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WORKERS' PROTECTION – POLISH STUDY

I. GENERAL INTRODUCTION

1. Objectives

The goal of this study is to analyse legal solutions and their application practice in the field of workers' protection, in order to consider and discuss the possibility and range of protection for persons who are not employees and are performing a work on a different basis than a contract of employment (labour relation).

It has been proposed, on the basis of studies on various Central and Eastern European Countries, to discuss problems related to the protection of workers, its deficiencies in law and in practice as well as propositions of solutions and means to be used in order to eliminate those deficiencies. It is clear that it is all about effective protection, not just formal protection.

Moreover, there has been a discussion proposition on problems related to the protection of persons performing a work on a different basis than a contract of employment (labour relation). It is most of all directed at "triangular relations", entirely independent work as well as independent work in conditions of economic subordination or any other subordination.

During the communist rule in Central European countries, human rights and freedoms were not respected, although those countries ratified many international law acts on this issue. After the systemic change, those countries engaged themselves to strictly respect their obligations in that respect, old ones as well as new ones – including those resulting from the signature by those countries of Association Conventions with the European Union and those resulting from the European Council Conventions that they ratified.

2. Notions and definitions

It is crucial for our discussion to define accurately and precisely notions that will be used. The text transmitted by the International Labour Bureau, being a basis for the preparation of national studies on worker's protection, contains a notion of "worker" which is used not only to characterise persons who are performing their work on a contract of employment/labour relation, but also as a

description of other persons, performing their jobs on the basis of “triangular relations”, independently or independently in conditions of economic subordination or any other subordination.

An employee shall be a person employed on the basis of a contract of employment, on appointment, an election, a nomination or a co-operative contract of employment (Art. 2 of the Labour Code).

An employer shall be any organisational unit even if it has no legal personality and any natural person, if they employ employees (Art.3 of the Labour Code).

By the establishment of an employment relationship the employee shall oblige himself/herself to perform specified work for the employer and under his direction, and the employer shall oblige himself/herself to employ the employee for remuneration (Art.22 § 1 of the Labour Code). Employment on the conditions specified in the Art.22 § 1 of the Labour Code shall be considered as employment within the scope of an employment relationship regardless of the name of the contract concluded between the parties (Art.22 § 2 of the Labour Code). Those notions will be discussed in a wider manner in the chapter III.

The difference in legal status of employees and those “other” persons is obvious. The Polish Act of 14th December 1994 on employment and unemployment counteracting considers “employment” as the performance of a work on the basis of a contract of employment, service contract or homework contract. Performing a job on the basis of civil law contracts (agency contract, contract to perform a specified work or task, order contract) is considered as being a “different kind of remunerated work”.

Definition issues are very important. During the 6th European Congress for Labour Law and Social Security, we agreed that it is necessary to seek for new notions, for instance instead of using the notion of “labour contract”, there exists a division in Poland that defines a notion of “wage employment” and “non-employee employment”, the latter containing all other forms of employment on other legal bases than a contract of employment/labour relation.

3. Methodology

There are at least two possible methods to be applied. There is the option to seek legal solutions in the field of protection for workers and other persons performing their work on a basis different from the one of contract of employment (labour relation), using existing national legislation as its background. There is, on the other hand, the opportunity to try building a certain general solution model in this respect that would take into consideration the economic and social situation on the labour market, the position of social partners as well as the role of the State as guardian of the social interest, including the one of weak social groups that require a wider protection.

When creating a general worker protection model, it would appropriate to answer a few questions: whom do we want to protect? What is it that we want to protect? Who will bear the costs of this protection?

4. Statistics

Territory area – 312700 square km
Population – 38,5 million.
Active population – 17 million persons.
Active population in the range of 15-64 years of age – 68,7%

Employment	Public sector	Private sector
1990	52,1%	47,9%
1998	30,9%	69,1%

5. Employee protection

The idea of protecting the employee was the basic reason for the creation of labour law. The employee is within the employment relationship the weaker party, most of all from the economic point of view. Most labour law provisions were adopted and are still adopted to counter the arbitrary decisions of employers as to work and remuneration conditions and to prevent the employee from being exploited. It may be then said that the entire labour law has been designed to protect the rights and interests of employees and therefore plays a protective role.

The protective role of labour law may be observed in the uneven regulation of both parties' rights and obligations, in fact an employee favouring, and through sanctions for breaching employee rights.

The labour law science differentiates the notion of universal and particular protection of the work or the employee. We usually talk about particular protection for the women's work and the youth's work. We also talk about particular protection against termination notice.

The notion of "labour protection" is used to define the security and hygiene in the workplace. Labour protection provisions also contain regulations relative to the work time, to free days and to holidays.

Within this article, the notion of employee protection will refer to the protection of the employees as a general group.

II. LABOUR LAW SOURCES IN POLAND

1. Introduction

The creation after 1989 of a new labour law model in Poland required many decisions to be taken as to the system of labour law sources, their hierarchy as well as the relationship between national law and international standards. Before 1989, a homogenous system of legal norms defined by the State was in place. Labour law was regulated by a Labour Code, executive acts to the Code as well as by particular acts. With the adoption of a democratic political and economic system, Poland opted for a pluralistic model of labour law sources, in which apart from the rules set by the State, there are norms defined in collective agreements concluded by trade unions and employers and their organisations.

