP in matters not regulated by the provisions of Chapter 6 of that Act ("Employment Agencies") in the scope of business activity referred to in Article 18 of EP, including the control of the entrepreneur's business activity, the provisions of Entrepreneurs Law are applicable.

An entrepreneur as an employer under the Act on Informing Employees and Conducting Consultations with them. Article 1(1) of the Act of 7 April 2006 on Informing Employees and Conducting Consultations with them (Journal of Laws of 2006 No. 79, item 550 with amendments, referred to as IE) defines "conditions for informing employees and carrying out consultations with them and the rules for the selection of the employees council."[12] The provisions of that Act apply to "employers engaged in business activities employing at least 50 employees" — Article 1(2) of IE.[13]

The definition of an employer is not included in the Act, hence it is necessary to refer to the provisions of the Labour Code.

Certainly, the provisions of the Act refer only to employers who are entrepreneurs (employing at least 50 employees). The lack of an autonomous definition of the term "business activity" in the analysed Act raises the need to refer to its understanding adopted under the Entrepreneurs Law, although it should be emphasized that that issue raised doubts in the study of labour law under the now-binding Act on the Freedom of Economic Activity (decision of the Supreme Court of 2 February 2009, V KK 330/08, LEX No. 485044).[14]

The literature emphasizes that it is irrelevant whether business activity is conducted by employers as a main or a side activity (Markowska-Wolert, 2006, p. 18). The view that the analysed Act will only apply to employers conducting profit-oriented activities should be considered dominant (Sobczyk, 2007, p. 17).

An entrepreneur as an employer under the Act on the Protection of Employee Claims in the Event of Insolvency of an Employer. Article 1 of the Act of 13 July 2006 on the Protection of Employee Claims in the Event of Insolvency of an Employer (unified text: Journal of Laws of 2018, item 1433 with amendments, referred to as PEC) "regulates the principles, scope and mode of protection of employee claims in the event of inability to satisfy them due to employer's insolvency." In turn, Article 2(1) of PEC states that the provisions of that Act "shall apply in the event of insolvency of an employer being an entrepreneur referred to in Article 4(1) of the Act of 6 March 2018 — Entrepreneurs Law (Journal of Laws, item 646), a branch of a foreign bank located in the territory of the Republic of Poland, (as understood by Article 4(1) point 20 of the Act of 29 August 1997 — Banking Law, Journal of Laws of 2017, item 1876 with amendments), and a foreign entrepreneur from the Member States of the European Union or member states of the European Free Trade Agreement (EFTA) — parties to the European Economic Agreement who established a branch or representative office in the Republic of Poland referred to in the provisions of the Act of 6 March 2018 on the Rules for the Participation of Foreign Entrepreneurs and Other Foreign Persons in the Course of Trade on the Territory of the Republic of Poland (Journal of Laws, item 649 and 1293)" (with the reservations set out in that law).

The statutory definition of an employer, closely related to the concept of an entrepreneur, is a particularly extensive definition (Goździewicz, Zieliński, 2009, p. 38). In view of the need to protect the claims of employees working in the territory of the Republic of Poland, if the bankruptcy is declared in another country, Article 2(1) of PEC has defined cases of employers whose insolvency has consequences in Poland. However, the partners of a civil law partnership are not considered to be entrepreneurs in the scope of their business activity, as understood by the Act under consideration, because the definition cited above does not refer to Article 4(2) of Entrepreneurs Law, according to which "entrepreneurs are also partners of a civil law partnership in the scope of their business activity".

An entrepreneur as an employer under the Trade Unions Act, the Act on Employers' Organizations and the Act on the Resolution of Collective Disputes. The fact that on January 1, 2019 the entire Act of 5 July 2018 amending the Act on Trade Unions and certain other acts (Journal of Laws of 2018, item 1608), implementing the judgment of the Constitutional Tribunal of 2 June 2015 (K 1/13, LEX No. 1730123) came into force, caused a significant change in the coalition law in trade unions. The full rights of the coalition were also gained by persons employed under civil law contracts and so-called self-employed. For that reason, on the basis of the Act of 23 May 1991 on Trade Unions (unified text: Journal of Laws of 2019, item 263 with amendments, referred to as TU), the statutory definition of an employer has been modified. Currently, an employer (within the meaning of the Act) is an employer within the meaning of Article 3 of Labour Code and an organizational unit, even if it does not have legal personality, as well as a natural person, if it employs a person other than an employee who does paid work, regardless of the basis of that employment (Article 1^1 point 2 of TU). In the Polish labour law system, there has been a definite departure from the traditional model of collective labour law "based on employee trade unions, towards heterogeneous structures" (Baran, 2018, p. 4). However, the legislator is not consistent in terms of the used terminology. Since Polish collective labour law has in fact been transformed into collective employment law that should also be reflected in the employer's statutory definition cited above (Article 1^1 point 2 of TU should not define the meaning of "employers").

