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## SELF-EMPLOYMENT IN THE LIGHT OF INTERNATIONAL AND UNION LAW

**Abstract.** The chapter discusses self-employment in the context of international and Union law. The phenomenon of self-employed activity grows in popularity as a result of massive social and economic as well as technological change. The author presents various definitions of self-employment and legal guarantees granted under international and Union law to persons who carry out business activity as a self-employed person. It should be noted that no uniform definition of self-employment exists. Moreover, there is no comprehensive approach to or coherent regulations of this matter. Legal rules concerning self-employment are fragmented and often inconsistent. The author points out that international protective standards cover all “working people”. As a result, the self-employed are accorded certain rights in areas such as: life and health, remuneration, non-discrimination and equal treatment, parenting, rest, and protection of collective interests. Due to the growing popularity of self-employed activity and the significance of human rights, national legislations should grant persons who pursue gainful activity for their own account appropriate protective guarantees. Another important matter is counteracting bogus self-employment, which deprives numerous working people of a proper standard of protection.

**Keywords:** self-employment, protective guarantees for the self-employed, right to rest, remuneration, salary, protection of life and health, parental rights, collective rights, bogus self-employment.

## SAMOZATRUDNIENIE W ŚWIETLE PRAWA MIĘDZYNARODOWEGO I UNIJNEGO

**Streszczenie.** Niniejszy rozdział omawia kwestię samozatrudnienia w kontekście prawa międzynarodowego i unijnego. Zjawisko samozatrudnienia jest coraz bardziej popularne ze względu na liczne przemiany społeczno-gospodarcze i rozwój nowoczesnych technologii. Autor rozdziału przedstawia różne definicje samozatrudnienia i gwarancje prawne przyznane osobom pracującym w tej formule na gruncie prawa międzynarodowego i unijnego. Dostrzec należy, że nie istnieje jednolita definicja samozatrudnienia. Brakuje również kompleksowego podejścia i spójnych regulacji prawnych w tej dziedzinie. Unormowania dotyczące samozatrudnienia są fragmentaryczne i często niejednolite. Autor rozdziału zwraca uwagę na to, że międzynarodowe standardy ochronne obejmują wszystkich “ludzi pracy”, co daje samozatrudnionym pewne uprawnienia w takich

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obszarach, jak: zdrowie i życie, wynagrodzenie za pracę, niedyskryminacja i równouprawnienie, rodzicielstwo, wypoczynek oraz ochrona interesów zbiorowych. Z uwagi na rosnącą popularność samozatrudnienia oraz znaczenie podstawowych praw człowieka, ustawodawstwa krajowe powinny przyznawać odpowiednie gwarancje ochronne osobom wykonującym pracę zarobkową na własny rachunek. Istotną kwestią jest również walka z fikcyjnym samozatrudnieniem, które pozbawia wielu wykonawców pracy należytego standardu ochrony.

**Słowa kluczowe:** samozatrudnienie, gwarancje ochronne samozatrudnionych, prawo do wypoczynku, wynagrodzenie za pracę, ochrona życia i zdrowia, uprawnienia rodzicielskie, uprawnienia zbiorowe, fikcyjne samozatrudnienie.

## 1. INTRODUCTION

Extensive social and economic change as well as the development of modern technologies have resulted in the emergence of new, flexible forms of providing work. One of the types of gainful activity that have been evolving most dynamically over the last years has been self-employment. This phenomenon is well known around the world, as can be seen from numerous documents, reports, and studies of international institutions and organizations that obtain and analyse statistical data related to the labour market, such as the OECD and Eurostat. According to research carried out by the OECD in 2021, the self-employment factor reached a level of 16.5% of the total number of working people in all countries (own calculations based on an OECD study from 2021 in <https://data.oecd.org/emp/self-employment-rate.htm> (accessed: 28.02.2022)). This means that on average, every sixth working person is self-employed. The study found that the lowest rates are observed in: the United States (6.3%), Norway (6.5%), Denmark (8.5%), and Canada (8.6%). In contrast, the highest rates of self-employment were recorded in Colombia (50.1%), Mexico (31.9%), Greece (31.9%), and Turkey (31.5%). Then, according to Eurostat, more than 25.3 m people in total carried out self-employed activity in the third quarter of 2021 in the EU Member States. The highest numbers of the self-employed among EU countries are recorded in Italy (4.3 m), France (more than 3.2 m), Germany (3 m), Poland (3 m), and Spain (2.9 m) (<https://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do> (accessed: 28.02.2022)). Yet the data reflecting the level of self-employed activity around the globe are not uniform. This results from the fact that many countries and international organizations adopt different definitions of self-employment, which will be discussed further on in the present chapter. Still, it should be noted that the self-employed constitute a very numerous group in the entire working population. The purpose of the present chapter is to present self-employed activity in the light of international and Union law, including to present its definitions and the legal guarantees granted to persons who perform this type of work.

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## 2. SOURCES OF THE LEGAL REGULATION OF SELF-EMPLOYED ACTIVITY – INTERNATIONAL AND EU STANDARDS

The idea of developing a universal and international system for the protection of human rights emerged already after the end of World War I. An important element of this system are acts of the United Nations Organization (UN), in particular the Universal Declaration of Human Rights passed on 10 December 1948 (UDHR). Although the stipulations of the Declaration are not binding, it is acknowledged as one of the crucial acts establishing fundamental human rights. It should be noted that the UDHR focuses chiefly on the protection of the human being with regard to socio-economic aspects. Among other things, it grants the right to carry out gainful activity under clearly named terms. The Declaration does not refer to self-employed activity directly. Still, its stipulations guarantee specific rights to every human being. As a result, all people enjoy the protection it provides, regardless of the legal basis on which they provide work. Beneficiaries of the socio-economic guarantees are not only those who work under an employment relationship, but also self-employed persons. In the case of the latter group of working people, the following rights should be highlighted: right to freedom and dignity (Article 1 UDHR), right to non-discrimination and equal treatment (Article 2), right to equality before the law (Article 7), right to own property and to protection of ownership (Article 17), right to social security and to realization of their economic rights (Article 22), and right to free choice of employment and to favourable conditions of work (Article 23). The guarantees listed above undoubtedly constitute the basis for providing work as a self-employed person as well as affect existing legal regulations in the analysed area.

Much the same can be said of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (passed by the UN on 19 December 1966 in New York, Journal of Laws of 1977, No. 38, item 169.) which specifies and extends the list of human rights enshrined in the UDHR. An analysis of its provisions reveals beyond doubt that its addressees are all who pursue gainful activity, regardless of its kind and legal form. Significant provisions from the perspective of the self-employed are Articles 2 and 3, which provide for non-discrimination (especially based on sex) with regard to exercising one's economic rights, as well as Article 4, under which rights in the analysed area (including economic rights) may be subject to limitations only by means of statutory provisions and only in justified situations. This means that the ICESCR grants every person the right to exercise their economic rights, which include the unrestricted freedom to take up and carry out business activity as a self-employed person.

Other international regulations, including mainly conventions and recommendations of the International Labour Organization (ILO) as well as acts of the Council of Europe (CoE), give specific legal guarantees chiefly

to employees. The ILO in particular is an organization primarily concerned with the protection of workers' rights. Nevertheless, some ILO acts refer directly to self-employed activity, which will be discussed in more detail further on in the present chapter. The CoE, in turn, is an international government organization concerned predominantly with the protection of human rights. The scope of its activity, however, includes also social and economic matters, that is the development of self-employment, as well. The key legal documents in this area are: the European Convention on Human Rights (ECHR) (opened for signature on 4 November 1950 in Rome, and amended by Protocols 3, 5 and 8 and supplemented by Protocol 2 (Journal of Laws of 1993, No. 61, item 284, as amended)) and the European Social Charter (ESC) (opened for signature on 18 October 1961 in Turin (Journal of Laws of 1999, No. 8, item 67, as amended)). Especially the provisions of the ESC refer to the issue of self-employment. Its very Preamble indicates that its primary objective is to pursue economic and social development. Articles 1 and 2 guarantee every person the right to engage in work in a freely chosen occupation and the right to just conditions of work. Article 18, in turn, grants the right to engage in a gainful occupation in the territory of other contracting parties and calls for applying existing regulations in a spirit of liberality and for simplifying related formalities and reducing costs. Another noteworthy provision is Article 19(10) ESC, which expressly mentions extending the protection and assistance granted to migrants and their families to self-employed migrants insofar as such measures apply to them.

Furthermore, it should be noted that many English versions of ILO and CoE documents use the term "worker" rather than "employee", which is material when ascertaining the personal scope of legal protection. "Employee" is a person hired exclusively under a contract of employment. The concept of worker, in turn, covers persons who work under a contract of employment as well as outside an employment relationship, including as self-employed. As a result, the term "worker" covers a much wider group of working persons compared to "employee" ([http://www.emito.net/poradniki/praca/umowa\\_i\\_rodzaje\\_zatrudnienia/pracownik\\_worker\\_a\\_pracownik\\_kontraktowy\\_employee](http://www.emito.net/poradniki/praca/umowa_i_rodzaje_zatrudnienia/pracownik_worker_a_pracownik_kontraktowy_employee) (accessed: 17.03.2022)). Therefore, we can look for sources of the legal regulation of self-employed activity also in acts issued by the above mentioned international organizations that guarantee a specific model of legal protection to all who carry out gainful activity.

Under EU provisions, self-employed activity is promoted as a vital means to increase the professional activity of Union citizens. The functioning of the EU is based on the principle of the freedom of the internal market, which is the principle underpinning the legal framework for self-employment. The first legal document that should be mentioned is the Charter of Fundamental Rights of the European Union (CFR) (Charter of Fundamental Rights of the European Union of 7 December 2000 (Nice) (OJ C 303, p. 1, as amended)). Under Article 15 CFR, everyone enjoys the freedom to choose an occupation and the right to engage

in work. This freedom, having no counterpart in the ECHR (Jurczyk 2009, point 3.2.2), covers: the right to engage in work and to pursue a freely chosen or accepted occupation; freedom of all EU citizens to seek employment, to work, to exercise the right of establishment, and to provide services; and the right of nationals of third countries to work in the territories of the Member States in working conditions equivalent to those of citizens of the Union. Consequently, Article 15 CFR guarantees not the right to work, but the right to provide it according to the individual's will, in any form (Hambura, Muszyński 2001, 92). Then, Article 16 CFR expressly provides for freedom to conduct a business in accordance with Union law and national laws and practices. Thus, self-employed activity is expressly listed as an element of the freedom of establishment in the internal market. Under Article 49 of the Treaty on the Functioning of the European Union (TFEU) (opened for signature on 18 October 1961 in Turin (Journal of Laws of 2004, No. 90, item 864, as amended)) freedom of establishment covers, among others, taking up and carrying out self-employed activity. To this end, the TFEU prescribes the enactment of directives to give effect to the principle of freedom of establishment, which follows directly from Article 50(1) TFEU. In addition, Article 50(2)(d) TFEU stipulates protection for potential self-employed workers where they have exercised business activity in the territory of another Member State and wish to start such an activity in the country in which they have arrived. Article 56 TFEU, in turn, prohibits restrictions on the freedom to provide services, which, under Article 57(d) TFEU, includes self-employed professionals. The direction and intentions of the EU legislature regarding the promotion of this form of gainful employment have been confirmed also in the European Pillar of Social Rights (EPSR) (European Pillar of Social Rights of 17 November 2017 (Göteborg); Commission Recommendation (EU) 2017/761 of 26 April 2017 on the European Pillar of Social Rights (OJ L 113, 29.04.2017, p. 56)). According to Principle 5, "Innovative forms of work that ensure quality working conditions shall be fostered. Entrepreneurship and self-employment shall be encouraged. Occupational mobility shall be facilitated". Moreover, pursuant to Principle 12 of the Pillar, "Regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection". Self-employed workers are mentioned also in Principle 15, which guarantees to both employees and the self-employed in retirement the right to "a pension commensurate to their contributions and ensuring an adequate income". Taking the provisions of the EPSR into account, it should be said that the authors of the document had begun to acknowledge the dynamically evolving socio-economic reality. This is why the Pillar includes calls for flexibility on the one hand and social protection of the self-employed on the other. The above mentioned freedoms are realized by removing a number of restrictions and barriers and granting appropriate rights to self-employed workers in the internal market. These include, among others: prohibition of discrimination

on grounds of nationality with regard to freedom to provide services and freedom of establishment; residence rights enhancing the mobility of self-employed workers and their families (Directive 2004/38/EC<sup>1</sup>); the principle of mutual recognition of professional qualifications and diplomas (Article 53 TFEU); the inclusion of self-employed workers in the system of social security coordination (Art. 48 TFEU<sup>2</sup>); anti-discrimination rights (Directive 2000/43/EC<sup>3</sup> and Directive 2000/78/EC<sup>4</sup>); the principle of equality between self-employed women and men (Directive 2010/41/EU<sup>5</sup>), as well as other rights, which will be further discussed in further sections of this chapter on the protective guarantees granted to the self-employed.

### 3. THE CONCEPT OF SELF-EMPLOYMENT IN THE LIGHT OF INTERNATIONAL AND UNION LAW

As has been mentioned in the introduction, there is no uniform definition of self-employment under international and Union law. Various international organizations often adopt a different understanding of the concept, which results in numerous interpretation problems. Statistical analyses likewise use various definitions of self-employed activity, which only increases the terminological chaos in this area. According to the OECD, a self-employed worker is a person who carries out business activity as a self-employed and who does or does not hire employees (employer), has their own farm business, or is a member of a producers' cooperative or an unpaid family worker (Buchelt, Pauli, Poczowski 2016, 42). Moreover, it is pointed out that a self-employed person does not have to provide services under a formal agreement or contract or to obtain fixed remuneration for their work. In order to distinguish the self-employed, the OECD does not

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<sup>1</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.04.2004, p. 77).

<sup>2</sup> Article 48 TFEU refers explicitly to the self-employed and guarantees the establishment of a system whereby these persons, as well as migrant employees and self-employed workers, retain their acquired rights and acquire new rights in terms of social security and, above all, acquire the right to the payment of benefits from that system in the Member State in which they reside.

<sup>3</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19.07.2000, p. 22).

<sup>4</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16).