The structure and hierarchy of law sources in Poland has been determined in article 87 of the Constitution, which stipulates as follows: “the sources of universally binding law of the Republic of Poland shall be: the Constitution, acts, ratified international agreements, and regulations. Accordingly to the Constitution and to the art. 9 of the Labour Code, the hierarchy of labour law sources will then be as follows: Constitution, ratified international agreements, Labour Code, other acts and executive acts, collective agreements based on legal acts, regulations and statutes determining the rights and obligations of employment relationship parties.

The stipulations of collective agreements, regulations and statutes cannot be less favourable for employees than the dispositions of the Labour Code and other acts and executive acts. In a similar manner, stipulations of regulations and statutes cannot be less favourable for the employee than stipulations of collective agreements. Labour contracts cannot include dispositions that would be less favourable that the above mentioned labour law sources.

After changing the system, it appeared necessary to choose legal acts in which new regulations would be placed. Labour Codes are obviously legal acts that are difficult to be modified in a short period of time. It seemed urgent to decide if the Labour Code was to be conserved and if it was still supposed to be a basic labour law source. Another question was if existing legal acts where to be modified or completely new ones to be prepared. It was then needed to determine the location of dispositions regulating various labour law institutions: would it be the Code, the executive acts or particular acts?

It seems that decisions related to labour law sources have been taken under the pressure of time and incredibly rich programme of legislative work. It has been decided to quickly regulate the most pressing labour law problems through particular acts. Those problems related to issues that have never been addressed during the communist rule (i.e. collective conflicts and right to strike). Together with particular acts, there were actions taken in order to amend the Labour Code.

Examples and experiences of western countries have been used in the regulation of various labour law institutions in Poland. As to the sources of labour law, the existing structure of legal labour law acts has been conserved.

2. Constitution

The political and economic system in Poland is defined in the new Constitution adopted in 1997 (Official Journal 1997, No 78 item 483). Accordingly to its provisions, the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice (Art. 2). A social market economy, based on the freedom of economic activity, private ownership and solidarity, dialogue and co-operation between social partners, shall be the basis of the economic system of the Republic of Poland (art. 20).

The Constitution regulates fundamental freedoms, rights and obligations of persons and citizens. Among them are personal, political, economic, social and cultural freedoms and rights, which relate to employees and persons performing a work on other bases than the employment relationship.

There is a freedom of economic activity in Poland. Limitations upon the freedom of economic activity may be imposed only by means of act and only for important public reasons (art.22). Work shall be protected by the Republic of Poland. The State shall exercise supervision over the conditions of work (art.24). The Constitution provides the protection of citizens' dignity (art. 30), freedom (art. 31) and equal treatment (art. 32). Men and women shall have equal rights in family, political, social and economic life in particular regarding education, employment and promotion, and shall have the rights to equal compensation for work of similar value, to social security, to hold offices and to receive public honours and decorations (art. 33).

The freedom of association shall be guaranteed to everyone (art.58-1). The freedom of association in trade unions, socio-occupational organisations of farmers, and in employers' organisations shall be ensured. Trade unions and employers and their organisations shall have the right to bargain, particularly for the purpose of resolving collective disputes, and to conclude collective labour agreements and other arrangements. Trade unions shall have the right to organise workers' strikes or other forms of protest subject to limitations specified by acts. For protection of the public interest, acts may limit or forbid the conduct of strikes by specified categories of employees or in specific fields. The scope of freedom of association in trade unions and in employers' organisations may only be subject to such statutory limitations as are permissible in accordance with international agreements to which the Republic of Poland is a party (art. 59, 1-4).

Everyone shall have the right to safe and hygienic conditions of work. The methods of implementing this right and the obligations of employers shall be specified by statute (art.66 -1).

An employee shall have the right to statutorily specified days free from as well as annual paid holidays; the maximum permissible hours of work shall be specified by statute (art. 66-2).

A citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age. The scope and forms of social security shall be specified by statute (art.67-1).

A citizen, who is involuntarily without work and has no other means of support, shall have the right to social security, the scope of which shall be specified by statute (art. 67-2).

The relation of national labour law and international labour law norms has been defined in constitutional regulations. In Poland, accordingly to article 91 of the Constitution, "1. After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.
2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

3. If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws."

3. Labour code and other acts presently in force in Poland

The Labour Code remains the basic act of legal regulation of employment relationships. It determines the basic labour law principles that are binding not only in employment relationships, but also in all cases of work, independently of the legal basis of its performance. The Polish Labour Code of 1974 has been changed on the 7th April 1989. It does however not mean that it already responded to the principles of the new system. It has been changed several times since then. The Polish Labour Code has been finally adapted to the new political and economic system through the Act of 2nd February 1996, following extensive modifications of its contents.

Collective agreements play a new role in the regulation of labour conditions and salaries. It is therefore odd proceed to a particular regulation of those conditions in executive acts to the Labour code. The number of those acts has been significantly reduced. Some issues that were quickly regulated because of being considered as urgent and important from the viewpoint of the performed economic reforms (labour market, employment and unemployment) and existing social and political situation, including certain collective labour law problems, remain regulated by particular acts.

The labour law has been changed and adapted to the new democratic political and market economy system in Poland. The new legal regulation has

been created under the influence of numerous factors and takes into account solutions resulting from the experiences of western countries as well as tradition and existing conditions in Poland.