From January 1, 2019, pursuant to Article 1(2) of the Act of 23 May 1991 on Employers' Organizations (unified text: Journal of Laws of 2015, item 2029 with amendments, referred to as EO), an employer (within the meaning of that Act) is the entity referred to in Article 1^1 point 2 TU (until December 31, 2018, an employer was defined as an entity referred to in Article 3 of Labour Code). At the same time, it should be pointed out, due to the problems discussed in this study, that Article 1(2) of the aforementioned Act until 1 January 2001 read: "an employer within the meaning of the Act is a natural person or an organizational unit employing employees whose subject of activity is running a business" (Act of 9 November 2000 amending the Labour Code and certain acts, Journal of Laws of 2000 No. 107, item 1127). At present, the definition of an employer under the Act on Employers' Organizations also includes entities that do not conduct business activities (the employer's degree and scope of organization, or lack of such organization is of no legal significance). The literature also emphasizes that the concept of an employer in accordance with Article 1(2) of EO is quite complex, because it defines the attribute of an employer not only as an employing entity, but also as a member of an employers' organization (Hajn, 1999, p. 123).

Also from January 1, 2019, in accordance with Article 5 of the Act of 23 May 1991 on the Resolution of Collective Disputes (unified text: Journal of Laws of 2019, item 174), an employer within the meaning of that Act is the entity referred to in Article 1^1 point 2 of TU (until 31 December 2018, an employer was defined as an entity referred to in Article 3 of Labour Code).

An entrepreneur as an employer on the basis of social insurance

Pursuant to Article 4 point 2(a) of the Act of 13 October 1998 on the Social Insurance System (unified text: Journal of Laws of 2019, item 300 with amendments, referred to as SIS), the contribution payer is, inter alia, an employer — "in relation to employees and persons taking part in substitute service and an organizational unit or natural person remaining with another natural person in a legal relation justifying the inclusion of social security, including those on parental leave or maternity allowance, excluding persons to whom the maternity benefit is paid by the Social Insurance Institution [Zakład Ubezpieczeń Społecznych]. The term "employer" used in the indicated provision should be understood in principle in the sense given to it by Article 3 of Labour Code (judgment of the Court of Appeals in Poznań of 3 December 2015, III AUa 608/15, LEX No. 2025584). Nevertheless, according to the Act on the Social Insurance System, an employer is also understood much more broadly than only on the basis of the code. An employer is by virtue of Article 4 point 2(a) of SIS as a contribution payer for all employees within the meaning of that Act, and therefore also for those referred to in Article 8(2a) of SIS, including for employees who are in employment relation with him and at the same time perform work for him under civil law agreements concluded with a third party[15] . It is emphasized in science and jurisprudence, that "civil law agreements listed in Article 8(2a) of SIS do not constitute (...) independent titles of compulsory social security coverage of an employee, nor do they create a concurrence of social insurance titles within the meaning of Article 9 of that Act. By creating a broad concept of "an employee" the norm of Article 8(2a) created a broad definition of an employee title of compulsory social insurance, which is the employment relationship between an employer and an employee and a civil law agreement concluded by an employee with an employer or concluded with a third party. Two actual situations, specified by the hypothesis of the norm of Article 8(2a), in which the person to whom the provision is addressed (an employee performing work under the aforementioned civil contracts concluded with an employer and civil contracts concluded with a third person, but when the work is provided to an employer) may find himself are of equal importance from the point of view of the effects described in the disposition of that legal norm" (judgment of the Poznań Court of Appeals of 3 December 2015, III AUa 608/15, LEX No. 2025584; also Dziwota, 2007, p. 63; Gudowska, 2011, p. 200).

Diversification of the legal status of entrepreneurs — employers

The admissibility and scope of differentiation of labour law provisions due to the characteristics of one of the parties to the employment relationship, i.e. an employer is the subject of discussion in the science of Polish labour law (Mikołajewska-Böning, 2006, p. 35).

In economic sciences, when defining small and medium-sized enterprises, two criteria are most often taken into consideration: quantitative (number of employees, turnover, size of the market) and qualitative (ownership and management unity, decision-making and financial independence, degree of flattening of the organizational structure, innovation, management system, market share) (Piasecki, 2001, p. 68 et seq.).