<sup>5</sup> Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (OJ L 180, 15.07.2010, p. 1).



include directors and corporation managers in this group.<sup>6</sup> It follows that the OECD has determined a very broad personal scope of the analysed concept, as the group of self-employed workers includes both persons who carry out business activity and employ others and persons who provide services personally, as well as persons who run agricultural establishments. Furthermore, the category of the self-employed includes assisting family workers who receive no remuneration, but participate in the income generated by the business. In contrast, studies prepared by Eurostat contain various definitions of self-employment. The institution does not carry out any research on its own. The statistics are obtained from the Member States as part of the Labour Force Survey (LFS).<sup>7</sup> This results in terminological inconsistencies in its publications. According to some analyses by Eurostat, self-employed workers are persons who carry out business activity or run an agricultural undertaking or their own practice. Moreover, in order to be classified as self-employed, such persons have to, in the week subject to the study, provide work (services) for the purpose of making profit or provide work (services) for the purpose of running their own business, or perform activities aiming to establish their own business (Lasocki, Skrzek-Lubasińska 2016, 6). In addition, Eurostat defines self-employed workers as persons who carry out self-employed activity on their own or as co-owners of businesses that have no legal personality. The group does not include self-employed persons providing work for one party, who are considered to be employees under flexible employment contracts (Buchelt, Pauli, Poczowski 2016, 42). Instead, Eurostat qualifies as self-employed unpaid family workers, outworkers, and persons providing work to meet their own needs, including to accumulate their own capital (EU LFS statistical database In <http://ec.europa.eu/eurostat/web/microdata/european-union-labour-force-survey> (accessed: 20.03.2022)). The ILO, in turn, uses the International Classification of Status in Employment (ICSE), which was adopted by the Fifteenth International Conference of Labour Statisticians in January 1993. The ICSE distinguishes the following: employees, employers, own-account workers, members of producers' cooperatives, and contributing family workers. In this document, the ILO defines self-employed workers as persons who create their own jobs. As opposed to employees, the remuneration of the self-employed depends directly on the profits gained as a result of producing goods or providing services. Moreover, the self-employed provide services at their own risk and take independent decisions concerning the functioning of their business (OECD, Glossary of statistical terms, <https://stats.oecd.org/glossary/detail.asp?ID=2426> (accessed: 11.04.2022)).

The concept of self-employment appears also in international documents and legal acts, especially those issued by the ILO. Discussion on this issue should

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<sup>6</sup> These persons are regarded as employees [in:] OECDiLibrary, <http://www.oecd-ilibrary.org/sites/factbook-2011-en/07/01/04/index.html?itemId=/content/chapter/factbook-2011-61-en> (accessed: 10.03.2022).

<sup>7</sup> In Poland under the name of Badanie Aktywności Ekonomicznej Ludności (BAEL).

begin with a citation of the provisions of the Convention relating to the Status of Refugees, which was drawn up on 28 July 1951 in Geneva (Journal of Laws of 1991, No. 119, item 517). Under Article 18 of the Convention, self-employed activity is defined as engaging on one's own account in agriculture, industry, handicrafts, and commerce, and establishing commercial and industrial companies. Moreover, the term "self-employment" appears in the ILO Rural Workers' Organisations Convention, 1975 (No. 141) (<http://libr.sejm.gov.pl/tek01/txt/mop/1975a.html> (accessed: 20.03.2022)). Article 2(1) of the Convention contains a definition of the rural worker. The term refers to persons engaged in agriculture, handicrafts, or a related occupation in a rural area, whether as a wage earner or as a self-employed person. Likewise relevant in this aspect is section 2 of this article, which excludes from protection those self-employed workers whose main source of income is not agricultural work and those who employ permanent labour or a large number of seasonal workers, or have the land cultivated by sharecroppers or tenants. Only those self-employed persons enjoy protection who work the land themselves or with the help of their families, or who engage the help of outside labour, but only occasionally. The concept of self-employed activity can be found also in ILO Safety and Health in Construction Convention, 1988 (No. 167) (<https://www.mop.pl/doc/html/konwencje/k167.html> (accessed: 20.03.2022)). Under its Article 7, the member states undertake to adopt legal regulations requiring that employers and self-employed persons have a duty to comply with the prescribed safety and health measures at the workplace. Furthermore, Article 8 provides for the obligation of employers and self-employed persons who undertake activities simultaneously at one construction site to cooperate in terms of applying health and safety measures. As for self-employed activity, the Convention refers the readers to the definition applied under national provisions. More importantly, however, the Convention clearly distinguishes between the "employer" and the "self-employed", which means that it perceives self-employed persons as workers who hire no workers themselves. ILO Employment Relationship Recommendation, 2006 (No. 198) ([http://www.dialog.gov.pl/gfx/mpips/userfiles/m.niewiadomska/zalecenie\\_198\\_pl\\_weryf.pdf](http://www.dialog.gov.pl/gfx/mpips/userfiles/m.niewiadomska/zalecenie_198_pl_weryf.pdf)) similarly omits to define self-employed activity. However, it calls for the states to provide any guidance on how to effectively determine the employment relationship and distinguish between employed and self-employed persons in order to provide workers with adequate protective guarantees. Furthermore, the Recommendation prescribes that the fact whether an employment relationship exists should be ascertained primarily on the basis of the circumstances of the performance of the work and the remuneration of the worker, irrespective of how the relationship has been characterized by any arrangement, such as a contract.

Union law likewise lacks a uniform definition of self-employment. Under the legislation of both the EU and the Member States, the concept refers now to so called freelancers, now to all persons who carry out business activity on their own



account, regardless whether they engage outside labour.<sup>8</sup> A characteristic feature of self-employed activity is that the person does not enter into an employment contract, but provides services under a commercial civil law contract. This is why the European Commission has been calling for greater transparency in the legal definitions of employment and self-employment in the Member States for many years now. It was found in the 2006 Green Paper titled “Modernising labour law to meet the challenges of the 21<sup>st</sup> century” that the lack of a general EU definition of self-employment could cause numerous problems, especially in cases of cross-border work (and cross-border provision of services). This is also the thrust of the opinion of the European Economic and Social Committee (EESC),<sup>9</sup> which likewise recognizes that, despite the efforts of many Member States, no precise definition has been drawn up to distinguish between employees and the self-employed. (opinion of the European Economic and Social Committee on ‘Abuse of the status of self-employed’ (own-initiative opinion) (2013/C 161/03) In <https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:52012IE2063&from=EN> (accessed: 1.04.2022)). According to the EESC, the creation of such a definition is important not only for labour law reasons, but also for the enforcement of social security and tax law. The EESC has divided this category of working people into two main groups. The first includes highly qualified and experienced professionals in various fields who are aware of their market position and wish to carry on business on their own account (genuine self-employment). The other category comprises self-employed people whose status has no purpose other than to reduce the administrative and financial burden on the client. People in that situation have little or no freedom of choice and are entirely economically dependent on their client (bogus self-employment). For this reason, attempts have been made in a number of Member States to make a clear legal distinction and define criteria for distinguishing an employment relationship from self-employment. Presenting these will make it possible to define self-employment. According to the EESC, employment (as opposed to self-employment) consists in performing work under the direction of another person in return for remuneration.<sup>10</sup> Moreover, it

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<sup>8</sup> The Commission emphasizes that various definitions of self-employed activity are used in the individual countries and distinguishes a range of sub-categories, e.g. based on the legal status of the business, on the existence of employees, or on the sector of the business (e.g. agriculture). Moreover, various categories of the self-employed exist in some countries. For instance, there is a separate definition of “dependent self-employment” (which will be discussed in more detail further on) or “genuine self-employment” and “bogus self-employment”.

<sup>9</sup> Hereafter: EESC.

<sup>10</sup> The worker is similarly defined under Article 45 TFEU (freedom of movement for workers). Following the criteria adopted in the judgment of the Court of Justice of 3 July 1986, C-66/85, *Deborah Lawrie-Blum v Land Baden-Württemberg* (ECR 1986/7/2121), an employee is a person who – regardless of the basis for employment – performs services of some economic value for a given time for another person and under their direction in consideration for remuneration, and their professional activities are real and significant.

is material whether remuneration is the worker's sole (main) source of income and whether they bear no economic risk. According to these guidelines, a self-employed person will therefore be a person who does not perform work under direction and who is subject to economic risk. In addition, according to the EESC Opinion, (Opinion of the European Economic and Social Committee on 'Abuse of the status of self-employed' (own-initiative opinion) (OJ C 161, 6.06.2013, p. 14)) it is a person who:

- is not dependent on the entity for whom they provide services as regards determining the type, place, and method of performing the commissioned work;
- does not use equipment, tools, or materials provided by the party for whom they provide services;
- is not subject to the work schedule adopted by the party for whom they provide services;
- does not subcontract work to others, but performs it personally;
- is not included in the structure of the production process, work organization, or hierarchy of the business or another organization;
- does not perform similar tasks as workers employed by the party for whom they provide services.

Furthermore, CJEU case law has specified the characteristics of an independent self-employed. According to the Court, an independent service provider enjoys freedom in the recruitment of their own staff and more leeway in terms of choice of the type of work and tasks to be executed. Furthermore, they can freely decide on the manner in which that work or those tasks are to be performed, and on the time and place of work (Judgment of the CJEU of 10 September 2014, C-270/13, *Iraklis Haralambidis v Calogero Casilli*, ZOTSiS 2014, No. 9, item I-2185). Then, a definition of self-employment was presented in the judgment of 20 November 2001 in case C-268–99 (Judgment of the CJEU of 20 November 2001, C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, ECR 2001, No. 11A, item I-8615) which pertained to pursuing economic activity as a self-employed person by a sexual worker in the Netherlands. The CJEU defined self-employed activity as providing services outside any relationship of subordination concerning the choice of that activity, working conditions, and conditions of remuneration, under the self-employed person's own responsibility, and in return for remuneration paid to that person directly and in full. Next, in the order in case C-692/19, (Judgment of the CJEU of 22/04/2020, C-692/19, *B v Yodel Delivery Network Ltd.*, OJ C 2020, No. 287, item 22) issued under the Working Time Directive 2003/88/EC (Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L 299, 18.11.2003, p. 9)) the Court admitted the possibility to apply working time standards to bogus self-employed workers. The Court pointed out in the order that a self-employed person, as opposed to an employee, can use

subcontractors or substitutes, can accept various tasks, can provide work (services) to other parties, and can independently determine their hours and place of work.

To sum up the above considerations, it is important to stress that, in line with the thesis set out at the beginning, there is no uniform terminological set describing the concept of self-employment. In their attempts to define this concept, institutions, international organizations, and EU bodies rely on its characteristics and the differences between self-employment and employment. However, the analysis leads to the conclusion that there are features – common to many of the definitions cited above – that distinguish self-employment from employment. These are the absence of subordination and subjection to the employer's authority, and freedom as to the specific conditions, time, and place of providing work. What remains ambiguous is the use of the work of others under various bases of gainful activity. It follows from the above presented arguments on the concept of self-employment under international and EU law that this category of actors includes both those who employ others and those who perform work personally. However, this distinction is only relevant for the definition of economically dependent self-employed, which refers only to solo self-employed persons.<sup>11</sup>

#### 4. PROTECTION OF THE SELF-EMPLOYED IN THE LIGHT OF INTERNATIONAL AND UNION LAW

##### 4.1. Protection of the self-employed in the area of life and health

The protection of human health and life is a cornerstone of the modern world. It should therefore be universal and cover every human being, and in particular the working person, since the pursuit of gainful activity can be a source of danger to their health and life. The right to protection in this area does not derive only from legal acts; it has its basis also in natural law and the teachings proclaimed by the Roman Catholic Church.<sup>12</sup> The protection of human life and health,

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<sup>11</sup> A new category of working persons has emerged in some EU Member States (e.g. Italy, the UK, Germany, and Spain), namely the economically dependent self-employed. This is an intermediary category between employees and self-employed workers. The general purpose of creating this category was to provide them with better protection without including them in the group of employees. It has been noted in the countries that introduced this intermediary category that the phenomenon of dependence is related to granting a range of rights exclusively to this group of the self-employed. This is a compromise solution: it gives working people the option to choose self-employed activity while retaining (provided that they meet certain criteria) some rights granted to employees.

<sup>12</sup> This is evident in both Leo XIII's encyclical *Rerum novarum* as well as in *Laborem exercens* by John Paul II (Majka 1996, 28; Wyka 2011, 456–459; 2015, 121–130). The main demand voiced in those works was to guarantee working people decent working conditions, including, above all, the right to work in a way that is safe and does not endanger their life and health (Auleytner 1996, 134–135). Moreover, according to the social teaching of the Church, the right to the protection

however, has primarily a normative basis and is the subject of international and EU legislation. It covers not only employees, but also the self-employed.

First of all, the UN acts should be cited. The UDHR guarantees each person the right to work under safe and satisfactory conditions. Article 3 of the UDHR should be noted here, which stipulates that “everyone has the right to life, liberty and security of person”. The right to life corresponds directly to the right to security. It means that everyone has the right to an adequate level of security, in any situation, including during the provision of work. It should be noted that providing security is linked to the obligation to comply with legal provisions and instructions for the proper performance of work, including the proper use of protective equipment. These obligations apply to both the party commissioning the work and the contractor, who may perform the work also as a self-employed person. Therefore, the commissioning parties are obliged not to expose the person performing the work to loss of health and life in any way, as otherwise the fundamental rights of the individual could be violated. Article 23 UDHR, on the other hand, guarantees everyone the right to adequate and satisfactory working conditions. It is listed among other rights addressed to the beneficiaries of social economy. On this basis, the protection of self-employed persons is justified in terms of: guaranteeing them a high level of health and safety at work, eliminating conditions that are harmful and arduous to health, shaping a proper working environment, preventing them from being involved in accidents at work, and providing them with preventive health examinations and access to training related to compliance with regulations affecting the safety of work. The self-employed worker is therefore entitled to work in safe and hygienic conditions. At this point, it is worth noting the list of socio-economic rights set out in the ICESCR. The issue of labour protection and social security is placed at the very beginning of this list, which shows its high rank in the hierarchy of human rights.<sup>13</sup> The ICESCR, like the UDHR, addresses the issue of safe and hygienic working conditions. According to Article 7 ICESCR, everyone has the right to enjoy “just and favourable conditions of work”. Its basic element is, first and foremost, the provision of health and safety at work for all workers (Article 7b). Article 12, on the other hand, guarantees everyone the right to “the enjoyment of the highest attainable standard of physical and mental health”, which refers in particular to “the improvement of all aspects of environmental and industrial hygiene” (Article 12(2)(b)), the prevention of, among others, occupational diseases (Article 12(2)(c)), and the “creation of conditions which would assure to all medical service

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of life and health is understood in a broad sense and not only includes the obligation to guarantee safe and hygienic working conditions to those who work, but also requires the observance of appropriate rules on working time and rest (Mazurek 1986, 180–181).

<sup>13</sup> The ICESCR takes precedence over ILO regulations in Florek, Seweryński (1988, 45), which means that the rights it stipulates, including the right to protection of health and life, are universal in nature in Matey (1977, 500).

and medical attention in the event of sickness” (Article 12(2)(d)). An analysis of the provisions of the ICESCR shows that, as in the case of the UDHR, the right to protection of health and life not only extends to workers, but is universal in nature. Indeed, it is enjoyed by anyone who provides work on any legal basis (Wyka 2003, 67) and therefore also by the self-employed. Consequently, states should implement appropriate steps, both legal and technical,<sup>14</sup> to protect, at least to a basic extent, every human being in the above area.

The standardizing activity of the ILO is very important in building a universal system of protection for workers, especially in the field of occupational health and safety (Wyka 2019, point 15.1.2). First of all, it should be noted that many of the acts of this organization, through their broad personal scope, extend protection in the area of health and life to the self-employed. An example is the Declaration of Philadelphia of 10 May 1944, introducing the new principles and objectives of the ILO.<sup>15</sup> Under Article III(7) of the Declaration, “adequate protection for the life and health of workers in all occupations” should be achieved, which allows for the extension of occupational health and safety guarantees to all persons performing work, regardless of the legal basis of their work (Wyka 2003, 69). This approach proves the fact that protection in the area of life and health has been extended to self-employed workers, as well. The ILO initially envisaged occupational health and safety protection only in very narrow aspects (so-called protection against specific hazards).<sup>16</sup> Gradually, however, its extension to specific industries and occupations could be observed.<sup>17</sup> Moreover, the ILO began to issue acts of a global nature establishing general standards for occupational health and safety.<sup>18</sup> These acts called for the member states to take appropriate steps to guarantee the self-employed the same protection as is provided for employees.<sup>19</sup> One of the most important ILO

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<sup>14</sup> This follows directly from Article 2 ICCPR.