Apart from the Code, there are also other acts in force: the Act of 25th September 1981 on particular principles of termination of employment relationship with the employee due to causes relative to the enterprise and on the modification of certain acts, three acts of 23rd May 1991 – on trade unions, on employers' organisations and on the settlement if collective labour disputes, the act of 29th December 1993 on the protection of employees' claims in case of insolvency of the employer, the act of 4th March 1994 on the enterprise's social services fund and the act of 16th December 1994 on the negotiation system of definition of the increase of average salaries in economic entities and on the modification of certain acts.

III. EMPLOYMENT RELATIONSHIP

1. Introduction

As we all know, labour law does not regulate all kinds of human labour. Labour Law's field of interest are contractually subordinated employment relationships and other closely related legal relations, relative to supervision and control of labour law respect (basically by the State and Social labour inspections), to the settlement of individual labour disputes and to the collective labour law. The employment relationship is the most important institution of labour law. It is regulated in the Labour code, defining the rights and obligations of employees and employers (art. 1 of the Labour Code), as well as in other labour law provisions that define employee and employer's rights and obligations.

The employment relationship has grown out of civil law relations that were created on the basis of contract for services. It has certain common characters with obliging relations of this law. The employment relationship has an obliging character with important elements such as the equality of parties and the freedom for the employee and the employer to enter such a relationship. This is the difference compared to the legal administrative relationship, in which one entity (administration organ) takes a unilateral decision that the other entity is obliged to respect. Employment relationship questions that remain unregulated by labour law provisions are subject to the respective provisions of the Civil Code, provided they are not contradictory with labour law provisions (art. 300 of the Labour Code). There are on the other hand certain characteristics that allow us to make the difference between employment relationships and civil legal relationships.

2. Employment relationship parties

Employee

An employee is a person employed on the basis of a contract of employment, an appointment, an election, a nomination or a co-operative contract of employment (article 2 of the Labour Code). The notion of "employment" means the performance of a work of a specified work for the employer and under his direction (Article 22 § 1 and § 1^1 of the Labour Code), on the basis of a contract of employment and others mentioned in the article 2 of the Labour Code, being a basis for the conclusion of an employment relationship. The "employment" is equals the remaining in a employment relationship. An employee is a person who remains in a labour contract, but only for the time of its duration, that is from the date standing in the contract of employment as the date of beginning of work, and if such a date has not been specified – from the date of the conclusion of the contract (article 26 of the Labour Code), until the termination of the employment relationship. A person performing a work on the basis of contract for a specified task or work is not an employee as she remains in a relationship of civil law.

An employee can be any person of 18 years of age and over. Accordingly to the conditions determined in the provisions on youth employment, a person of over 15 and less than 18 years of age may also be considered an employee. It is forbidden to employ persons who are under 15 years of age. In particular conditions, for a person of over 14 and under 15 years of age, there is a possibility, upon the demand of her legal representative, of concluding a contract of employment destined to prepare professionally prepare the person through learning the occupation (§ 5 al. 1 and 2 of the decree of the Minister of Labour and Social Policy of 29t^h May 1996, Journal of Laws NR 62, item 291).

A person incapacitated in her abilities to enter legal transactions (minor, having over 13 years of age or person partly incapacitated – art. 15 of the Civil Code) may enter an employment relationship without the consent of her legal representative and undertake activities related to that relationship. It is about the respect of free and independent entrance into an employment relationship by the employee, also when he is a minor. However, if the employment relationship is contrary to the well being of the person in question, the legal representative may, with the consent of the youth tribunal, terminate the relationship. The legal representative may not however take himself engagements relative to the employment relationship on behalf of the minor person.

Employer

An employer is an organisational unit, even though it does not have legal identity, and also a natural person, if she employs employees on their own behalf (article 3 of the Labour Code).

After the codification of the Polish law in 1974, the notion of employer has not been used for years. The Labour code was using the notion of workplace (in a subjective meaning). Such a situation led to some misunderstandings, because the notion of workplace was and still is used in an objective meaning, as the total of possessions and technical means (buildings, machines, devices, etc) being a separate whole.

The Labour Code, modified in 1996, consequently uses the notion of employer. Certain other legal acts of Polish law (i.e. in the act of 28th December 1989 on particular principles of termination of employment relationship with the employee due to causes relative to the enterprise and on the modification of certain acts, Journal of Laws, 1990, NR 4, item 19 with further amendments) still use the notions of workplace and workplace director. This is why every time when legal provisions are mentioning rights and obligations of the workplace or workplace director, those provisions are respectively applied to employers in the meaning of article 3 of the Labour Code.

In the labour law literature, the notion of employing entity is used as corresponding to the notions of employer and workplace.

Any organisational entity may be employer, no matter its legal status (i.e. State-owned enterprise, State magistrate, bank, territorial self-government organ, communal magistrate, commercial law company, co-operative, social organisation, Church parish). Also departments, sections and branches may be employer, not only self-standing organisational entities, provided they meet the conditions mentioned above. This means that in a complex organisational structure of an entity, an enterprise with numerous plants for instance, this enterprise will not be the sole employer, but also its plants, provided that they employ employees on their own behalf.

Accordingly to article 3 of the Labour Code, the specificity of activities of a given organisational entity does not influence its quality of being employer. It may be any kind of activity requiring the performance of a work (productive, commercial, services, scientific, cultural activities or managing and administrative activity).

An employer is only an organisational entity that employs an employee, that is a person employed on the basis of contract of employment, an appointment, an election, a nomination or a co-operative contract of employment (article 2 of the Labour Code). An employer cannot exist alone. It becomes employer only when it employs an employee, which means the entrance into an employment relation.