In the provisions of the Act — Entrepreneurs Law, the legislator defined a micro[16] , small[17] and medium-sized entrepreneur.[18] The average annual employment for a given entrepreneur, for the purposes of its possible qualification into one of the indicated categories of entrepreneurs, is determined in full-time equivalents, excluding employees on maternity leave, leave on maternity leave terms, paternity leave, parental leave and upbringing leave, and also employed for the purpose of vocational training — Article 7(3) of Entrepreneurs Law.[19] Due to the lack of a statutory definition of a large entrepreneur, it should be assumed that it will be an entrepreneur whose employment or financial situation exceeds the limits set for medium-sized entrepreneurs.

Under the Polish labour law, the main, if not the only, criteria for differentiating the legal status of employers are quantitative criteria — diversification due to the size of employment (Mikołajewska-Böning, 2006, p. 40; Łaga, 2016, p. 174). As examples of that differentiation, the following normative limit values should be given: no more than 5 employees (paragraph 5(4) of the Statistical Regulation of the Occupational Accident Card, Journal of Laws of 2009 No. 14, item 80 with amendments); no more than 10 employees (Article 237^{11} § 1 point 1 of Labour Code); at least 20 employees (Article 23^{1a} of Labour Code, Article 77^{2} paragraph 1^{2} of Labour Code, Article 104 paragraph 3 of Labour Code, Article 237^{11} paragraph 1 point 2 of Labour Code); at least 25 employees (Article 21(1) of the Act on Vocational and Social Rehabilitation and Employment of People with Disabilities, unified text: Journal of Laws of 2019, item 1172 with amendments); at least 50 employees (Article 1(2) IE, Article 77^{2} paragraph 1 of Labour Code, Article 104 paragraph 11 of Labour Code, Article 3(1) of the Act on the Company Social Benefit Fund, unified text: Journal of Laws of 2019, item 1352 with amendments); more than 100 employees (Article 237^{11} paragraph 1 of Labour Code), at least 100 employees (Article 1(1) point 2 of the Act on Special Rules for Terminating Employment Relationships for Reasons Not Attributable to Employees, unified text: Journal of Laws of 2018, item 1969 with amendments); at least 150 employees (Article 2, points 3 and 4 of the Act on European Works Councils, unified text: Journal of Laws of 2018, item 1247 with amendments); more than 250 employees (article 237^{12} paragraph 1 of Labour Code); at least 300 employees (Article 1(1) point 3 of the Act on Special Rules for Terminating Employment Relationships for Reasons Not Attributable to Employees); at least 1000 employees (Article 2, points 3 and 4 of the Act on European Works Councils).

Employment limits have been referred to several dozen times in employment legislation. In the largest number of cases, the legislator uses the criterion of employment size at the level of 20 and 50 employees, nevertheless, there are not any systemically accepted limits of employment, "which would consistently be used to differentiate individual institutions of labour law" (Łaga, 2016, p. 174). At the same time, the literature formulates attempts to develop concepts of micro, small and medium employer (Goździewicz, 2013).

The numerical criterion characteristic of labour law does not correspond to the provisions of the Act — Entrepreneurs Law (Gładoch, 2013, p. 366). The definition of "small entrepreneur" does not completely correspond to the reality of labour law (Szmit, 2013, p. 376). However, it should be emphasized that under the Treaty of Lisbon, the special protection of small and medium-sized enterprises in labour law has been regulated as a binding norm of European Union labour law. In the opinion of M. Łaga, the special protection of small and medium-sized enterprises is nowadays the principle of European labour law expressed in Article 153(2)(b) of the Treaty on the Functioning of the European Union (Łaga, 2016, p. 260).

At present, there are certainly too many employment-size terms in the labour law, in particular too many employment limits (Łaga, 2016, p. 263). It is necessary to fully share the view that "the adoption of a uniform convention of determining employment in the scale of the labour law system would foster coherence of that system, emphasize the importance of employment as a criterion for differentiating labour law and would constitute a further step in order to take into account the specificity of labour relations for small employers in labour law" (Łaga, 2016, 264). The indicated convention should also harmonize with the criteria of differentiation based on the Act — Entrepreneurs Law.

Summary

The need for thorough changes in Polish labour law is now considered not only to be an undisputed matter, but even an urgent one (Zieliński, 2006, p. 12). The binding Polish labour law was formed in the system of real socialism. The adaptation of labour law to the needs of small and medium-sized enterprises is one of the principle objectives of a possible labour law reform (Mikołajewska-Böning, 2006, p. 41).