<sup>15</sup> <http://www.mop.pl/doc/pdf/inne/dekfil.pdf> (accessed: 15.03.2022). The Declaration was an annex to the ILO Constitution (Part XIII of the Treaty of Versailles).

<sup>16</sup> E.g.: ILO White Lead (Painting) Convention, 1921 (No. 13), *Journal of Laws of 1925*, No. 54, item 382; ILO Benzene Convention, 1971 (No. 136), <http://www.mop.pl/doc/html/konwencje/k136.html>; ILO Occupational Cancer Convention, 1974 (No. 139), <http://www.mop.pl/doc/html/konwencje/k139.html> (accessed: 15.03.2022) etc.

<sup>17</sup> E.g.: ILO Protection against Accidents (Dockers) Convention, 1929 (No. 28), <http://www.mop.pl/doc/html/konwencje/k028.html> (accessed: 15.03.2022); Safety Provisions (Building) Convention, 1937 (No. 62), *Journal of Laws of 1951*, No. 11, item 83; ILO Hygiene (Commerce and Offices) Convention, 1964 (No. 120), *Journal of Laws of 1968*, No. 37, item 261, etc.

<sup>18</sup> E.g.: ILO Occupational Health Services Convention, 1985 (No. 161), *Journal of Laws of 2005*, No. 34, item 300; ILO Labour Inspection Convention, 1947 (No. 81), *Journal of Laws of 1997*, No. 72, item 450; ILO Occupational Safety and Health Convention, 1981 (No. 155), <http://www.mop.pl/doc/html/konwencje/k155.html> (accessed: 15.03.2022) etc.

<sup>19</sup> See e.g. Occupational Health Services Recommendation, 1985 (No. 171), <http://www.mop.pl/doc/html/zalecenia/z171.html> (accessed: 26.03.2022), which was passed to supplement ILO Occupational Health Services Convention, 1985 (No. 161), <http://www.mop.pl/doc/html/konwencje/k161.html> (accessed: 26.03.2022).

acts in the field of occupational health and safety is the Occupational Safety and Health Convention, 1981 (No. 155) (<http://www.mop.pl/doc/html/konwencje/k155.html> (accessed: 26.03.2022)) along with its complementary Occupational Safety and Health Recommendation, 1981 (No. 164). (<http://www.mop.pl/doc/html/zalecenia/z164.html> (accessed: 26.03.2022)). These two documents are considered to be an “international code of occupational health and safety” (Wyka 2019, point 15.1.2; 2003, 73). Their provisions introduce a universal personal and sectoral scope. They apply to all workers, including the self-employed (Wyka 2003, 73; Florek, Seweryński 1988, 215–216). ILO Recommendation No. 164 explicitly refers to self-employed workers. It proposes broad protection in terms of health and safety at work. It contains a number of principles and rules that should guide member states when regulating this protection. In section 1, the Recommendation advocates that this protection should be extended to the self-employed by taking necessary and practically feasible legal measures. In addition, the ILO has enacted several pieces of legislation related to the protection of the self-employed from specific hazards in various industries and occupations.<sup>20</sup> An important act relating to the protection of the life and health of the self-employed is the Safety and Health in Construction Convention, 1988 (No. 167). (<http://www.mop.pl/doc/html/konwencje/k167.html> (accessed: 26.03.2022)). The fact that its provisions apply to the self-employed follows expressly from Article 1(3). Under its Article 7, the member states undertake to adopt legal regulations requiring that employers and self-employed persons have a duty to comply with the prescribed safety and health measures at the workplace. Next, Article 8 imposes on employers and the self-employed an obligation to co-ordinate the prescribed safety and health measures whenever they undertake activities at one construction site.<sup>21</sup> The Convention calls for member states to cover the self-employed with protective health and safety regulations to the same extent as other employees.<sup>22</sup>

Similarly, acts of the CoE extend protection in the area of occupational health and safety to each provider of work, that is including self-employed workers. In

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<sup>20</sup> See e.g.: Working Environment (Air Pollution, Noise and Vibration) Recommendation, 1977 (No. 156), <http://www.mop.pl/doc/html/zalecenia/z156.html> (accessed: 26.03.2022); Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148) (Journal of Laws of 2005, No. 66, item 574); Safety Provisions (Building) Convention, 1937 (No. 62) (Journal of Laws of 1951, No. 11, item 83 – it came into force on 4 July 1942 and was accompanied by three Recommendations: 53, 54, and 55. See more in: Florek, Seweryński (1988, 226).

<sup>21</sup> The Convention is supplemented by ILO Safety and Health in Construction Recommendation, 1988 (No. 175), <http://www.mop.pl/doc/html/zalecenia/z175.html> (accessed: 26.03.2022). Under section 3 of the Recommendation, its provisions should also apply to self-employed persons. Pursuant to section 4, national legislation should require that employers and self-employed persons have a general duty to provide a safe and healthy workplace and to comply with the prescribed safety and health measures.

<sup>22</sup> The same is said in the ILO Chemicals Recommendation, 1990 (No. 177), <http://www.mop.pl/doc/html/zalecenia/z177.html> (accessed: 26.03.2022).



the context of the analysed field, we should note chiefly Articles 2 and 5 ECHR, which guarantee the right to life and the right to liberty and security, which applies to every sphere of the human being, personal and professional alike. Both a negative obligation (prohibition to deprive someone of life) and a positive obligation (order to take appropriate steps to protect life) follow from these provisions (Nowicki 2017, art. 2 and 5). It is worth emphasizing that the rules do not limit the personal scope only to employees, but are addressed to every human being. This means that protection in the area of the right to life and liberty and security is – under this act – available to self-employed persons, as well. The ECS likewise recognizes in Article 3 the right to work in safe and healthy conditions (Florek, Seweryński 1988, 70). This is regarded as one of the social rights (Blanpain, Matey 1993, 263–264; Makowski 2020) to which the self-employed are also entitled.

Protection in terms of occupational health and safety under Union law has undergone a true evolution. At the outset, the EU made no attempts to regulate this domain (Wyka 2020, point 23.2.). The need to introduce rules in the area of occupational health and safety became the reason for the passing of the Single European Act.<sup>23</sup> The TFEU is one of the major EU acts that take up this subject. Its most important part for the protection of life and health is Title X, which covers social policy. Article 151 stipulates that, having in mind the provisions of the ESC and the 1989 Community Charter of the Fundamental Social Rights of Workers, the Union and the Member States should promote employment and improve living and working conditions while at the same time maintaining progress and adequate social protection. It should be emphasized that this provision does not pertain to employees only, but concerns the process of providing work, which shows that the regulation covers also self-employed persons. The most important provision from the perspective of protecting the self-employed from workplace hazards is Article 153(1) TFEU (ex Article 137 TEC), which specifies the objectives listed in Article 151. It provides that the Union should support the Member States in improving the working environment and the working conditions in order to protect the health and security of all workers. Importantly, these activities are mentioned first in order to highlight the significance of the right to occupational health and safety among all workers' rights. (Sanetra 2012, 924; Wyka 2020a, point 23.2.2). Furthermore, this provision granted the Union the right to adopt directives concerning occupational health and safety. As a result, occupational health and safety has gained strategic importance for the EU, which follows also from the Opinion of the EESC on the communication from the Commission to the European

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<sup>23</sup> Journal of Laws of 2004, No. 90, item 864, as amended. Under the Act, Article 118a TEWG was adopted, according to which the Member States will endeavour to bring about favourable changes in the workplace (working environment) in particular, with a view to protecting the health and safety of workers, and will endeavour to harmonize tasks in this area in a spirit of progress (section 1).

Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on an EU strategic framework on health and safety at work (2014–2020) (OJ C 230, 14.07.2015, p. 82). Thus, the provision of Article 151 TFEU does not limit the personal scope to employees within the meaning of national labour law only, but extends protection to persons who provide work outside of an employment relationship (Wyka 2007, 336–344; Sobczyk 2013, 162; Liszcz 2018, 139–148; Sanetra 2012, 926). This is why Article 153(1)(a) TFEU covers self-employed workers, too (Wyka 2020a, point 23.2.2).<sup>24</sup> As a result, we should agree that TFEU provisions concerning the protection of workers' life and health, and in particular the obligation to provide work in safe conditions, is directed at the self-employed, as well (see more in: European Parliament, *Sprawozdanie z 26 października 2015 r. w sprawie strategicznych ram UE dotyczących bezpieczeństwa i higieny pracy na lata 2014–2020*, A8–0312/2015).

Another legal act that is worth noting is the Charter of Fundamental Rights of the European Union. The rules stipulated by this document highlight the need to provide an adequate level of protection of life and to each working person, including the self-employed. Title II of the Charter, "Equality", contains a list of all rights and civil liberties that should be respected in order to properly protect fundamental human rights. Article 6 CFR stipulates that "everyone has the right to liberty and security of person". Article 31, in turn, guarantees proper and fair working conditions for every worker (Wyka 2020b, art. 31.1). The main point here is the right to respect for the worker's health and safety, as laid down in section 1 of the provision. Under section 2, workers have the right to limitation of maximum working hours, to daily and weekly rest periods, and to an annual period of paid leave, all of which similarly affect matters related to occupational health and safety. Another provision worth noting is Article 35 of the Charter, which grants every person the right to preventive health care and to medical treatment with the objective of attaining a high level of human health protection. Even though this stipulation pertains chiefly to matters related to access to medical care, it indicates that the central objective of the states signatories of the Charter was to achieve a high level of protection of human life and health, which covers protection of the life and health of all workers (including the self-employed). Moreover, the above rule concerns one of the main duties in the area of occupational health and safety, namely to carry out initial (as well as periodical) health surveillance – which, however, is not always compulsory for the self-employed. The European Pillar of Social Rights likewise refers to the protection of life and health of self-employed persons. Pursuant to section 10(a)

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<sup>24</sup> Moreover, the CJEU ruled that the classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker under EU law if their independence is merely notional and serves to disguise an employment relationship, [in:] Judgment of the CJEU of 13 January 2004, C-256/01, *Debra Allonby v Accrington & Rossendale College and others*, ECR 2004, No. 1B, item. I-873.

EPSR, workers have “the right to a high level of protection of their health and safety at work”. Under section 10(b), they have the right to a working environment which is adapted to their professional needs and enables them to prolong their participation in the labour market. Taking into account section 15 of the Preamble, the above guarantees cover all working people, irrespective of their employment status, terms, or period. Consequently, principles on the creation of a safe and healthy working environment as well as protection regarding safe and hygienic working conditions pertain to self-employed workers, too.

The system of protection of the life and health of self-employed persons is shaped also by secondary EU legislation. The basic framework and general act (Florek 1996, 76; Florek 2010a, 207–208) in this matter is Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (Journal of Laws of 1989, No. 183, item 1, as amended). It is called the “EU labour code”, the EU basis of occupational health and safety law, in subject literature (Wyka 2003, 89; 2018, 1203; Świątkowski 2015, 254–256) Both the material and the personal scope of the Directive are very broad, as the act was adopted with the aim to ensure protection against all kinds of risks in the working environment (Makowski 2020) (see also: Judgment of the CJEU of 3 October 2000, C-303/98 *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, LEX No. 82998). It refers to the “working environment” meaning any place where work is carried out (Wyka 2003, 90). Therefore, it must be assumed that the protective guarantees included in the Directive cover self-employed workers who carry out their work at a registered office or other place designated by the principal (See e.g.: Świątkowski 2015, 257–258).<sup>25</sup> This follows also from the broad understanding of the term “employer”, which refers to any natural or legal person that hires labour under various legal bases, regardless of their size, sector, or industry. Importantly, the Directive was the basis for adopting further, specific acts of secondary EU law, which introduced protection of workers in various aspects.<sup>26</sup> An important act in the field of protection of life, health, and security of self-employed persons is first and foremost Council Directive 92/57/EEC of

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<sup>25</sup> However, some representatives of labour law theory believe that the Directive under discussion does not apply to the self-employed.

<sup>26</sup> E.g.: Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 393, 30.12.1989, p. 18, as amended; Council Directive 90/269/EEC of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 156, 21.06.1990, p. 9, as amended; Council Directive 92/91/EEC of 3 November 1992 concerning the minimum requirements for improving the safety and health protection of workers in the mineral- extracting industries through drilling (eleventh individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 348, 28.11.1992, p. 9, as amended.

24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (Journal of Laws of 1992, No. 245, item 6, as amended). It seeks to extend the personal scope contained in earlier directives on the subject to self-employed workers and employers engaged personally in construction work. The aim of the Directive is to provide them with safe and hygienic working conditions. Moreover, the act extends the personal scope of other EU secondary legislation to self-employed workers. These include in particular Council Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive) (Journal of Laws of 1989, No. 393, item 13, as amended) and Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual Directive) (Journal of Laws of 1989, No. 393, item 18, as amended). It should also be borne in mind that the sources of EU occupational health and safety law are not only acts adopted on the basis of the Framework Directive 89/391/EEC, but also a number of other directives aimed at protecting the health and life of working persons.<sup>27</sup> All the aforementioned secondary EU legislation introducing occupational health and safety guarantees in various branches and industries revolves around the broadly defined “working environment”. This means that they protect every worker (including the self-employed).<sup>28</sup>

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<sup>27</sup> In particular, this is about: Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work (fourteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 131, 5.05.1998, p. 11, as amended; Directive 2000/54/EC of the European Parliament and of the Council of 18 September 2000 on the protection of workers from risks related to exposure to biological agents at work (seventh individual directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 262, 17.10.2000, p. 21, as amended; Directive 2003/10/EC of the European Parliament and of the Council of 6 February 2003 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) (Seventeenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 42, 15.02.2003, p. 38, as amended; Directive 2013/35/EU of the European Parliament and of the Council of 26 June 2013 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (20<sup>th</sup> individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) and repealing Directive 2004/40/EC, OJ L 179, 29.06.2013, p. 1; Commission Directive 91/322/EEC of 29 May 1991 on establishing indicative limit values by implementing Council Directive 80/1107/EEC on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work, OJ L 177, 5.07.1991, p. 22, as amended.

<sup>28</sup> E.g.: Council Directive 92/91/EEC of 3 November 1992 concerning the minimum requirements for improving the safety and health protection of workers in the mineral-extracting industries through drilling (eleventh individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 348, 28.11.1992, p. 9, as amended; Council Directive 92/104/EEC of 3 December 1992 on the minimum requirements for improving the safety and health protection of workers

## 4.2. Protection of the self-employed in the area of remuneration

Remuneration is an essential element of pursuing gainful activity. It has first and foremost a guarantee and maintenance function for any person making a living from the work of their own hands. It enables the person to support themselves and other family members. This has been recognized by international and EU legislatures, which introduced an appropriate standard of protection for remuneration also for the self-employed.