The employer is a party of an individual employment relation and has given rights and obligations towards the employee, the latter being the second party of this relation.

The employer has also defined rights and obligations towards the crew. He may be a party to collective employment relationships, in which the second party will be trade unions, the general assembly of employees of a state-owned enterprise or the employee council of a state-owned enterprise. The employer intervenes as a party of collective negotiations and social dialogue with trade unions. The employer may conclude collective labour agreements and other collective agreements with them. The employer may also be a party in a collective labour dispute. A strike may be called against an employer.

A natural person may also be employer, provided she employs employees on her own behalf.

Any acts concerning matters within the scope of Labour law shall be performed on behalf of the employer being an organisational unit by a person or an authority managing such unit or by a person designated for that purpose (art. 3^1 § 1 of the Labour Code). This principle is respectively applied to the employer being a natural person if she does not perform personally the acts on matters within the scope of labour law (art. 3^1 § 2 of the Labour Code).

In Poland, apart from natural and legal persons, there are also organisational units that do not possess any legal identity, but that are allowed to enter legal transactions. If the employer is a legal person, it acts through its organs. The employer does not however need to have a legal identity. Even though lacking this identity, the employer is entitled to legal activities in matters in the scope of labour law. As to matters in the scope of labour law, a person or organ managing the organisational unit is entitled to intervene, or any other person designated for that purpose. Such a person or organ is not employer, they only intervene on his behalf. The basic criterion of the definition of an employer is the fact that he employs employees on his own behalf. This means that the employer freely employs and fires employees, accordingly to his will.

3. Employment relationship notion

The Labour code does not contain a full definition of the employment relationship. Accordingly to Labour code provisions, jurisprudence and scientific opinions, an employment relationship is a legal relationship existing between two entities equal in rights, the employee and the employer, concluded on the basis of a contract of employment, an appointment, an election, a nomination or a co-operative contract of employment, and in relation to a minor – on basis of a contact of employment destined to a professional preparation of the person in question.

Within the frame of the employment contract, the employee is obliged to personally perform a continuous specified work for the employer and under his direction, the employer on his side is obliged to employ the employee in exchange for a remuneration.

The object of the employment relationship is a reliable activity of the employee and not the provision to the employer of a finished product or the performance of a specified task. For the duration of the employment, the employee gives the employer the full extent of his professional and personal abilities for usage. A continuous work performance means that for the entire duration of the employment relationship the employee and the employer continuously satisfy to their duties in a repeated manner. An isolated performance of a certain amount of work and the payment of remuneration for this work does not mean the end of the employment relationship because such a performance does not fulfil all mutual obligations of the parties of this relationship.

In some cases, the Labour code uses equally the notions of “employment relationship” and “employment contract”. There are however significant differences between those two expressions. The contract is an act of will, a single legal activity, performed by two parties, the employee and the employer, on basis of which an employment relationship will be created. The employment relationship is then a period of time in which contracted mutual rights and obligations of the employee and the employer will be fulfilled. Except from that, the notion of “employment relationship” is a much wider one, because it may be created not only on the basis of a contract, but also an appointment, an election or a nomination.

4. Legal bases

When speaking of legal bases of the employment relationship, it is necessary to make the difference between legal bases of its creation and legal bases, that is provisions, that regulate the way it is created, the way it lasts and terminates. We will be talking here about the first group, as the second one has been covered in the chapter on labour law sources.

An employment relationship may be exclusively created on the basis of a contract of employment, an appointment, an election, a nomination or a co-operative contract of employment and in relation to a minor – on basis of a contact of employment destined to a professional preparation of the person in question. In the following part of this text, we will concentrate uniquely on the contract of employment. Employing employees on a different basis, for example a contract to perform a specified task or work, does not create an employment relationship.

5. Voluntariness

An employment relationship may be created and lasts only on the basis of a free and voluntary will commitment of the employer and employee. The will to conclude such a relationship may be expressed in a direct and in an indirect way (i.e. through the admittance of a given employee to work and the usage of his work). Compulsory work is prohibited in Poland. This prohibition results from the ratified conventions NR 29 and 105 of the International Labour Organisation and has been defined in the basic principle of labour law, contained in article 11 of the Labour Code, accordingly to which the creation of an employment relationship requires a consent declaration of the employer and employee, independently of the legal founding of the relationship. The voluntariness of the creation and maintenance of an employment relationship affects the contractual relationship and the appointment, election and nomination relationships as well. This characteristic is a necessity, because throughout the duration of an employment relationship the employee is subordinated to the employer.