The large enterprises dominating in the previous system now constitute less than 1% of all economic entities, which means a radical change in social and

economic structures (Łaga, 2016, p. 15). The literature emphasizes that "the transformation process showed a significant need to adjust labour law to the specificity of the implementation of work processes and employment relations in a few million micro, small and medium enterprises" (Łaga, 2016, p. 16). Existing changes in labour law do not keep pace with changes in the economy.

The entrepreneur does not have to employ employees (in particular, he can employ people on the basis of a contract of mandate, unnamed contract for the provision of services, contracts for specific work, or run a business independently without employing other people). That means that, similarly to the concepts of an employer and the concept of an entrepreneur which cross each other, the same happens between the category of different size of employers and the category of micro, small and medium-sized enterprises.

The key issue, without which any changes in commercial law and labour law regarding the mutual correlation of the concepts of an entrepreneur and an employer will not make any sense, is the urgent need to create uniform statutory definitions of an entrepreneur and an employer (employers) on a normative, systematic basis; such definitions will have to define each other's conceptual ranges. It seems that it is not possible without the adoption of the employer's ownership model in the labour law, which has been broadly described here[20] .

The lack of a clear vision of the Polish legislator in the analysed thematic scope is one of the main obstacles in the process of comprehensive reconstruction of the employment relationship in order to adapt it to the ever-changing economic and social conditions.

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[1] Partners of a partnership are also considered entrepreneurs within the scope of their economic activity — Article 4 (2) of Entrepreneurs Law.

[2] As an example of other definitions of an entrepreneur, it should be pointed out that pursuant to Article 2 of the Act of 16 April 1993 on Suppression of Unfair Competition (unified text: Journal of Laws of 2018, item 419 with amendments) entrepreneurs, within the meaning of this Act, are natural persons, legal persons and organizational units without legal personality, who, even by way of business or professional activity, participate in business activities. In turn, the provision of Article 2 point 1 of the Act of 23 August 2007 on Counteracting Unfair Market Practices (unified text: Journal of Laws of 2017, item 2070) states that the entrepreneurs, within the meaning of this Act, are natural persons, legal persons and organizational units without legal personality who conduct business or professional activity, even if the activity is not organized and continuous, as well as persons acting on their behalf or for them. Other legal definitions of the employer are quoted in the further part of this study.

[3] It should be emphasized that despite the fact that the legislator used plural form ("employees") also the employment of one employee, results in the acquisition of employer status, which is due to teleological considerations (Baran, 2016, p. 34).

[4] Pursuant to Article 2 of Labour Code "an employee shall be a person employed on the basis of a contract of employment, an appointment, an election, a nomination or a cooperative contract of employment."

[5] Pursuant to Article 22 paragraph 1 of Labour Code "by the establishment of an employment relationship an employee shall oblige himself 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."

[6] It should be noted that the author refers to the judgment of the Supreme Court of 14 March 2001, according to which the necessary condition for the recognition of a natural person as an employer would be "to establish a relationship between the work provided by an employee and the work carried out by the employee. Meanwhile, in the aforementioned justification of the verdict, the Supreme Court states that "there are no grounds to limit the notion of an employer being a natural person only to those who do not conduct business activity, and at the same time expand the concept of an organizational unit as an employer for any type of economic activity conducted by a natural person "(II UKN 274/00, LEX No. 48494).

[7] The legislator uses the term "workplace" in the Labour Code in the subject approach, e.g. in Article 23^1 of Labour Code, Article 128 § 1 of Labour Code, Article 207 paragraph 1 of Labour Code (Baran, 2016, p. 35; Sobczyk, 1995, pp. 211–212).

[8] An example is Article 100 paragraph 2 point 4 of Labour Code, according to which an employee is obliged to take care of the good of the workplace, protect its property and keep confidential information, the disclosure of which might expose the employer to detriment. The prevailing view is that "the legislator does not explicitly formulate the duty of the employee to care for the "good of the workplace" understood as the organizational unit, which is the workplace, and thus the common value, "good" not only of the employer, but also employed employees" (judgment of the Supreme Court of 2 October 2012, II PK 56/12, LEX No. 1243024; judgment of the Supreme Court of 17 May 2012, I PK 176/11, LEX No. 1148380; differently the judgment of the Supreme Court of 28 April 1997, I PKN 118/97, LEX No. 31725). In P. Korus's opinion, the workplace in the analysed provision may be included subject to the assumption that Article 100 paragraph 2 point 4 of Labour Code "besides the principle of loyalty to the employer, imposes on the employee an obligation of loyalty also towards the crew (co-workers)" (Korus, 2015, p. 8).