The UDHR is the first UN act to call for the protection of economic rights, including remuneration. From this point of view, Article 23(3) of the Declaration plays an important role. It stipulates that “everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection” (Prusinowski 2019, point 12). Furthermore, the UDHR introduces remuneration protection in other aspects, such as the right to just and satisfactory working conditions (Article 23(1)) and the right to equal pay for equal work (Article 23(2)). This implies the principle of non-discrimination in matters of remuneration, with particular attention to the equal treatment of women and men. The privileges listed in Article 23(1) and (2) of the Declaration are guaranteed to every person, which highlights the broad personal scope of protection in the area under analysis. In contrast, “everyone who works” is covered by the right to adequate, satisfactory, and decent remuneration (Article 23(3) UDHR). This means that it is addressed to all “working people” regardless of the formal legal basis for the provision of work. Its personal scope includes not only employees, but also self-employed persons. From the perspective of the protection of the self-employed with regard to remuneration, Article 7 ICESCR concerning the right to just and favourable working conditions to which everyone is entitled is relevant (Prusinowski 2019, point 12; Bomba 2015, point 2). Article 7(a) ICESCR stipulates the right to remuneration which provides all workers with a subsistence minimum. In addition, this article introduces the right to fair wages and equal remuneration for work of equal value without any distinction (Florek, Seweryński 1988, 199). It demands that women be guaranteed working conditions no worse than those enjoyed by men as well as equal pay for equal work. Moreover, remuneration should be high enough to create satisfactory living conditions for workers and their families, which follows from Article 7(a)(ii). Another relevant provision is

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in surface and underground mineral-extracting industries (twelfth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 404, 31.12.1992, p. 10, as amended; Council Directive 93/103/EC of 23 November 1993 concerning the minimum safety and health requirements for work on board fishing vessels (thirteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 307, 13.12.1993, p. 1, as amended; Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work (fourteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 131, 5.05.1998, p. 11, as amended.

Article 7(d) ICESCR, which guarantees remuneration for work on public holidays. The personal scope of the above-mentioned privileges is very broad, as they apply to “all workers” regardless of the legal basis under which they provide work, and therefore also to the self-employed.<sup>29</sup>

The ILO has adopted a number of pieces of legislation on protection in the area of remuneration. In the preamble to the ILO Constitution (Journal of Laws of 1948, No. 43, item 308, as amended) the need to ensure an adequate living wage that allows for a decent livelihood is clearly emphasized.<sup>30</sup> This is reaffirmed in Article I(3) of the Declaration of Philadelphia,<sup>31</sup> where fight against poverty is recognized as a primary focus of the ILO (Prusinowski 2019a). The organization has adopted several pieces of legislation on this matter that extended minimum wage protection to all groups of workers (including the self-employed) and sought to ensure that the number of workers not covered by minimum protection was as low as possible (Florek, Seweryński 1988, 194; Prusinowski 2019a).<sup>32</sup> A relevant legal act from the point of view of the issue under analysis is the ILO Protection of Wages Convention, 1949 (No. 95) (Journal of Laws of 1955, No. 38, item 234. The Convention entered into force on 24 September 1952 and was ratified by Poland on 18 September 1954). Under its Article 2, the provisions of the Convention apply to “all persons to whom wages are paid or payable”. This means that they apply to all working persons receiving remuneration for the provision of work possible (Florek, Seweryński 1988, 196; Prusinowski 2019a), which is related to the profit-making nature of the activity (including business activity). They therefore apply to all contractors who personally provide work to the principal in return for remuneration (wages), especially those who are economically dependent. Furthermore, the act applies to self-employed persons providing work under the above-mentioned conditions. The Protection of Wages Convention introduces a number of elements that make up the general protection of remuneration for work (wages). First, it stipulates that wages should, as a general rule, be paid in

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<sup>29</sup> In addition, the use of the phrase “in particular” in Article 7 ICESCR indicates an exemplary list of rights related to just and favourable working conditions. This means that states parties should introduce other legal solutions that will positively contribute to raising the level of protection of remuneration for all workers.

<sup>30</sup> The ILO’s minimum wage standard amounts to 50% of the average wage in a given country.

<sup>31</sup> The document was adopted on 10 May 1944, at the 26<sup>th</sup> Conference of the ILO in Philadelphia. The Declaration was annexed to the ILO Constitution in 1946 and forms an integral part of it.

<sup>32</sup> See also the ILO Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99) of 28 June 1951 (it entered into force on 23 August 1953. Poland ratified the Convention on 5 July 1977, Journal of Laws No. 39, item 176) together with the Minimum Wage-Fixing Machinery (Agriculture) Recommendation, 1951 (No. 89) of 28 June 1951, <http://www.mop.pl/doc/html/zaleceni/z089a.html> (accessed: 18.03.2022), as well as the ILO Minimum Wage Fixing Convention, 1970 (No. 131) of 22 June 1970, <http://www.mop.pl/doc/html/konwencje/k131.html> (accessed: 18.03.2022) together with the Minimum Wage Fixing Recommendation, 1970 (No. 135) of 22 June 1970, <http://www.mop.pl/doc/html/zaleceni/z135.html> (accessed: 18.03.2022).



cash, only in legal tender (Article 3). Second, it requires that remuneration for work (wages) be, in principle, paid directly to the worker (Article 5). Third, it prohibits the employer (the commissioning party) from limiting in any manner the freedom of the workers to dispose of their wages at their own discretion (Article 6). Fourth, it prohibits the compulsion of workers to purchase services and goods through the employing entity (Article 7). Fifth, it points out that a deduction from remuneration (wages) may only occur under the conditions and within the limits prescribed by national legislation (Article 8). Sixth, it introduces protection in terms of attachment and prescribes that they may only be made in the manner and within the limits provided for by national legislation (Article 10). Seventh, it establishes the priority of the payment of remuneration (wages) over other claims in the event of bankruptcy or judicial liquidation of an undertaking (Article 11). Eighth, it ensures that remuneration (wages) should in principle be paid at regular intervals (Article 12). Ninth, it mandates that remuneration (wages) should, in principle, only be paid on working days and only at or near the workplace (Article 13). In conclusion, the ILO Convention cited above, together with ILO Protection of Wages Recommendation, 1949 (No. 85) (<http://www.mop.pl/doc/html/zalecenia/z085.html> (accessed: 23.03.2022)) laid the foundations for a series of national regulations on the protection of remuneration for employees and the self-employed. The stipulations included in this act were reaffirmed in the ILO Plantations Convention, 1958 (No. 110)<sup>33</sup> (Articles 36–35) (Florek, Seweryński 1988, 198).

A significant role in the context of international standards for the protection of the remuneration of the self-employed is played by the ESC. The act provides for the protection of the remuneration (wages) of the self-employed as long as they provide work personally for the principal (different views are expressed in: Prusinowski 2020). Article 4 of this act provides for the right to a fair remuneration, which consists of several essential elements. First, remuneration must be such as to give the workers and their families a decent standard of living (Article 4(1) ESC) (Florek, Seweryński 1988, 199). Second, under the Charter, workers have the right to an increased rate of remuneration for overtime work, subject to exceptions (Article 4(2) ESC). Third, men and women workers have the right to equal pay for work of equal value (Article 4(3) ESC). Fourth, the Charter provides for the right to a reasonable period of notice in the case of termination of employment (Article 4(4) ESC). Fifth, the provisions of the act under analysis permit deductions from wages only under conditions and to the extent prescribed by law. The above-mentioned rights should be guaranteed either by collective agreements or by national laws. In turn, Article 19(4)(a) ECS ensures that migrant workers are entitled to remuneration and employment and working conditions on the same basis as nationals of the given country. This is important

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<sup>33</sup> It entered into force on 22 January 1960. It has not been ratified by Poland.

also from the perspective of the self-employed, as these persons often start their own businesses as self-employed workers in the foreign country. Finally, Article 20 ECS introduces the right to equal opportunities and to equal treatment in matters of employment and occupation without discrimination on the grounds of sex. One of the areas protected against discrimination are employment and working conditions, including the issue of remuneration.

Primary EU law likewise provides for remuneration protection for the self-employed. A *prima facie* analysis of the TFEU reveals that the issue of remuneration is in principle an exclusive competence of the Member States and subject to national regulation. The only exception to this rule is the guarantee concerning the application of the principle of equal opportunities and equal treatment of men and women in employment and occupation, including the principle of equal pay for equal work or work of equal value. These principles are supposed to be implemented not only by Member States, but also by EU bodies.<sup>34</sup> Although Article 153(5) TFEU expressly excludes the issue of remuneration for work from EU jurisdiction (Mitrus 2003, 45; Mitrus 2013, 20) the issue arises in the Treaty in the context of other EU objectives (Mitrus 2006, 56–57). Here, attention should be drawn to Article 157(1) TFEU, which obliges Member States to “ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied”. The subsequent section defines the concept of remuneration.<sup>35</sup> Under Article 157(3) TFEU, EU bodies<sup>36</sup> are obliged to adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.<sup>37</sup> Moreover, the protection of the remuneration of the self-employed is inferred from the fundamental EU principle of free movement of persons, services, and capital. Article 45 TFEU provides for the free movement of workers within the Union, which is a central feature of Member States’ employment policies. Article 45(2)

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<sup>34</sup> Article 157 TFEU.

<sup>35</sup> Pursuant to Article 157(2) TFEU, pay means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of their employment, from their employer. The European Institute for Gender Equality was established to promote and monitor the principle of equality. That was done by Regulation (EC) No. 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality, OJ L 403, 30.12.2006, p. 9.

<sup>36</sup> The European Parliament and the Council, following the ordinary legislative procedure and after consultation with the Economic and Social Committee.

<sup>37</sup> Moreover, it follows from section 4 of the provision that maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers is without prejudice to the principle of equal treatment of remuneration. This means that the above principles concerning the protection of remuneration under primary EU law cover self-employed workers.

specifies expressly that such freedom of movement “shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment”. This means that EU citizens should be treated equally in these matters, including when they are self-employed as sole proprietors (Świątkowski 2014, 567).

Protection in terms of remuneration for the self-employed is found also in the Charter of Fundamental Rights. From the perspective of the issue under consideration, a relevant provision is Article 23 on equality between women and men, among others in the field of remuneration (Prusinowski 2020b). The provisions of the CFR emphasize that it is not an obstacle to the application of the principle of equality, including equality in pay, to maintain or adopt measures providing for specific advantages for the underrepresented sex (Majkowska-Szulc, Tomaszewska 2013, 770). The above rules refer to “every woman and every man”, which means that the self-employed are covered by this regulation. Furthermore, rationale for protecting the remuneration of the self-employed should be sought in the provisions of the EPSR. Section 12 of this document explicitly addresses this category of workers: “Regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection”. It includes matters related to an adequate protection of remuneration, which often constitutes the main source of income for the self-employed and their family. Another provision relevant from the perspective of the area under analysis is Section 6, which is located in Chapter II of the Pillar (Prusinowski 2020c). It stipulates that workers have the right to fair wages that provide for a decent standard of living.

The EU Treaties have omitted to give EU bodies broad competence to legislate on the protection of remuneration. Nevertheless, it is worth highlighting several pieces of secondary EU legislation that introduce certain guarantees in this area, including for the self-employed. First and foremost, mention should be made of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (see more: Topolewski 2015). This act was adopted due to the existence of clear differences between national legislations in this matter.<sup>38</sup> The Directive regulates the rights and obligations of commercial agents and special protection as regards remuneration (Articles 6 et seq.). It follows from these provisions that in the absence of a contractual arrangement as to the amount of remuneration, a (self-employed) commercial agent is entitled to the remuneration customary in the place where they carry out their activity. Should there be no such customary practice, a commercial agent is entitled to reasonable remuneration taking into account

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<sup>38</sup> It has been recognized that the aforementioned disparities have a negative impact on the conditions of competition and adversely affect the scope of protection of self-employed commercial agents, especially in their relations with their principals.

all the aspects of the transaction (Article 6(1) of the Directive). Then, Article 11 provides a closed list of circumstances in which a commercial agent may lose their right to remuneration (commission). It is noteworthy that the Directive grants a number of protective guarantees to self-employed commercial agents. Their rights are in many cases similar to those provided for employees, which is justified by the special economic position of agents vis-à-vis principals.

Similarly, protection of the remuneration of the self-employed is provided for in Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204 of 2006, p. 23). The personal scope of this act covers not only employees as well as retired and disabled workers, but also self-employed workers, which follows directly from Article 6 of the Directive. And according to its Article 4, “for the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated”. This means that the Directive guarantees to self-employed persons the protection of equal treatment of men and women in the field of employment, including ensuring equal pay for equal work.

Another act that should be mentioned in the context of protection of remuneration is Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union (OJ L 275, 25.10.2022, p. 33). Even though it is highly controversial, as the EU lacks legislative competence in this area (see Article 153(5) TFEU) (see also: Bomba 2022, point 3.2.) it directs Member States to put in place certain mechanisms for setting minimum wages. It was adopted primarily with the aim of improving the living and working conditions in the EU, including in particular ensuring the adequacy of minimum wages and reducing wage inequalities.<sup>39</sup> The Directive applies to workers who have an employment contract or an employment relationship as defined by law, collective agreements, or practice in force in each Member State, taking into account the criteria for determining the status of a worker established by the Court of Justice (Article 2 of the Directive). This construction of the personal scope renders it possible to apply the provisions of the Directive to individuals who fall within the definition of “worker” under CJEU case law. Undoubtedly, the protection resulting from this act covers, among others, persons who are bogus self-employed and undeclared workers, as explicitly stipulated in point 21 of the preamble to the Directive (see also: Bomba 2022, point 3.2.). However, the question of the genuine self-employed raises doubts, because according to the preamble to the act in question, these individuals do not qualify for its personal scope. In my opinion, the EU legislature wrongly assumed

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<sup>39</sup> See also section 13 of the preamble of Council Recommendation of 13 July 2021 on the economic policy of the euro area, OJ C 283, 15.07.2021, p. 1.

here that the genuinely self-employed need no protection in this regard. It has therefore failed to take into account the situation in which genuine self-employed persons may be economically dependent on a counterparty, which in my view entails the obligation to cover them with protection under the Directive. This view is based chiefly on the Directive's fundamental objective of ensuring that all workers – irrespective of the legal basis on which they work – are guaranteed a minimum wage set at an appropriate level by law or collective agreements. In my opinion, in order to bring order to this matter, the EU legislature should clarify that the Directive does not apply only to genuine self-employed persons who are not economically dependent on their counterparties, as only such individuals in principle require no protection in the field of remuneration.

#### **4.3. Protection of the self-employed in the area of non-discrimination and equal treatment**

The principles of non-discrimination and equal treatment now underpin the functioning of a democratic state under the rule of law, making social justice a reality. They have a considerable impact on social and economic development. It comes therefore as no surprise that they have been introduced into various legal systems, including the international (Świątkowski 2008, 170) and the European (Świątkowski 2006, 230; Florek 1996, 76). One of the largest areas of discrimination is the labour market, so protection in this field is now a key challenge of modern labour law. As a result, the self-employed have been granted rights in the area of non-discrimination and equal treatment under both international and EU law.