6. Characteristics of an employment relationship

a) Personal work performance

Entering an employment relationship, the employee engages himself to perform for the employer a work of a given specificity, quantity and quality. This means that the work will be performed personally. The employer employs a given employee because of his professional background and because of his entire psychophysical characteristics, such as age, sex, the way he performs his work, his ability to work in a team, etc. The whole thing is not to perform a work of certain kind; it is about the work to be performed by a concrete person, chosen by the employer. The personal performance of the work by a given employee is also necessary due to the fact that the employer assumes a risk related to the employment of employees and also to the performance of their work. This is why an employee is not allowed to individually decide that another person will do his job, or to designate a deputy even in a situation of inability to work (i.e. due to insobriety). The prohibition of an arbitrary designation of a deputy by the employee relates to employees of a given plant as well as persons that are foreign to the enterprise and do not have any insurance. The prohibition of designating a deputy who will perform the job the employee is engaged to perform is also related to the fact that this employee would become a sub-lessee in the meaning of the civil law, a situation that is not legally allowed.

b) Employee subordination

The employment relationship is concluded between two entities equal in rights. In the period of this relationship, the employee performs a work of a given specificity for the employer and under his direction. The employee is then

subordinated to the employer as to the nature, location, time and way of performing work. The type and place of work should be defined in the employment contract (art. 29 § 1 of the Labour Code). The work time is the time during which the employee remains at the disposal of the employer at the workplace or any other place designated for the performance of the work (art. 128 of the Labour Code). The principles of organisation and order in the work process in force in a given establishment are defined in work regulations (art. 104 § 1 of the Labour Code).

The employer or persons that the employer designates (director, department directors) organise the work in the establishment and control the observance of provisions and principles of its organisation. In the frame of so-called director rights, those persons are entitled to concretise the above mentioned duties through the issue of orders related to work (art. 100 § 1 of the Labour Code).

There are however limits to the subordination of the employee, defined by law, contract, justified interest of the establishment (the principles of caring for the wealth of the establishment, the prohibition of competition), principles of social co-existence and habits (for instance when parties did not define the principles or amount of the remuneration and these elements are not defined in provisions in force, the employee has the right to a remuneration adequate to the type, quantity and quality of effectively performed work).

The employee is obliged to respect the orders of his superiors relative to work, provided that they are not in contradiction with law provisions or the employment contract (art. 100 of the Labour Code).

c) The employer's risk

The employee is not obliged to produce a finished product, but to an accurate and thorough performance of his work in the conditions created by the employer and in the way the employer wishes the work to be performed. This is why the employee does assume the risk related to the activity of the employer, and is not liable for damages resulting from activities in the limits of admissible risk (art. 117 § 2 of the Labour Code). The employer bears the risk related to the activity of the establishment. The extent of this risk widened since the introduction of market economy principles in Poland.

There are numerous and various elements that may influence the activity and the performance of an establishment in a market economy. They relate to external factors (work market situation, competition and necessity to comply to its requirements, the existence or lack of output markets, etc.) and to internal factors (technical and technological level, work organisation and effectiveness, the choice of the crew and its professional qualifications, etc.). There are different kinds of risks depending on the elements that we take into consideration.

The employer bears the so-called technical risk when the work process gets disturbed or stopped due to technical or organisational reasons, such as machine failure, lack of raw materials, electricity or other energy sources necessary in the production process.

The so-called personal risk related to a situation when the employer assumes damages due to his own mistake of choice, consisting in an inadequate crew choice, in a mistaken assignment of various posts to persons with insufficient professional qualifications or due to other events, such as work accidents for instance. This risk is also present when damages occur due the lack of performance or inadequate performance of employee duties. The employee does not assume any liability if his attitude was not faulty, and in case his responsibility is proven, the employee's liability is limited to the amount of a three-monthly remuneration (art. 114 and 119 of the Labour Code).

In cases of a lack of performance of a work by an employee due to reasons defined in the cause regulations recognised as justified absence and preserving the right to remuneration, and also in cases of particular employee protection against termination notice (in case of illness for instance), the employer assumes the so-called social risk.

The so-called economic risk is the widest assumed by the employer. It is related to the entire activity of he establishment and consists in the fact that even in case of failure to reach planned objectives and in case of lack of planned incomes, the employer is obliged to pay employees, provided they satisfied to their duties. A partial, direct sharing of this risk between the employer and he employee is possible when the payment of a given and separate element of the employee remuneration depends on the reaching of defined financial results by the establishment. It is also the case in the so-called piecework labour rate system. Employees bear an indirect risk related to the fact that their professional and life situation is closely linked to economic results of the establishment in which they are employed.

d) Remuneration

The employee has the right to fair remuneration for the performance of a work. Provisions of labour law and remuneration policy of the State specify the conditions of this right, in particular by fixing a minimum remuneration for work (art. 13 of the Labour Code). The remuneration is also due to the employee for the time of non-performance of the work if he was ready to perform it and encountered obstacles for reasons relative to the employer, also for the time of work cease which has not been his fault (art. 81 § 1 and § 2 of the Labour Code).

7. Employee protection

The basic labour law principles play a particular role in the field of employee protection. Those principles relate not only to employees, but also to all persons performing a work.

The basis labour law principles play a role of legislative guides and have a function of indicator on how to interpret particular labour law provisions. The Labour Code provides a minimum of employee rights and protection. Provisions of employment contracts and other instruments on the basis of which an employment relationship is established, cannot be less favourable to the employee than the provisions of labour law. The provisions of contracts and acts defined above that are less favourable to the employee than the provisions of labour law shall be null or void; appropriate provisions of labour law shall apply instead (art. 18 § 1-2 of the Labour Code).

Later in this article, we will only be discussing the employment relationship established on the basis of a contract of employment.

a) At the conclusion of an employment relationship

The employee protection at the conclusion of a contract of employment is assured by Labour code provisions regulating the following issues: the prohibition of concluding consecutively repeated definite period contracts; the term of establishment of an employment relationship; the form and compulsory contents of a contract of employment.