[9] Pursuant to Article 33^1 paragraph 1 of Civil Code "provisions on legal persons shall accordingly apply to such organizational units not being legal persons which have been granted the legal capacity by virtue of statutory law."

[10] The Labour Law Codification Commission in its justification indicated that "the project proposes to modify the concept of an employer by stating that employers are, in principle, organizational units." In the case of natural persons, only employers are considered as employers. Natural persons employing employees to perform work for purposes related to work in the household are defined as home employers, and the

rights and obligations of such employers and domestic employees have been regulated in a separate section of the draft Code, thus the Commission has attempted to limit the application of the full scope of labour law to people earning by doing housework." The Commission also proposes to introduce an interpretative directive in the text of the draft Code, according to which the interpretation of labour law provisions should in particular apply the principle of proportionality, taking into account, above all, the right to work, the freedom to conduct business and the need to achieve social goals. The above emphasises that labour law is not intended to protect the interests of one of the social groups, but it consists in weighing the rights and freedoms of employees and employers. There is also no reason to claim that workers' rights are by definition more important than entrepreneurs' rights. In the process of interpreting the law, the courts will therefore be obliged to apply constitutional interpretative rules. The Commission's proposals have caused much controversy. In April 2018, the Minister of Family, Labour and Social Policy informed that the current draft of the Commission would not be further processed and would not be accepted.

[11] Pursuant to Article 6 of ETE "the provisions of the Act of 13 March 2003 on Special Rules for Terminating Employment Relationships for Reasons Not Attributable to Employees shall not apply to the temporary employees."

[12] This is not an exhaustive list (the law also regulates the activities of the board of employees or the status of members of the employees council).

[13] The provisions of the Act concerning the principles of selecting the employees council and protecting its members do not apply to: state enterprises in which the enterprise's crew is created; mixed enterprises employing at least 50 employees; state film institutions — Article 1(3) of IE.

[14] A different view was expressed by M. Smusz-Kulesza, who postulated that in the said case, the notion of economic activity should be used (Smusz-Kulesza, 2008, pp. 46–76).

[15] Pursuant to Article 8(2a) of SIS "a person performing work on the basis of an agency agreement, contract of mandate or other contract for the provision of services to which the provisions of the Civil Code on contract of mandate or contract for specific work are applicable, if he concluded the an agreement with an employer with whom he remains in an employment relationship, or if within the framework of such an agreement he performs work for the benefit of an employer with whom he remains in an employment relationship is also considered an employee."

[16] Pursuant to Article 7(1) point 1 of Entrepreneurs Law a micro entrepreneur is an entrepreneur who in at least one of the last two financial years met all the following conditions: 1) employed on average fewer than 10 employees per year, and 2) achieved annual net turnover from the sale of goods, goods and services and financial operations not exceeding the PLN equivalent of EUR 2 million, or the total assets of its balance sheet prepared at the end of one of those years, did not exceed the PLN equivalent of EUR 2 million.

[17] Pursuant to Article 7(1) point 2 of Entrepreneurs Law a small entrepreneur is an entrepreneur who in at least one of the last two financial years met all the following conditions: 1) employed on average fewer than 50 employees, and 2) achieved annual net turnover from the sale of goods, goods and services and operations not exceeding the PLN equivalent of EUR 10 million, or the total assets of its balance sheet prepared at the end of one of those years, did not exceed the PLN equivalent of EUR 10 million — and which is not a micro-enterprise.

[18] Pursuant to Article 7(1) point 3 of Entrepreneurs Law an average entrepreneur is an entrepreneur who in at least one of the last two financial years met all the following conditions: 1) employed on average fewer than 250 employees annually, and 2) achieved annual net turnover from the sale of goods, products and services and operations not exceeding the PLN equivalent of EUR 50 million, or the total assets of its balance sheet prepared at the end of one of those years, did not exceed the PLN equivalent of EUR 43 million — and which is not a micro-enterprise or a small entrepreneur.

[19] In the case of an undertaking operating for less than a year, its expected net turnover from the sale of goods, goods and services and financial operations as well as average annual employment is determined based on data for the last period documented by the entrepreneur — Article 7(4) of Entrepreneurs Law.

[20] At this point, it is necessary to signal the creation of a completely new and interesting concept of related employers in Polish labor law (Raczkowski, 2019). The author, emphasizing the need to redefine the concept of employer, emphasizes that it should be precisely indicated who is on the side of the employer in the individual employment relationship and in collective relations (Raczkowski, 2019, p. 433).

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