The UDHR contains a list of fundamental human rights, including the right to non-discrimination and the right to equal treatment (Wujczyk 2019, point 11.3). Under Article 2 UDHR, “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. The UDHR provides an open list of reasons for discrimination, which is of advantage from the perspective of the standard of protection in this area (Góral, Kuba 2017, point 1.2). Moreover the Declaration does not restrict the personal scope, as it applies to “everyone”, without making differences based on their economic situation or other characteristics, including the legal basis on which they provide work. Consequently, the application of the rights and freedoms guaranteed by the UDHR and, above all, the protection against discrimination and unequal treatment, applies also to self-employed persons. In turn, Article 7 of the UDHR stipulates that “all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”. Furthermore, pursuant

to Article 23(1) of the Declaration, “everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment”, and everyone, without any discrimination, has the right to equal pay for equal work (Article 23(2)).

The ICESCR likewise refers to the principles of non-discrimination and equal treatment. Under its Article 2(2), the states parties to the Covenant “undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Kuźniar 2000, 15). Next, Article 3 ICESCR stipulates that the states should ensure the equal right of men and women to the enjoyment of all economic, social, and cultural rights set forth in the document. Another noteworthy provision is Article 7, which obligates the states to recognize the right of everyone to the enjoyment of just and favourable conditions of work (Florek, Seweryński 1988, 151). In particular, the Covenant calls for ensuring equal remuneration for work of equal value without distinction of any kind as well as for guaranteeing women conditions of work not inferior to those enjoyed by men, with equal pay for equal work (Article 7(a)(i)). Moreover, Article 7(c) ICESCR provides for the right to equal opportunity to be promoted to an appropriate higher level, subject to no considerations other than those of seniority and competence (Wujczyk 2019, point 11.3).

The ICCPR, signed on 19 December 1966 in New York, is another document that refers to the issue of non-discrimination and equal treatment. Article 2(1) ICCPR, similarly as in the case of the ICESCR, obligates the states to respect and to ensure to all individuals the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Furthermore, Article 3 introduces the principle of equal treatment of men and women with regard to the enjoyment of all civil and political rights, including protection against discrimination. In turn, Article 26 stipulates that “all are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. Similarly as under the UDHR, protection in the area of non-discrimination and equal treatment is not addressed to a limited group of individuals, but extends to “all persons”. Consequently, it applies to self-employed workers, as well (see more in: Kędziora, Śmieszek, 2010, 5–6).<sup>40</sup>

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<sup>40</sup> A similar provision can be found in the International Convention on the Elimination of All Forms of Racial Discrimination (Journal of Laws of 1969, No. 25, item 187). Article 5 ICERD stipulates that the states are obliged to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law in the enjoyment of the right to work, to free choice of employment,



The most important ILO document regarding the analysed subject is the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (<http://www.mop.pl/doc/html/konwencje/k111.html> (accessed: 28.12.2019); Journal of Laws of 1961, No. 42, item 218; see more: Walczak 2015, point 9.6). The Convention is a general act, in which all discrimination related to employment is considered unacceptable, regardless of the legal basis for the provision of work (see: Buchowska 1999, 59)<sup>41</sup> The list of grounds for discrimination included in this Convention is not exhaustive, as under Article 1(1)(b), the Convention prescribes that other manifestations of discrimination “as may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations” are to be taken into account, as well (Góral, Kuba 2017, point 1.2.2). Moreover, the act contains provisions specifying situations where there is no discrimination.<sup>42</sup> It is noteworthy that the Convention does not make the granting of protection in terms of non-discrimination and equal treatment conditional on any legal basis for the provision of work, which implies that said protection extends to self-employed persons.<sup>43</sup>

Next, the ECHR contains provisions on non-discrimination and equal treatment that apply to self-employed workers. Article 14 stipulates that “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. Importantly, the list of reasons for discrimination is open, which guarantees legal protection to every person irrespective of the grounds for discrimination (Góral, Kuba 2017, point 1.2.3). From this perspective, another important document is Protocol No. 12 to the Convention adopted in Rome on 4 November 2000. It introduced the general principle of equality of all persons before the law as well as prescribed that “the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” (Nowicki 2013, 984–987). Both the ECHR and the Additional Protocol impose on the signatory states the obligation to take all measures to support equality of all persons by means of a common guarantee of a general prohibition of discrimination

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to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, and to just and favourable remuneration.

<sup>41</sup> The Convention defines “discrimination” in Article 1(1) as any distinction, exclusion, or preference made on the basis of race, colour, sex, religion, political opinion, national extraction, or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

<sup>42</sup> Article 1(2) and Article 4 of the Convention.

<sup>43</sup> Attempts to restrict the Convention’s personal scope and to exclude from it the self-employed were not accepted by the delegates to the Conference in Świątkowski (2008, 192).

and unequal treatment. It should be emphasized that, as in the case of other international instruments, the ECHR together with the Protocol broadly define the group of individuals entitled to benefit from anti-discrimination protection, and thus also include self-employed persons in their scope. Also noteworthy are the provisions of the ESC, including its Preamble emphasizing that “the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin” (Góral, Kuba 2017, point 1.2.3). Under Article 4(3) ESC, in order to ensure the effective exercise of the right to a fair remuneration, it is necessary to recognize the right of men and women workers to equal pay for work of equal value. Another relevant document in this regard is Additional Protocol to the ESC adopted on 5 May 1988, whose Part II, Article 1(1) provides for a right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex. It clarifies the provisions of the ESC on the principle of non-discrimination and equal treatment and obliges states to take appropriate measures to ensure or promote its application in various areas, including, among others: access to employment, protection against dismissal and occupational resettlement, vocational guidance, training, retraining and rehabilitation, terms of employment and working conditions including remuneration, including pay, and career development, including promotion. It is worth highlighting that the above-mentioned list is open-ended, as Article 1(3) provides that specific measures may be adopted to remove *de facto* inequalities.

Protection in terms of non-discrimination and equal treatment of the self-employed is provided also under EU legislation. In the Union, the two principles are considered fundamental in the area of broadly understood employment (Florek 2002, 2–8). This is why the objective of relevant EU legislation work is to extend protection to all working persons, irrespective of the legal basis for providing work (see more in: Tomaszewska 2011, 285). The TFEU contains rules on protection in the area of non-discrimination and the principle of equal treatment (Góral, Kuba 2017, point 1.3; Florek 1996, 58). A relevant provision in this context is Article 8 TFEU, under which “in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women”. Next, Article 10 stipulates that when defining and implementing its policies and activities, the EU will aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. Then, Article 18 TFEU is the basis for prohibition of discrimination on grounds of nationality, which additionally grants the European Parliament and the Council the authority to adopt rules designed to prohibit such discrimination acting in accordance with the ordinary legislative procedure. Another noteworthy provision is Article 19, which confers additional legislative authority upon the Parliament to take measures to combat discrimination. Further stipulations significant from the perspective of the analysed subject are Article 45(2) and Article 49(1) TFEU. The former provides for freedom

of movement for workers and prohibits any discrimination as regards employment, remuneration, and other conditions of work. This prohibition applies universally to all forms of gainful activity. Thus, it extends to the conditions of access to employment, to self-employment, and to the exercise of a profession (Wujczyk 2020, point. 13.5) The latter provision, namely Article 49(1) TFEU, stipulates freedom of establishment and prohibits the adoption of any restriction on taking up and pursuing self-employed activities as well as on setting up and managing undertakings. Considerable emphasis is placed on matters related to equal pay for work and to guarantees of implementing the principle of equal treatment of men and women in the area of employment and work. Under EU law, protection in this regard includes the self-employed (Wujczyk 2020, point. 13.5). This means that persons who carry out a business on their own must not be discriminated against not only with regard to the taking up and pursuit of economic activity, but also in the area of remuneration and other working conditions. Then, Article 21(1) CFR lists characteristics protected by law covered by non-discrimination (See also Wujczyk 2020, point. 13.3).<sup>44</sup> The principle of non-discrimination is based on a non-exhaustive list of reasons for discrimination, as seen from the expression “such as” used in the provision (Maliszewska-Nienartowicz 2012, 59–60). It is worth noting here that the 2007 CFR has significantly broadened the material scope of characteristics protected by law compared to those included in the original version of the 2000 CFR. In addition, Article 21(2) prohibits discrimination on grounds of nationality within the scope of application of the Treaties and without prejudice to their specific provisions. Relevant to the issue under consideration is Article 23 CFR, which provides for equality between women and men in all areas, including employment, work, and pay. Moreover, this provision allows for the maintenance or adoption of measures providing for specific benefits to the underrepresented sex, as in such a case they do not violate the principle of equality. In addition, the CFR does not limit the personal scope of the prohibition of discrimination and the application of the principle of equal treatment, which means that these provisions protect all those whose rights are at stake, regardless of other characteristics, including the type of employment and the legal basis for providing work. Therefore, the provisions of the CFR should be considered to cover the self-employed. The development of EU anti-discrimination law is likely to move towards making the principle of non-discrimination a universal right of individuals, which will certainly lead to a higher standard of protection in this area in the future (Prechal 2004, 533).

Protection of the self-employed in terms of discrimination and equal treatment is not only enshrined in the Treaties, but also has its basis in secondary legislation,

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<sup>44</sup> They include: sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, and sexual orientation.

notably EU directives. Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood played an important role in this regard. This act set a main direction for the EU legislature, and with it the legislatures of the individual Member States, to follow when it came to building a standard of protection in terms of non-discrimination and the principle of equal treatment for the self-employed.<sup>45</sup> However, after several years, the act was repealed and replaced by Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity (OJ L 180 of 2010, No. 180, p. 1). It was adopted with a view to improving the clarity of legislation and the effectiveness of the enforcement of the principle of equal treatment between men and women engaged in self-employed activities. However, the Directive's personal scope covered not only self-employed persons, but also their spouses or life partners.<sup>46</sup> In addition, the Directive defined the content of the "principle of equal treatment" for the self-employed.<sup>47</sup> It is worth noting that the document contains an open list, as the quoted provision only gives examples of situations in which the principle of equal treatment may be violated, which leaves a wide margin for interpretation. Furthermore, the Directive prohibits the use of harassment, including sexual harassment, against the self-employed, which are explicitly recognized as manifestations of sexual discrimination.<sup>48</sup> Then, in Article 10, the act introduces the right to obtain real and effective compensation or reparation. In this case, the Directive imposes on Member States that the compensation or reparation must effectively deter from discriminatory behaviour and that they must be proportionate to the loss or damage suffered by the victim of discrimination (whether already in business or wishing to start business activity). The protection of self-employed persons and their spouses and life partners from

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<sup>45</sup> It should be noted that the Preamble to this act already indicated that the right to equal treatment is granted to all self-employed men and women. In addition, the authors of the act advocated that this right should be guaranteed to spouses who are not employees or partners and who participate in the activity on a permanent basis and perform the same or assisting tasks. Moreover, it was recognized that there are considerable differences in the standard of protection against discrimination among the Member States and that steps should therefore be taken to harmonize the national regulations existing in this field.

<sup>46</sup> These concepts are defined identically as in Council Directive 86/613/EEC, with the difference that the new (later) Directive extended the personal scope to include the life partners of self-employed workers.

<sup>47</sup> Pursuant to Article 4 of this act, "the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the public or private sectors, either directly or indirectly, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity".

<sup>48</sup> Article 4(2–3) of Directive 2010/41/EU of the European Parliament and of the Council.

discrimination on grounds of sex should be strengthened by the existence in each Member State of one or more bodies competent to analyse the problem of discrimination. This includes examining possible solutions and providing practical assistance to victims, as stipulated in Recital 22 and Article 11 of the Directive.

The core of EU anti-discrimination law along with primary legislation is made up today of three directives: 2000/43/EC, 2000/78/EC, and 2006/54/EC, all of which include provisions concerning self-employed workers (Wujczyk 2020, point. 13.3). Council Directive 2000/43/EC of 29 June 2000 implements the principle of equal treatment between persons irrespective of racial or ethnic origin (see: Parmar 2004, 131).<sup>49</sup> It aims primarily to combat discrimination on the grounds of racial or ethnic origin and to implement the principle of equal treatment. A relevant provision from the point of view of protection against discrimination and unequal treatment of the self-employed is Article 3 of the Directive, which defines its personal scope. Following this provision, the stipulations of the Directive apply to all persons, as regards both the public and the private sector, including public bodies, in relation to, among others, conditions for access to self-employment and to occupation. Moreover, the provisions of the Directive apply to selection criteria and recruitment conditions, regardless of the type of activity and at all levels of the professional hierarchy, including as regards promotion. The issue concerning the protection of the self-employed has been regulated jointly with the protection of employees, which indicates that these areas are not only very close to each other, but in fact closely related. Therefore, the standard of protection against discrimination and unequal treatment should be guaranteed at a comparable level for the two categories of working persons mentioned here.

The superior objective of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2000, p. 16) in turn, was to implement the principle of equal treatment in employment and to combat discrimination on grounds of religion or belief, disability, age, and sexual orientation. The scope of this act covers not only the conditions for access to employment, but also the prerequisites for admissibility of self-employment, including selection and recruitment criteria, regardless of the field of activity and at all levels of the professional hierarchy, including with regard to promotion. The directive therefore applies to the self-employed, too (Góral, Kuba 2017, point 1.3.2; Florek 2002, 2–8). In addition, the Preamble emphasizes that everyone is equal before the law and has the

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<sup>49</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.07.2000, p. 22. Furthermore, it should be noted that the area of protection covered by this Directive goes beyond employment and work issues. This is why some representatives of the doctrine of anti-discrimination law call it “pioneering”, as no other piece of legislation has defined the standard of protection against unequal treatment in such a comprehensive way.

right to protection against discrimination, as these are universal guarantees provided for in many acts of international law.<sup>50</sup> This means that protection under Council Directive 2000/78/EC is available to the self-employed in many areas of social, political, and economic life, including, above all, in the field of work and employment.

Another piece of secondary EU legislation that regulates protection against discrimination and unequal treatment is Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204 of 2006, p. 23). Its purpose is primarily to structure the regulations on equal treatment of women and men as well as to take into account the recent case law of the CJEU regarding access to employment, including promotion and vocational training, working conditions, pay, and occupational social security schemes. It is noteworthy that, in some aspects, the self-employed fall into the personal scope of the Directive.<sup>51</sup> This is the case with the chapter on equal treatment in occupational social security schemes and the chapter covering equal treatment in the areas of access to employment, vocational training and promotion, and working conditions. The Directive prohibits all discrimination, both direct and indirect, on the grounds of sex (in the private and public sectors, including public bodies), among others with regard to the conditions of access to self-employment and pursuing a profession.

When analysing EU primary and secondary law on protection against discrimination and unequal treatment of self-employed workers, several important conclusions should be reached. Firstly, the standard of this protection increased with the enactment of successive primary and secondary legislation. The EU legislature began to recognize a growing need to extend protection to the self-employed in the area of non-discrimination and equal treatment. Therefore, it successively increased the level of guarantees in this field by gradually extending the personal and material scope of legal regulations concerning the analysed matter. Secondly, the protection granted to the self-employed in the field of non-discrimination and equal treatment concerns in particular discrimination on grounds of sex, although protection against discrimination on the basis of other criteria, such as ethnic origin or nationality, is not excluded, either. Thirdly, the EU legislature has granted a very similar scope of protection to both those in an employment relationship and those who work on another legal basis,

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<sup>50</sup> The acts referred to are mainly: the Universal Declaration of Human Rights; the UN Convention on the Elimination of All Forms of Discrimination against Women; the UN International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111); and the Convention for the Protection of Human Rights and Fundamental Freedoms. All EU Member States are signatories to the above documents.