Entering into a subsequent employment contract for a definite period shall have a legal effect identical to entering into an employment contract for an indefinite period, provided that the parties have previously entered into an employment contract for a definite period twice for periods immediately following each other and if the interval between the termination of one employment contract and entering into the subsequent one was not longer than one month (art. 25^1 of the Labour Code). An employment relationship shall be established within the time limit defined in the contract as the first day of work, and if such time limit has not been defined – on the day of conclusion of the contract of employment (art. 26 of the Labour Code).

An employment contract should be concluded in writing. If the contract of employment has not been concluded in writing, the employer should immediately, that is not later than within 7 days following the commencement of work, confirm to the employee in writing the nature and the conditions of the contract (art. 29 § 3 of the Labour Code). Any employer person or a person acting on behalf of an employer, who fails to confirm in writing, within 7 days, a contract of employment concluded with an employee, shall be liable to a fine.

b) At the modification of the employment relationship

The protection of the employee at the modification of the contract of employment is assured by article 42 of the Labour Code, which stipulates as follows:

§1 The provisions on notice of termination of a contract of employment shall apply respectively to the notice of termination of conditions of work and remuneration as agreed in the contract.

§2 The termination of the conditions of work or remuneration shall be deemed effected if the new conditions have been proposed to the employee in writing.

§3 If the employee rejects the proposed conditions of work or remuneration, the contract of employment shall be terminated at the end of the period of notice. Should the employee not make a statement on the rejection of the proposed conditions, they shall be considered accepted; the letter of the employer terminating the conditions of work or remuneration shall include appropriate information on this matter. If there is no information, the employee may make a statement rejecting the proposed conditions until the end of the period of notice.

§4 The termination of present conditions of work or remuneration shall not be required if the employee is assigned, when it is justifiable by the interest of the employer, work other than that specified in the contract of employment for a period not longer than three months in a calendar year, if that does not result in lower remuneration and corresponds with the qualifications of the employee.

c) At the employment relationship termination notice

The employer shall notify in writing the establishment's trade union body representing the employee of any intention to terminate a contract of employment concluded for an indefinite period and shall give the reason for termination of the contract (art. 38 § 1 of the Labour Code). If it has been determined that the notice of termination of a contract of employment concluded for an indefinite period is unjustified or that it is contrary to the provisions on termination of contracts of employment, the labour court, upon request of the employee, shall declare the notice of termination ineffective, and if the contract has already been terminated the Court shall order that the employee be reinstated in his/her job on former conditions or that compensation is due to the employee (art. 45 § 1 of the Labour Code). The protection of the employee also consists in the possibility for the employee to present claims in court. This opportunity is regulated by provisions of article 262 §1 and 2 of the Labour Code, of article 264 § 1 of the Labour Code and of provisions of the Code of Civil Procedures.

8. Disguised employment relationship

Accordingly to general principles of contractual freedom, parties may define their legal relationship as they wish, provided that its contents are not contradictory with the nature of this relationship, the act or principles of social co-existence (art. 353-1 of the Civil Code). This means that parties are free to

decide whether they want the given work to be performed in the scope of an employment relationship or in the scope of a civil law contract. The Labour code does not allow disguised employment relationships.

The conclusion of a disguised civil law contract (for instance a contract to perform a specified work or task) instead of an employment contract is forbidden by provisions of the Labour Code.

Accordingly to art. 22 § 1^1 of the Labour Code, the employment in the conditions specified in the art. 22 § 1, especially in employee subordination conditions, is considered as an employment on basis of an employment relationship, independently of the name the parties have given to their contract. Any employer or a person acting on behalf of the employer who concludes a contract of civil law where under art. 22 paragraph 1 a contract of employment should be concluded shall be liable to a fine (art. 281 of the Labour Code).

Practical repercussions of disguised employment relationships on the formal and effective protection of workers.

It is necessary to remark two situations here: the employer and the employee consciously conclude a civil law contract, mainly because it lowers the cost of work as the employer is not obliged to pay social insurance and health taxes. The employer cheats on the employee who thinks he concluded an employment contract and possesses all employee rights. The whole disguise gets revealed when the employee has for instance an accident at work. Practical consequences of disguised employment relationships are that the employee does not have any employee rights.

Legal consequences of disguised employment relationships hit both parties of such a relationship. This means:

1. The automatic transformation of the relationship binding parties into an employment relationship after the validating of the verdict of the labour tribunal in the case of a claim presented at this tribunal by the given worker himself or the labour inspector – on behalf of the worker, which goal is to determine the legal character of the employment. The case relates more specifically to determining the legal qualification of the concluded contract. After the validation of this verdict, the employer if obliged to confirm in written the work and remuneration conditions.
2. The responsibility of the employer, and in certain cases of the worker, towards fiscal organs, and possibly towards Social Security Agency organs for the breach of fiscal law provisions in the field of calculation and tax levy, and in the case of the Social Security Agency, for exceeding allowed incomes in the case of retired persons and pensioners.
3. The change of legal status of a person treated until that moment as a contractor. The person in question will be brought into the scope of protection defined by labour law provisions.

4. The employer’s penal and administrative liability towards the labour inspector for the offence of employee rights.

IV. EMPLOYMENT OF PERSONS PERFORMING A WORK ON A DIFFERENT BASIS THAN AN EMPLOYMENT CONTRACT.

1. Homework employment

Homework employment relationships are the closest to the employment relationship. They are regulated in the by the Government regulation of 30 December 1975 with further amendments. This regulation defines the range of application of the provisions of labour law to persons permanently working on a basis other than an employment relationship or homework contract, with modifications resulting from the specific conditions of such work. Home workers have among other rights the one of joining any trade union that functions in the establishment with which they concluded the homework contract (act of 23 May 1991 on trade unions, Art. 2-2).

2. Employment on the basis of civil law contracts

It is necessary to remark that accordingly to the principle of contractual freedom, there are various services, performed personally and for remuneration, constantly or for a longer period of time, that may be performed on basis of civil law contracts. Here are a few examples:

- The performance of a work by an associate for the society, provided that the work performed is considered as the associate’s contribution to the civil society. This relates also to activities performed constantly and related to the management of the society’s affairs or to its representation towards third parties. In such cases the duty of personal work is a normal statute duty of the associate, resulting of commercial law provisions. It is however important to notice that the mentioned functions and tasks may also be performed within the scope of an employment relationship, provided that the society’s statute organs consider that in this concrete case the associate should be performing his tasks on basis of a legal employment relationship. This relativity of legal forms of employment of an associate is allowed by the jurisprudence (see verdict of the Supreme Court of 14 January 1993, II CZP 21/92, OSNCP of 1993, book 5, item 69).
- The performance of a work by an associate of a limited liability society, provided this work will be qualified by the society’s statute organs as the object of a so-called unremunerated service of the associate for the society in the meaning of article 177 of the Commercial Code.

- Continuous management of society's affairs or continuous representation of a capital society after being appointed in the society's board, or in case when the management of the society's affairs owes to its statute.
- The performance of tasks of receiver in a State-owned enterprise or any other economic organisation, of tasks of accountant in bankruptcy on basis of a economic court verdict, of tasks of a compulsory manager of an economic organisation, provided that the ordering organ did not clearly specify that those tasks are to be performed on basis of an employment relationship.
- The performance of obligations resulting from a so-called manager contract, that is a contract for managing the affairs of a defined economic organisation, a State-owned enterprise for instance.
- The performance of tasks belonging to the obligations of a tourist guide, including piloting domestic and foreign excursions and providing all arrangements necessary to that effect (see verdict of the Supreme Court of 11 November 1988 II PZP 8/80).
- The performance of services belonging to one of the medical occupations of doctors, midwives, nurses, that is treatment, diagnosis, patient care etc. We are of course talking of a performance of services on basis of a separate contract concluded between the person seeking those services and a doctor, nurse. We are not talking of a legal relationship between the healthcare employee and the private or public healthcare establishment that employs the person in question (see verdict of the Supreme Court of 9 June 1972 I PR 8/72, OSNCP of 1973, book 1 item 16, and of 17 December 1972, I PZP 66/72).
- The remunerated performance of tasks by attorneys, notaries and in certain cases by legal advisors.
- The performance of tasks commissioned by governmental organs, courts, prosecutor's office and the police to interpreters, experts and appraisers, chartered specialists. This includes the performance of those tasks on commission of natural or legal persons.
- The performance of services consisting in teaching, additional teaching, knowledge testing in the scope of educational advice provided by teachers, tutors, scientific workers, etc.
- Other cases of remunerated services' provision in contractual conditions characteristic for a commission (art. 734 and following of the Civil Code).

3. "Triangular" relationships

So-called "triangular" relationships are not legally regulated in Poland. It is known from press information that such relationships exist, but their scope and their way of regulation are unknown. We also lack information on the mutual relationships between the agencies (well known as "head-hunters") that seek out workers, the enterprise that would be willing to employ the worker without having to conclude an employment contract and the worker himself. The

following question arises: may we consider the activity of such agencies as professional counselling?

Accordingly to the provisions of the act of 14 December 1994 on employment and unemployment countermeasures (Journal of Laws 1997 NR 25, item 128, with further amendments), professional counselling consists in providing to persons seeking employment the help in their choice of an appropriate profession and workplace. It also consists in providing employers with a choice of candidates for posts requiring particular psychophysical characteristics. The following principles should be observed in the professional counselling activities: availability of services for all persons seeking employment and all employers; voluntariness; equality in the use of those services for anyone requiring their assistance, independently of their sex, nationality, religion, belief, political and social organisation membership, etc.; freedom of choice of profession and workplace and, most of all, the availability of the services **at no charge**. Regional Employment Offices provide professional counselling.

It seems that in the context of those provisions, headhunter agencies may not be considered as professional counselling institutions.

V. CONCLUSION

It is necessary to consider that one of the goals of this study will be the preparation in the future of a project of a convention legal act and/or recommendation of the International Labour Organisation. In this respect it seems necessary to discuss and motivate the full extent of considered problems. It is at the same time necessary to take into account the opinions of workers and their representative organisations, of employers and their organisations as well as the opinions of governments, representing general social interests. It would seem to be needed to take into consideration the critical opinions of employers and their organisations presented during the discussion on the convention project on contract labour, at the International Labour Conference in 1997 and 1998.

The following conclusions should be drawn from the analysis of workers' protection in Poland: there is a legal and practical differentiation between the large enterprises on the on hand and small and medium sized enterprises on the other hand. Polish labour law is still more adapted to regulating the activity of large enterprises. Employers and their organisations demand a greater flexibility of employment and are pushing towards the following changes:

- limitation of social charges
- greater freedom of employment contract conclusion and termination
- limitation of certain administrative obligations
- greater flexibility of working time and its organisation
- limitation of the economic risk related to the employment of workers

On the other hand, employees claim labour law is breached, mostly in the private sector, but also in certain foreign enterprise (some supermarkets for instance).