<sup>51</sup> Articles 6 and 14 of Directive 2006/54/EC.



including self-employment. Fourthly, the EU has recognized the importance of those cooperating with the self-employed. In the early days, this protection was narrowed only to spouses who assisted in the business. Now, however, it has been extended to life partners, as well.<sup>52</sup>

#### 4.4. Protection of the self-employed in the area of parental rights

The protection of parental rights is one of the key issues regarding the realization of family life in the context of reconciliation with work (the concept of work-life balance). It was introduced to protect the family, marriage, and the rights of children. Maintaining a family is not only a major physical and emotional effort, but also a huge economic challenge. Many people choose to work in order to earn an income to support themselves and other family members, while balancing work and family life. For this reason, states have gradually started to introduce more extensive parenting rights for those working outside the employment relationship. Regulations on this issue can be found in a number of international and EU laws, some of which apply to the self-employed.

The UDHR regulates the basic list of human rights, including protection in terms of parental rights. It guarantees certain privileges to the family, with “family” defined as the fundamental group unit of society. Under Article 16(1) UDHR, women and men, without any limitation due to race, nationality, or religion, have the right not only to marry, but above all also to found a family (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 17). It is noteworthy that Article 16(3) UDHR explicitly grants this basic social unit the guarantees to enjoy the protection from the state and society. Another relevant provision in terms of the protection of parenthood is Article 25 (Florek, Seweryński 1988, 232; Duraj 2019, 344). Its section 1 stipulates that everyone has the right not only to a standard of living adequate for the health and well-being of themselves and of their family, but also to social services and security in the event of various circumstances that may cause a loss of income, including maternity. Section 2, in turn, expressly provides for the right of the mother and her child to special care and assistance. Consequently, it is possible to maintain that the UDHR guarantees parental rights to self-employed persons.

The ICESCR likewise contains regulations concerning parental rights. Under Article 10(1), the family should be accorded the widest possible protection and assistance, especially in the period of care and education of dependent children (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 17). Section 2 complements the above provision in that it stipulates that special protection should be granted to mothers during a reasonable period before and

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<sup>52</sup> Article 2(b) of Directive 2010/41/EU of the European Parliament and of the Council. It is worth noting that, in extending this protection to “life partners”, the Directive has in this case specified that it is only those persons who are recognized under national law to that extent.

after childbirth. During this time, working mothers should receive paid leave or leave with adequate social security benefits (Florek, Seweryński 1988, 232). The special need to protect working women arises primarily from their psychological and physical characteristics and their responsibilities in the family (Zieliński 1986, 60). The parental rights guaranteed under the ICESCR extend to every working person, which includes the self-employed (Duraj 2019, 344). UN acts concerning the protection of parenthood include also the Convention on the Rights of the Child, which was adopted by the General Assembly on 20 November 1989 (Journal of Laws of 1991, No. 120, item 526, as amended). It guarantees every child such protection and care as is necessary for their well-being, taking into account the rights and duties of their parents, legal guardians, or other individuals legally responsible for them (Article 3 of the Convention). Then, under Article 18, every child has the right to grow up in a family environment, to be brought up by parents or legal guardians, and to be cared for. The Convention does not make the enjoyment of these rights dependent on the legal basis of the provision of work by the parents or legal guardians, which indicates that it extends protection to children of self-employed persons (Duraj 2019, 344).

An analysis of ILO instruments on parental rights shows that they have a broad scope of application covering not only employees, but also other persons pursuing gainful activity outside the employment relationship, including the self-employed. Reference should first be made to the Maternity Protection Convention, 1919 (No. 3), which concerns the employment of women before and after childbirth (<http://www.mop.pl/doc/html/konwencje/k003.html> (accessed: 10.03.2022)). Under Article 2 of the Convention, a “woman” is any female person, irrespective of age, nationality, and marital status (married or unmarried). Pursuant to the Convention, a woman, regardless of whether she works in a public or private industrial or commercial undertaking or in any of their branches, is entitled to certain rights in connection with maternity (Article 3) (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 17.2.2; Duraj 2019, 345). Those rights include: prohibition to work for six weeks following the labour, right to leave before labour, and the right to monetary and non-monetary benefits (such as free medical care) during her absence from work related to her pregnancy and labour. Moreover, Article 4 of the Convention stipulates that it is not lawful to give a woman who is absent as a result of maternity a notice of dismissal.

The issue under consideration is further pursued in ILO Maternity Protection Convention (Revised), 1952 (No. 103) (<http://www.mop.pl/doc/html/konwencje/k103.html> (accessed: 10.04.2022))<sup>53</sup> which revised Convention No. 3. (see: Florek, Seweryński 1988, 230; Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 17.2.2). Under Article 3 of this act, every woman is entitled to a period of

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<sup>53</sup> ILO Maternity Protection Convention, 1919 (No. 3) was ratified by Poland on 5 February 1976, Journal of Laws of 1976, No. 16, item 99.

maternity leave of at least twelve weeks, including a period of compulsory leave after childbirth of at least six weeks. The Convention prescribes the introduction by national legislation of additional pre-labour leave when a woman develops an illness in connection with pregnancy. Under Article 4 of the Convention, the woman is entitled to receive cash and medical benefits while absent from work on maternity leave. It is stipulated that these benefits should be paid through compulsory social insurance, while when a woman does not have a legal title to receive these benefits, she should receive them out of specific social assistance funds. Furthermore, the Convention recognizes the woman's right to a paid break included in her working time for the purpose of nursing her child (Article 5). Similarly to ILO Convention No. 3, this act stipulates in Article 6 that the employer may not dismiss a woman while she is absent on maternity leave (protection of continuity of employment) (Świątkowski 2008, 234). ILO Convention No. 103 was supplemented by the Maternity Protection Recommendation, 1952 (No. 95), (<http://www.mop.pl/doc/html/zalecenia/z095.html> (accessed: 10.04.2022)) which clarifies and expands the rights of women included in the Convention (see: Florek, Seweryński 1988, 231; Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 17.2.2).<sup>54</sup> The above ILO acts do not make the granting of maternity rights conditional on any qualities. They apply to all women, regardless of the legal basis for their employment. It must therefore be concluded that maternity protection provided by these regulations covers self-employed women (Duraj 2019, 345).<sup>55</sup>

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<sup>54</sup> The act calls for an extension of maternity leave to 14 weeks and an increase in benefits to 100% of their remuneration. In addition, the Recommendation introduces a prohibition on night work and overtime for pregnant and nursing women, and clarifies issues relating to the provision of adequate nursing breaks.

<sup>55</sup> See also ILO Social Security (Minimum Standards) Convention, 1952 (No. 102), <http://www.mop.pl/doc/html/konwencje/k102.html> (accessed: 10.04.2022). It follows from Article 8 of this act that all medical conditions as well as pregnancy and childbirth, including their possible consequences, are the object of protection. According to the wording of Part VIII of ILO Convention No. 102, States should provide protected persons with certain maternity benefits. Article 47 explicitly stipulates that the protection should extend to pregnancy, labour, and their consequences, as well as the resultant suspension of earnings. Furthermore, Article 49 of the Convention grants women medical assistance and care before, during, and after childbirth, which should be provided by a midwife or a doctor. Pursuant to Article 49(3) of the act, the purpose of medical care is to seek the restoration or improvement of the protected woman's health and the recovery of her capacity to work. ILO Convention No. 102 does not make protection in this area dependent on the legal basis for the provision of work. It must therefore be agreed that it is fully applicable to women working as self-employed persons. See also ILO Income Security Recommendation, 1944 (No. 67), <http://www.mop.pl/doc/html/zalecenia/z067.html> (accessed: 10.04.2022). The ratio legis of the act was, among other things, to eliminate inequality and social injustice by unifying or coordinating social security systems and covering all workers and their families as well as the rural population and the self-employed. It is recommended in section 17 that social insurance should afford protection to all employed and self-employed persons as well as their dependants in the event of risks to which they are exposed. Next, under section 21, it is suggested that the self-employed be insured against invalidity, old age, and death under the same conditions as employed persons. Moreover, it is

Then, ILO Workers with Family Responsibilities Convention, 1981 (No. 156) (<https://www.mop.pl/doc/html/konwencje/k156.html> (accessed: 10.04.2022)) together with Recommendation 1981 (No. 165) of the same name (<https://www.mop.pl/doc/html/konwencje/k165.html> (accessed: 10.04.2022)) were adopted with the aim of protecting all women from disadvantage because of their family responsibilities. These acts guarantee the protection of continuity of employment, the right to parental leave at the end of maternity leave, and the right to leave to care for a sick child, to which both women and men should be entitled (Florek, Seweryński 1988, 234). They have a broad personal scope, as they apply to all areas of economic activity and to all categories of workers. This means that the guarantees provided for in the above mentioned normative acts cover the self-employed, as well.

Another ILO legal instrument of relevance to the issue under analysis is ILO Maternity Protection Convention, 2000 (No. 183).<sup>56</sup> With its broad scope of application, this document applies to all working women, including those performing atypical forms of dependent work (Article 2(1)). The Convention introduces important principles for the protection of the health of pregnant and nursing women as well as the right to maternity leave and the right to leave in the case of sickness or complications (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 17.2.2). It extends the minimum duration of maternity leave to fourteen weeks.<sup>57</sup> The Convention grants women the right to adequate monetary benefits at a level which ensures that the woman can maintain herself and her children in proper conditions of health and with a suitable standard of living (Article 6(2) of the Convention). In addition, every woman should be guaranteed medical benefits for herself and her child (Article 6(7) of the Convention) and leave pay (Article 6(8)) or assistance from a social assistance fund (Article 6(6)). It is noteworthy that Article 8 of the act under discussion not only introduces protection against the termination of a woman's employment during pregnancy and maternity leave, but also guarantees protection after her return to work. Furthermore, the burden of proving that the dismissal was not related to pregnancy or childbirth or their consequences or to the nursing of the child rests on the employer. Under Article 8(2) of the Convention, a woman should be able to return to work to the same position or an equivalent position paid at the same rate at the end of her maternity leave. Furthermore, Article 9 of the Convention stipulates protection in

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suggested to consider insuring them against sickness and maternity necessitating hospitalization, sickness which lasts for several months, and extraordinary expenses incurred in cases of sickness, maternity, invalidity, and death. The Recommendation explicitly provides for income security for self-employed persons in the event of certain risks, including sickness and maternity.

<sup>56</sup> The act revises ILO Maternity Protection Convention, 1952 (No. 103) <http://www.mop.pl/doc/html/konwencje/k183.html> (accessed: 10.04.2022).

<sup>57</sup> This period amounted to six, and then to twelve months in the preceding ILO conventions (i.e. No. 3 and No. 103).

terms of non-discrimination on the grounds of maternity.<sup>58</sup> It should be noted that the above mentioned acts do not define the term “performance of atypical forms of dependent work”, but it can be concluded that what is meant here are situations in which the woman worker is in any way dependent on the employer. It follows that maternity protection is available not only to women with employee status, but also to women who perform work outside of an employment relationship, including as self-employed workers, as long as they meet the condition of dependence on the employer.

The parental rights of self-employed persons have also become the subject of legislation enacted by the CoE. Here, attention should first be drawn to Article 8 ECHR. It introduced protection for everyone with regard to respect for private and family life, their home, and their correspondence. Next, Article 12 stipulates that men and women of marriageable age have the right to marry and to found a family. It is worth emphasizing that the rules do not limit the personal scope only to employees, but are addressed to every human being. Hence, it should be considered that self-employed persons are likewise entitled to protection in this area. Also the ESC contains legal solutions for the protection of maternity and the family. This is related to the basic premise of this act, which is to improve living and working conditions in order to render them equal while maintaining progress (Matey-Tyrowicz 2000, 3). Article 8 ESC regulates the right of employed women to protection (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 18.2). It introduces a number of demands that should be respected by states ratifying the act. Firstly, it establishes a woman’s right to paid leave before and after childbirth of not less than twelve weeks. Secondly, it prohibits the employer from dismissing a woman from her job during her absence on maternity leave. Thirdly, it establishes the right for mothers who are nursing their infants to sufficient time off for this purpose. Fourthly, it prohibits the employment of pregnant women in underground mining and, as necessary, in all work that is unsuitable because it is dangerous, unhealthy, or arduous. Furthermore, Article 16 ESC establishes the right of the family to social, legal, and economic protection. And according to Article 17, states should take all appropriate and necessary measures to ensure the effective exercise of this right through the establishment or maintenance of adequate institutions or services. Then, Article 19 introduces the right of migrants and their families to protection and assistance. States should take care of them in many respects, including in the area of parenthood. It is noteworthy that section 10 of this article explicitly calls for the protection to be extended to migrant

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<sup>58</sup> See also ILO Maternity Protection Recommendation, 2000 (No. 191), <http://www.mop.pl/doc/html/zalecenia/z191.html> (accessed: 10.04.2022), which supplements ILO Convention No. 183. In addition to detailing the issues contained in the Convention, the act introduced the possibility for the father of a child to take maternity leave when the mother – due to health reasons – cannot care for the child. Moreover, the Recommendation calls for the establishment of a right to parental leave at the end of maternity leave for the child’s both working mother and working father.

self-employed persons insofar as these measures apply to them. An analysis of the provisions of the ESC demonstrates that the above mentioned guarantees regarding parental rights extend not only to women with employee status, but also to those who work outside of an employment relationship, including the self-employed. This interpretation of the act is supported by the general terms “woman”<sup>59</sup> and “mother” used in the provisions.

Similarly, the issue of maternity protection for those pursuing gainful activity has been recognized at EU level. Article 151 stipulates that, having in mind the provisions of the ESC and the 1989 Community Charter of the Fundamental Social Rights of Workers, the Union and the Member States should promote employment and improve living and working conditions while at the same time maintaining progress and adequate social protection. It ought to be emphasized that this regulation is not limited to employees only; its personal scope covers also persons performing work outside the employment relationship, including as self-employed workers.

In the context of the issue under analysis, attention should be drawn to the CFR, which contains the basic principles of EU labour law (see more: Rycak 2013 and the subject literature cited therein). Under its Article 7, “everyone has the right to respect for his or her private and family life, home and communications”. Then, Article 9 provides for the right to marry and the right to found a family. Next, pursuant to Article 33 CFR, “the family shall enjoy legal, economic and social protection” and “to reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child” (Duraj 2019, 345–346; Mitrus 2020, art. 33 KPP). Under Article 34, the Union recognizes and respects the entitlement to benefits in cases such as maternity as well as everyone’s right to social security benefits and social advantages in accordance with Union law and national laws. Moreover, the Charter’s Article 35 grants everyone the right of access to preventive health care and the right to benefit from medical treatment with a view to achieve a high level of human health protection. The above analysis shows the quoted act uses the expression “everyone” in many places, which confirms the wide personal scope of the guarantees it provides regarding parenthood protection. They are therefore not only addressed to women and workers, but apply to fathers and the self-employed, as well (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 18.4; Szczerba-Zawada 2014, 27).

Protective guarantees for self-employed workers with regard to parental rights are found also in the EPSR. Principle 9 calls for maintaining a work-life balance. It follows from it that parents and those with caring responsibilities should be guaranteed the right to suitable leave, flexible working arrangements, and access

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<sup>59</sup> Sometimes also “employed woman”.



to care services. In addition, women and men must have equal access to special leaves of absence in order to fulfil their caring responsibilities. It is also worth mentioning Chapter III of this act, which concerns social protection and inclusion. According to principle 12, regardless of the type and duration of their employment relationship, workers and, under comparable conditions, the self-employed have the right to adequate social protection, which includes protection in the area of parenthood protection (see: Duraj 2019, 346). It is thus evident that the authors of the EPSR recognized the dynamically changing socio-economic realities and called for, on the one hand, the pursuit of flexibility and, on the other, the introduction of the widest possible social protection for the self-employed.

Secondary EU legislation likewise contains provisions on the protection of self-employed persons regarding parental rights. First of all, we should mention Council Regulation (EEC) No. 1390/81 of 12 May 1981 (OJ L 143, 29.05.1981, p. 1) concerning the application of social security schemes. This act extended the personal scope of social security from only employees and their families to self-employed workers and their family members.<sup>60</sup> It was recognized that the free movement of persons was not limited to employees, but applied also to self-employed persons under the freedom of establishment and the freedom to provide services. The drafters of this document acknowledged that limiting oneself only to national legislation on social security may not be sufficient. Hence came the recommendation that, in order to provide adequate protection, the self-employed should be included in a coordinated system that applies across all EU Member States. In addition, it is advocated that, for reasons of equity, the self-employed should, as far as possible, be given the same rights as employees. This trend is evident also in Council Regulation (EC) No. 1606/98 of 29 June 1998 amending Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and in Regulation (EEC) No. 574/72 laying down the procedure for implementing Regulation (EEC) No. 1408/71 with a view to extending them to cover special schemes for civil servants.<sup>61</sup> As these civil servants can be self-employed at the same time, the EU legislature included them in the coordinated social security system in order to grant them appropriate social protection, including maternity protection. Similarly, Regulation (EC)

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<sup>60</sup> Regulation No. 1390/81 repealed Regulation (EEC) No. 1408/71, which covered employees only. In Regulation No. 1390/81, the term “worker” was replaced with “employed or self-employed persons”, which extended the personal scope of those provisions.

<sup>61</sup> This trend is evident also in Council Regulation (EC) No. 1606/98 of 29 June 1998 amending Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and in Regulation (EEC) No. 574/72 laying down the procedure for implementing Regulation (EEC) No. 1408/71 with a view to extending them to cover special schemes for civil servants, OJ L 209, 25.07.1998, p. 1.

No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.04.2004, p. 1) provides for the extension of appropriate social security protection, including parental rights, to all working people – both employees and the self-employed. This act confers the same rights on both these categories of workers.

One of the major pieces of EU legislation on the protection of parental rights is Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC. Its drafters concluded that the protection of the maternity and paternity rights of the self-employed should be much broader. The Directive's scope extends to self-employed workers and their spouses and life partners when they assist in the exercise of the business activity (Article 2). Under Article 7, spouses and life partners of self-employed workers should be able to benefit from social protection in accordance with national law (which means also in the area of maternity). Moreover, the drafters of the Directive recognized the particular economic and physical situation of pregnant self-employed women as well as of the female spouses and life partners of self-employed workers. That is why they decided to guarantee them the right to maternity benefits under the terms specified in the legislation of the Member States. The duration of these benefits should be similar to the length of maternity leave available to women with an employment relationship. Pursuant to Article 8(1) of the Directive, the period of maternity allowance enabling interruptions in their occupational activity must not be shorter than 14 weeks and must be at a sufficient level to guarantee an equivalent income (Article 8(3) of the Directive). In addition, it is provided that if the length of the maternity leave is increased, the duration of maternity benefits for pregnant self-employed women (female spouses and life partners) should likewise be extended. The same is true for access to all existing national social services (or the maternity benefit), which should benefit pregnant self-employed women (female spouses and life partners) to the same extent.

From the point of view of the issue under consideration, a relevant piece of legislation is Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers (OJ L 188, 12.07.2019, p. 79) which repealed Council Directive 2010/18/EU. The purpose of this act is to improve access to work-life balance solutions and to increase the level of men's use of leave for family reasons (see more: Ślęzak-Gąsiorowska 2019, 12–16; Czerniak-Swędzioł, Kumor-Jezińska 2021, 189–207) and for flexible working arrangements. The subject of the Directive is therefore to introduce individual rights in relation to paternity leave, parental leave, and carers' leave, as well as the adoption of flexible working arrangements for workers who are parents or carers (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 18.3.3). The group of individuals entitled to benefit from this protection is not limited

only to those working under an employment relationship, and the provisions of this act will cover the self-employed, as well. This view is supported by the Preamble to the above-mentioned Directive, which specifies that the legal basis for this instrument were other directives expressly covering the self-employed.<sup>62</sup> Furthermore, Article 18 of the Directive obliges Member States to submit reports accompanied by “a study of the rights to family-related leave that are granted to self-employed persons”. It is moreover worth noting that previous EU legislation explicitly prescribed the extension of protection regarding parental rights to persons who are not in an employment relationship. However, it should be clearly stated that the manner in which the personal scope of the Directive has been regulated is flawed and does not provide a sufficient guarantee that Member States will extend these rights also to self-employed persons by way of implementation into their legal systems. There are no such doubts regarding the provisions of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.07.2006, p. 23) which expressly extended protection to the self-employed (Article 6). Under this act, unequal treatment of a woman (including one who is self-employed) on the grounds of pregnancy or maternity constitutes direct discrimination based on sex. Furthermore, the Directive provides that a woman on maternity leave is entitled, after her leave ends, to return to her job or to an equivalent post on terms and conditions no less favourable to her, and to benefit from any improvement in working conditions to which she would have been entitled during her absence (Article 15) (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 18.3.4; Florek 1996, 179). In addition, the act grants both self-employed mothers and fathers the right to take parental leave in order to reconcile family and working life more effectively. The directive demands that parents, including those who are self-employed, be guaranteed full equality in their working lives, which involves, in particular, granting fathers adequate rights to exercise their parental functions.

#### **4.5. Protection of the self-employed with regard to the right to rest**

The right to rest is one of the key rights granted to a working person (Florek, Seweryński 1988, 200). It became an important demand of many labour movements as early as the nineteenth century, indicating at the time the great need to reduce working hours. A number of these demands, including those for reducing working hours and granting holiday privileges, have found their reflection in international and national legislation. The right to rest is also very important from

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<sup>62</sup> Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

the point of view of maintaining productivity and safety in the workplace. It has long been known that if a worker is tired, they pose a greater risk to themselves and others. Therefore, the aim should be that every working person (including the self-employed) has the right to rest in order to recuperate. Adequate rest consists not only of the right to holidays, but also of daily and weekly rest as well as restrictions on maximum working hours (see more: Góral 2011, 179).

The UDHR contains provisions concerning the right to rest of self-employed persons. Article 24 guarantees everyone the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay (Florek, Seweryński 1988, 203). The authors of the act use the expression “everyone”, which means that the right should not be restricted to employees only: it is addressed to all working people, irrespective of the legal basis on which they provide work. Moreover, it should be noted that Article 24 UDHR covers several aspects related to rest. It namely not only guarantees holidays with pay, but also prescribes that “reasonable limitation of working hours” be introduced.

Regulations concerning the issue under analysis can be found in the ICESCR, as well. From the perspective of the protection of the self-employed regarding the right to rest, Article 7 ICESCR concerning the right to just and favourable working conditions is relevant (Florek, Seweryński 1988, 203). It guarantees everyone safe and healthy working conditions, rest, leisure, reasonable limitation of working hours, periodic holidays with pay, as well as remuneration for public holidays (Article 7(d)). It is worth mentioning that, as in the case of the UDHR, the ICESCR covers “everyone” within its personal scope, regardless of the legal basis for the provision of work. This approach means that, under UN documents, the right to rest is granted to the self-employed (Kędzia, Hernandez-Polczyńska 2018, point 1.1).

ILO acts likewise regulate protection in the area of the right to rest. They stipulate broadly the right to paid annual leave and prescribe limits on working time. These regulations provide for the protection of self-employed persons in certain professions. In addition, it should be noted that most of the ILO normative acts broadly define their personal scope and include various occupational groups, regardless of the legal basis for providing work (see: Rycak, Pisarczyk 2019, point 13.3).<sup>63</sup> Under these regulations, the right to rest is universal in nature and should be granted to any person pursuing gainful activity, regardless of the legal basis of their activity (including the self-employed) (see: Stefański 2018). The rationale for such a construction is primarily to guarantee the safety of both the person performing the work and other people who may suffer harm as a result of an error of an unrested worker. Examples include ILO solutions adopted in relation

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<sup>63</sup> These conventions use various expressions, e.g.: persons employed (ILO Conventions No. 1 and 30), all employed persons (ILO Convention No. 132), seafarer (ILO Convention No. 146).

to: persons operating in road transport,<sup>64</sup> medical personnel,<sup>65</sup> seafarers,<sup>66</sup> and persons working in mines.<sup>67</sup> One of the most important ILO acts setting minimum standards of protection regarding the right to rest is ILO Holidays with Pay Convention (Revised), 1970 (No. 132) (<http://www.mop.pl/doc/html/konwencje/k132.html> (accessed: 11.03.2022)). Pursuant to Article 2 of the Convention, its provisions apply to “all employed persons” (see more: Babińska-Górecka 2020, point. 17.1.2).<sup>68</sup> Thus, it does not specify the form under which a worker would be entitled to the rights contained therein. On this basis, it can be assumed that the Convention covers in its personal scope self-employed persons performing

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<sup>64</sup> See ILO Hours of Work and Rest Periods (Road Transport) Convention, 1939 (No. 67), <http://www.mop.pl/doc/html/konwencje/k067.html> (accessed: 11.03.2022). The Convention stipulates that the working hours of self-employed persons and their family members engaged in road transport work should not exceed eight hours per day and forty-eight hours per week. Moreover, the act regulates adequate daily and weekly rest periods for self-employed persons performing work in road transport. The Convention was revised by ILO Hours of Work and Rest Periods (Road Transport) Convention, 1979 (No. 153), <http://www.mop.pl/doc/html/konwencje/k153.html> (accessed: 11.03.2022), which not only upheld the above regulations, but also introduced several other protective guarantees for self-employed persons in road transport. Undoubtedly, the aim of the acts mentioned above was to improve working conditions as well as to increase the level of safety both for those working in this transport and for other road users. It was thus recognized that a driver, regardless of the legal basis for their work, should be guaranteed a multi-faceted right to rest.

<sup>65</sup> See ILO Nursing Personnel Convention, 1977 (No. 149), <http://www.mop.pl/doc/html/konwencje/k149.html> (accessed: 11.03.2022). Article 1 of this act is relevant from this point of view. It defines the term “nursing personnel” and includes all categories of persons providing nursing care or services. This approach supports the inclusion of the self-employed in the category of persons entitled to benefit from the guarantees stipulated in this Convention. According to its Article 6, nursing personnel will enjoy conditions at least equivalent to those enjoyed by other workers in the country concerned. This means that self-employed persons providing nursing care or services are covered by regulations concerning: hours of work, including regulation and compensation of overtime, inconvenient hours, and shift work (Article 6(a)); weekly rest (Article 6(b)); paid annual holidays (Article 6(c)); and educational leave (Article 6(d)).

<sup>66</sup> See ILO Seafarers’ Annual Leave with Pay Convention, 1976 (No. 146), <http://www.mop.pl/doc/html/konwencje/k146.html> (accessed: 11.03.2022). Under Article 3, every seafarer is entitled to annual leave with pay of a specified minimum length (of no less than 30 calendar days for one year of service). The personal scope includes all persons who are employed as seafarers. This means that the rights under the Convention are granted to self-employed seafarers, too.

<sup>67</sup> See ILO Hours of Work (Coal Mines) Convention (Revised), 1935 (No. 46), <http://www.mop.pl/doc/html/konwencje/k046ang.html> (accessed: 11.03.2022), which has guaranteed certain rights regarding leave to not only employees, but also other persons who provide work underground. Under Article 2 of this act, a worker is any person occupied underground performing any work, as well as any person employed directly or indirectly in the extraction of coal. It follows that, under this Convention, the right to maximum working time standards and to a minimum weekly rest is granted to a miner regardless of the legal basis for the work. It can therefore be seen that the protection in the above regard is extended to all persons working underground, even if they are self-employed.

<sup>68</sup> With the exception of seafarers, who are covered by a separate regulation in this respect, namely Seafarers’ Annual Leave with Pay Convention, 1976 (No. 146).

paid work for a specific counterparty. In its Article 3, the Convention entitles every person covered by it to a minimum period of paid annual holiday. The holiday should in no case be less than three working weeks for one year of service (Florek, Seweryński 1988, 210; Rycak, Pisarczyk 2019, point 13.11). Furthermore, Article 12 of the Convention prohibits the possibility of relinquishing the right to the minimum annual holiday with pay or forgoing such holiday in exchange for compensation.

The rationale for extending the right to rest to the self-employed can also be found in the provisions of the ESC. Article 2 of this act, which regulates the right to just conditions of work, obliges states to: provide for reasonable daily and weekly working hours and to reduce them as productivity increases; provide for public holidays with pay; and provide for a minimum of four weeks' annual holiday with pay (Florek, Seweryński 1988, 203 and 208; see more: Stefański 2020, point 15.2; Nowak 2018, point 3.1.2). Given the preceding considerations regarding the personal scope of the ESC, it must be concluded that the self-employed are covered by the guarantees of Article 2 of the ESC, provided that they meet the conditions laid down by law (different views are expressed in: Zwolińska 2019, 55).

Few provisions guaranteeing the right to rest for working persons can be found in primary EU legislation (Babińska-Górecka 2020a, point 17). Article 158 TFEU (ex Article 142 TEC) stipulates that "Member States shall endeavour to maintain the existing equivalence between paid holiday schemes". This is a rather laconic provision, which expresses the demand to maintain the institution of paid holiday in all EU Member States, without specifying any other rules. The regulation is only programmatic in nature and confers no specific rights on working persons (Mitrus 2020, art. 33 KPP). However, we can find protective guarantees regarding the right to rest in the provisions of the CFR. Pursuant to its Article 31(2), "every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave". The right to rest under the CFR is understood broadly, as it is interpreted in the context of dignity and the protection of human life and health (Mitrus 2020, art. 33 KPP). Moreover, according to A. Sobczyk, work should be adapted to the physical characteristics of a human being (Sobczyk 2005, 53). Such an approach to this issue determines that the right to rest under the CFR covers persons who pursue gainful activity on their own account for another party (Mitrus 2013, 16–30).<sup>69</sup> This is additionally determined by the broad definition of the concept of "worker" under EU legislation, as mentioned earlier.

The rationale for protecting the self-employed with regard to the right to rest can also be derived from the provisions of the EPSR. Article 9 of this document

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<sup>69</sup> A different view is expressed by L. Mitrus, who claims that the right to holiday is a right related to providing work under an employment relationship.



refers to the principle of work-life balance. It prescribes the introduction of leave, flexible working arrangements, and access to care services. When analysing the EPSR, it is important to note that its drafters began to recognize the dynamically changing socio-economic realities. This is why it calls for flexibility on the one hand and for the protection of all workers on the other, including with regard to holiday and maximum working hours standards. In my opinion, the content and objectives of the EPSR clearly show that the guarantees arising from this document extend to people working outside of an employment relationship, including to the self-employed.