The uneven protection of employees in the private and public sector is a result of the fact that in the private sector the unionisation rate is very low, almost non-existent. Employees in this sector are therefore deprived of rights resulting from collective labour law (collective bargaining, collective disputes, etc.).

Whom do we want to protect apart from the employees? Which groups of persons performing a work should be entitled to such a protection?

National solutions are prepared with the idea that the reference will be an employee employed on the basis of a contract of employment, in conditions of subordination. As we know, there are quite substantial differences in protection provided to various groups of employees. This is not a problem that we will be considering here. However, it is important to notice the phenomenon of increasing flexibility of certain labour law solutions in highly industrialised countries (for instance in the field of working time or labour contract dismissal), as well as that of the so-called deregulation, which allows the introduction, into collective labour contracts, of solutions which are less favourable to employees in the sense of the traditional meaning of the privileging principle. We come to the point when it becomes obvious that it will be more favourable to the employee to lower certain social benefits instead of the company going bankrupt and closing its activity. Is it really possible to consider in a realistic approach the protection of other persons performing a work if there is no possibility to guarantee this protection to employees? I think it is possible. It would however require a search for legal solutions and financial sources adapted to the reality and situation on the global labour market.

It is not possible to solve present problems with means adapted to an era that is just becoming history!

What is it that we want to protect? Which values require protection?

The notion of “employee protection” has been widely defined in preparation studies. It is related to employment and remuneration conditions, to hygienic and security conditions, to social security, to trade union freedom, to collective negotiation and access to courts. It describes a wide range, referred to in labour law as “protection of employee rights and interests”.

The study is supposed to disclose existing deficiencies in the field of employee protection, in law provisions as well as in practice. Then comes the time to propose means destined to improve the situation. First, it would appear

to be most suited to ask why are there any deficiencies in the field of employee protection? What are the causes of such a situation? Do they exist in all countries? Is it possible to expect an improvement in employee protection in the perspective of employers' expectations to improve the flexibility of labour law?

Are there any particular conditions in Central and Eastern European Countries which negatively influence the protection of the employee? It is possible to give examples of employee rights that could be fulfilled in a centralised economy by State-owned enterprises, but which are currently exceeding the possibilities of private enterprises, particularly small and medium ones.

There is a problem of employee rights in Central and Eastern European Countries, contained in the field of "employee protection", treated and referred to as "acquired rights", especially by employees and trade unions. Do those rights always have to be respected, or are there any exceptions to it?

Accordingly to the Constitutional Tribunal and science (T. Zieliński, "The Role of Law in the Transition to a Democratic System", in "Polish Labour Law and Collective Labour Relations in the Period of Transformation", ed. M. Seweryński, Social Dialogue Library, Warsaw, 1995, pp 10-11), the principle of acquired rights is not an absolute principle and the rights themselves are not sacred. Certain exceptions, when based on the exigencies of systemic reforms, may be found to exist. These exceptions may be listed as follows: first, those rights acquired unjustly are not protected. Second, rights previously acquired, the vestment of which was dependent on continuation of the previous, now abolished system. Third, rights acquired due to previous erroneous or irrational decisions acquire no guarantee of inviolability. Fourth, acquired rights may be reduced or suspended for either a fixed or indefinite period if they are impossible of fulfilment due to a state of emergency, economic crisis and so on.

Who will bear the costs of this protection?

As we all know, the protective function of labour law and many of its institutions relies on a lack of symmetry of labour relation parties: the employee and the employer. Labour law has left behind the formal equality of parties and protects the employee in a wider extent, giving him a much more favourable position that the employer's situation. We all know examples of that. There are employer milieus' opinions on overdeveloped employee protection in post-communist countries. It is often said that the "grey zone" and unofficial work (in French: travail "au noir") are caused by legal solutions introducing an excessive protection of the employee.

Therefore it the employer who bears in a major part the cost of employee protection. Will he be willing to pay even more? Will it be possible to expect from the employer to pay for the protection of persons who are not employees? Doubtful. With a preliminary consideration of a necessity to provide protection

to all persons performing a work, the question arises – **who** would have to pay for it:
- the State?
- the social insurance?
- the social security?
- the local or regional community?

Problems to be solved

One of the most important and crucial problems to be solved is the appropriate identification of existing legal and practical relations. It is necessary to define and adequately evaluate the existence of a labour relation, of other legal relations being the basis for the performance of the work, or maybe assess if we have to do with a legal abuse consisting of the application of civil law provisions to a labour relation.

It seems not possible to extend the full employee protection to other persons performing a remunerated work on a different basis than a contract of employment (labour relation).

It is also necessary to define the values and attributes of persons performing a remunerated work that are to be protected no matter what the legal basis of their work is. The next stage will be to define the extent of this protection.

If the protection of the employee and other persons performing a remunerative work is to be an effective one rather than just formal, it is necessary to seek the creation of solutions that will take the existing conditions into account in a possibly widest view. There is a need of an interdisciplinary approach, particularly including the adaptation of legal solutions to economic and social conditions. There is also a necessity to harmonise solutions adopted in various fields of law (labour law, commercial law, civil law, financial law, taxation law, social security law...). A good organisational solution would be to create an interdisciplinary team responsible for the preparation of a draft, and at least for the evaluation of projects in preparation.