An important piece of secondary EU law in the context of the issue under consideration is Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L 299, 18.11.2003, p. 9) which repealed Directive 93/104/EC.<sup>70</sup> It guarantees the right to rest in four main areas, namely: breaks from work during the working day, daily and weekly rest periods, and annual leave (Babińska-Górecka 2020, point 17.1.1.2). Furthermore, the Directive introduces certain rules on night work and on the length of rest for certain occupational groups.<sup>71</sup> In my view, self-employed workers are likewise covered by the scope of this act if they personally carry out work for another party. This follows not only from the definition of the term “worker” under EU legislation, but also from the wording of the Preamble. It states that the rationale for the Directive was to guarantee the protection of life and health of workers, which is universal and covers every human being.

#### 4.6. Protection of the self-employed in the area of collective rights

Freedom of association belongs to the canon of fundamental human rights (Florek, Seweryński 1988, 118; Piątkowski 2019, point 26). This demonstrates its significance, its fundamental nature, and the functions it performs in society (Kuczma 2014, 312). It is primary and inalienable. It applies to every human being, including, above all, so-called “working people”, as shown by an analysis of international and EU law. The right of association is fundamental in shaping the legal status of many workers. It should be noted that very often the collective action of people with converging professional interests enables certain categories of workers to obtain a certain level of protection in particular areas. The broad personal scope of the freedom of association indicates that these guarantees are extended to workers other than employees, including those who are self-employed. It appears that the self-employed have common professional interests that can be

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<sup>70</sup> Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, OJ L 307, 13.12.1993, p. 18, as amended.

<sup>71</sup> This includes: persons working on board offshore fishing vessels, persons working en route, and persons working on offshore equipment.

protected collectively, which justifies granting them protection in the area under consideration. The aim of those relations is first and foremost to protect the rights and interests of the employees and the self-employed.

UN acts expressly grant the self-employed freedom of association. According to Article 20(1) of the UDHR, “everyone has the right to freedom of peaceful assembly and association”. This provision is very general and does not directly address issues related to the exercise of professional work (Piątkowski 2019, point 26). It merely stipulates that everyone has an unlimited right to belong to various social groups, including professional ones. It is only Article 23 UDHR that contains rules related to the pursuit of gainful activity. Section 4 of the said article provides that “everyone has the right to form and to join trade unions for the protection of his interests”. It is noteworthy that the above mentioned guarantees are enjoyed by “everyone”. However, the scope is limited by the objective of protecting professional interests (Tomaszewska 2014, point 7.5). This means that the right under analysis is granted to anyone who unites to protect their economic and social rights related to the provision of work (Grygiel-Kaleta 2015, 42). Article 23(4) UDHR does not determine that the freedom of association is to be enjoyed by workers only. This leads to the conclusion that, on the basis of this document, self-employed persons associating to protect their interests are also covered by these guarantees.

Freedom of association<sup>72</sup> for the self-employed is anchored also in the ICESCR. This act regulates the issue more extensively than the UDHR. Its Article 8(1)(a) provides for the right of everyone to form and join trade unions to promote and protect their economic and social interests. This right may be restricted only by law and only for important reasons, such as guaranteeing public order or protecting the rights and freedoms of others. Freedom of association under the ICESCR, as under the UDHR, is granted to anyone who associates in order to protect their interests. This includes self-employed persons (Duraj 2018, point 2). Subsequent subsections of Article 8(1) ICESCR include the rights of trade unions to, among others, establish and join federations and confederations (Article 8(1)(b)) and to freely exercise their activities (Article 8(1)(c)). Then, Article 8(1)(d) ICESCR prescribes that states introduce the right to strike. It should be noted that the wording of this provision is not conclusive as to whether this right is available to everyone, indicating only that it must be in accordance with the legislation of the country concerned. It is therefore the exclusive competence of the signatory states to shape this right. Despite this, no country is entitled to take legislative steps or to apply the law in a way that would violate the guarantees provided for in the Convention (Article 8(3) ICESCR). Another act adopted in 1966 in addition to the ICESCR was the ICCPR (Journal of Laws of 1977, No. 38, item 167.) which similarly stipulates protection of the self-employed in terms of

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<sup>72</sup> In other words, the right to associate in trade unions. See more in: Florek (2010a, 69).

collective rights. Under Article 22(1) of this act, “everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests”. It should be noted that the ICCPR, like the UN acts mentioned above, grants the right to associate to everyone, regardless of the legal basis for the provision of work (Piątkowski 2019, point 26). This means that, on the basis of this document, the right to form and join trade unions applies also to self-employed persons.

Other documents of considerable importance in setting standards for the protection of working people regarding collective rights are ILO instruments. It is stated already in the introduction to the Constitution of this organization adopted on 10 May 1944 ([http://www.mop.pl/html/miedzynarodowe\\_standardy/konstytucja\\_mop.html](http://www.mop.pl/html/miedzynarodowe_standardy/konstytucja_mop.html) (accessed: 17.02.2022)) that the recognition of freedom of association leads to the building of peace and universal harmony through the establishment of fair working conditions contributing to the implementation of the principle of social justice. The key ILO legal instrument relating to the issue under consideration is the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (<http://www.mop.pl/doc/html/konwencje/k087.html> (accessed: 17.02.2022)). Journal of Laws of 1958, No. 29, item 125; see: Florek, Seweryński 1988, 123). Due to its universal nature and timelessness, this document is fundamental for setting minimum standards of protection in the field of collective rights, as explicitly confirmed by the ILO Governing Body (Grygiel-Kaleta 2012, 287). The cited ILO Convention is characterized by its broad personal scope. Under its Article 2, “workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation”. The category of persons covered by the provisions of this act therefore includes various types of people who provide work, even the non-profit ones (see more: Musiała 2016). Such an approach supports the view that the Convention applies also to the self-employed and grants them all the rights it stipulates (Duraj 2018, point 2; Tomaszewska 2014, point 7.5). Consequently, the existence of an employment relationship is not a criterion determining the possibility of exercising freedom of association, as widely emphasized in subject literature (Hajn 2010, 178; Servais 2017, 215). This thesis was confirmed by the position of the ILO Committee on Freedom of Association of 6 September 2010,<sup>73</sup> which recognized that the right to freedom of association consisting in the ability to establish and join trade unions is enjoyed also by workers other than employees, including those working under civil law contracts. Then, the “Digest of decisions and principles of the Freedom of Association Committee of the Governing Body

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<sup>73</sup> [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:2328810:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2328810:NO) (accessed: 17.02.2022).

of the ILO” (Geneva 2006) was issued in 2012.<sup>74</sup> This document likewise shows that freedom of association is available to all workers, regardless of the legal basis for their work.<sup>75</sup> The same was confirmed by the Committee on Freedom of Association in Case No. 2888 against Poland (in response to a complaint by NSZZ “Solidarność”), obliging the Polish authorities to take all measures to ensure that all working people, including those providing work under civil law contracts and as self-employed, have the right to form and join trade union organizations of their own choice (Tomaszewska 2014, point 7.5).<sup>76</sup>

Another act that can be classified as one of ILO instruments relating to collective rights is the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (<http://www.mop.pl/doc/html/konwencje/k098.html> (accessed: 17.02.2022)): This act protects workers against any discrimination aimed at violating freedom of association in the field of work (see more: Florek, Seweryński 1988, 135–137). The provisions of the Convention guarantee protection against discrimination on grounds of trade union membership at every stage (see more: Walczak 2004, 10–11). This includes both making the employment of a worker subject to the condition that they will not join a union or will relinquish trade union membership, as well as dismissing them or otherwise prejudicing them because of their trade union membership or any participation in trade union activities (Article 1(2)(a) and (b) of the Convention). It is noteworthy that, as in the case of ILO Convention No. 87, the self-employed have been included in the personal scope of the act. In other words, persons who pursue gainful activity on their own account have the right not to be discriminated against on grounds of trade union membership. To reinforce the above guarantees, the ILO introduced protection for trade unionists and trade union members (see more: Kurzynoga 2019, point 30.3).<sup>77</sup>

Similarly, acts of the CoE broadly include the right to form and join trade union organizations (Duraj 2018, point 2). Under Article 11(1) ECHR, “everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests”. The above provision applies also to self-employed persons who wish to form or join a trade union to protect their interests. A restriction of this right

<sup>74</sup> The first Polish translation of ILO’s study on trade union freedom [http://www.solidarnosc.org.pl/edukacja/oswiata/attachments/1300\\_Przegląd\\_MOP.pdf](http://www.solidarnosc.org.pl/edukacja/oswiata/attachments/1300_Przegląd_MOP.pdf) (accessed: 17.02.2022).

<sup>75</sup> With the exception of military and police officers.

<sup>76</sup> See Reports of the Committee on Freedom of Association (GB.313/INS/9), complaint against Poland (Case No. 2888, items 1066–1087) available at <http://www.ilo.org>. See also Freedom of Association, Compilation of decisions of the Committee on Freedom of Association, International Labour Office, 2018, section 388 [in:] [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_632659.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_632659.pdf) (accessed: 17.02.2022).

<sup>77</sup> See ILO Convention No. 135, Journal of Laws of 1977, No. 39, item 178 and ILO Recommendation No. 143.

may only be dictated by the interests of national or public security, the prevention of disorder and crime, the protection of health and morals, or the protection of the rights and freedoms of others (Article 11(2) of the Convention). It follows that while the right to form and join trade unions under the ECHR is not absolute, no one may be unduly deprived of this right (see: Garlicki 2011, 651–711).<sup>78</sup> This approach fully supports the granting of collective rights to the self-employed.

The ESC likewise contains provisions on the right to organize and bargain (Nowik 2020, point 25.1.2). Article 5 of the act provides for the right to organize consisting in “ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations” (see more: Blanpain, Matey 1993, 281–282). To this end, it obliged the states signing the ESC to ensure that they do not impair freedom of association when creating or applying law. Then, Article 6 ESC grants an effective right to collective bargaining and emphasizes that states committing to the Charter are obliged to promote joint consultation between workers and employers and to recognize the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike. Similarly to ILO Convention No. 87, the ESC takes a broad view of the concept of worker, which includes the right to take collective action in cases of conflict of interest, including the right to strike (Duraj 2018, point 2). This means that the rights guaranteed by its provisions apply to the self-employed, as well.

Primary EU law likewise protects the collective interests of the self-employed (Piątkowski 2019a, art. 1; Nowik 2020, point 25.1.2). Pursuant to Article 153(5) TFEU, the right of association and the right to strike and impose lockout do not fall within the legislative competence of the European Parliament and the Council (Cudowski 2014, 269). However, this does not mean that EU law omits to address the issue of collective rights in any way. The EU often refers to various provisions of international law, and in particular to acts of the CoE, which contain norms on the above-mentioned issues. Significant regulations in the area of freedom of association can be found primarily in the CFR (Piątkowski 2019a, art. 1). Article 12 of the Charter guarantees everyone “the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests”. Next, Article 28 regulates matters related to the right of collective bargaining and action. Under this provision, “workers and employers” (in a broad sense) (Kocher 2017, 1382; Heuschmid 2017, 171) or their respective organizations “have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective

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<sup>78</sup> See section 3.5 of the statement of reasons of judgment of the Constitutional Tribunal of 02.06.2015, K 1/13, OTK 2015, No. 6, item 80.

action to defend their interests, including strike action”. The broad personal scope of freedom of association under the CFR, which extends to the self-employed, and the lack of reference of these guarantees to EU or national law indicating their autonomous nature, (see more: Sanetra 2010, 4–12) enhance the standard of protection in the area under analysis.

It has been debated recently in the context of EU law whether collective agreements entered into by the self-employed may breach the prohibition of unfair competition, given the broad personal scope of freedom of association. Under Article 101 TFEU, “the following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (...)”. Taking the quoted provision *prima facie* into account, therefore, one would have to conclude that collective agreements concluded between self-employed workers may infringe Article 101 TFEU. It was ruled in case C-413/13 (Judgment of the CJEU, 04/12/2014, C-413/13, FNV Kunsten Informatie en Media v Staat der Nederlanden, ZOTSiS 2014, No. 12, item I-2411) that

on a proper construction of EU law, it is only when self-employed service providers who are members of one of the contracting employees’ organisations and perform for an employer, under a works or service contract, the same activity as that employer’s employed workers, are “false self-employed”, in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU. It is for the national court to ascertain whether that is so.

This would imply that collective agreements of the self-employed do not infringe Article 101 TFEU under the condition that we were dealing with bogus self-employed persons only. Accordingly, the European Commission adopted Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons in 2022 (2022/C 374/02) (OJ C 374 of 2022, p. 2). In line with the Guidelines, solo self-employed workers were considered to be in a situation similar to employees and, therefore, their collective agreements did not infringe Article 101 TFEU, regardless of whether they met the criteria to be considered as bogus self-employed. Furthermore, the European Commission indicated in the document that solo self-employed persons who provide services exclusively or mainly to a single counterparty are likely to be in a situation of economic dependence on that counterparty,<sup>79</sup> with the result that they do not determine their actions on the

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<sup>79</sup> According to the European Commission, a solo self-employed person is in a situation of economic dependence when they earn, on average, at least 50% of their total work-related income from a single contractor, over a period of either one or two years.



market independently and are largely dependent on the counterparty, forming an integral part of its business and thus an economic unit with that counterparty. In the Commission's view, such a situation entails that collective agreements on working conditions concluded between solo self-employed persons should fall outside the scope of Article 101 TFEU. Similarly, solo self-employed persons who perform the same or similar tasks as employees of the same counterparty are in a situation comparable to that of employees. According to the Commission, such persons provide their services under the direction of the counterparty and do not bear the commercial risks of the counterparty's activity or enjoy sufficient independence as regards the performance of the business activity concerned. Consequently, collective agreements on working conditions between a counterparty and solo self-employed persons who perform the same or similar tasks as employees of the same counterparty fall outside the scope of Article 101 TFEU. The emergence of platform economy and the provision of work through digital platforms has created a new reality for some solo self-employed persons, who are in a comparable situation to that of workers in relation to the digital platforms through or for which they provide work. Solo self-employed workers may be dependent on digital platforms, especially as regards reaching their clients, and may often be faced with job offers that are non-negotiable or that allow only limited negotiation of working conditions, including pay. In light of the above, the European Commission considered that collective agreements between solo self-employed workers and gig economy platforms concerning working conditions likewise fall outside the scope of Article 101 TFEU. In addition, the Commission found that in some cases, solo self-employed persons who are not in a situation comparable to that of employees nevertheless find it difficult to influence their working conditions because they are in a weak bargaining position vis-à-vis their counterparty(s). The existence of such an imbalance is presumed in the following situations. The first is where solo self-employed persons negotiate or conclude collective agreements with one or more counterparties who represent an entire sector or industry. The second is where solo self-employed workers negotiate or conclude collective agreements with a counterparty with an annual aggregate turnover or annual balance sheet total in excess of EUR 2 million or with a workforce of at least ten employees, or with several counterparties that together exceed one of these thresholds. The Commission decided that collective agreements concluded by the self-employed in the above situations do not violate Article 101 TFEU.

With regard to the collective rights of the self-employed, it is also worth referring to the provisions of Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, cited above. Pursuant to Article 4 of this act, collective bargaining on wage-setting should be promoted, supported, and encouraged. Moreover, the Directive requires that, in Member States with a collective bargaining coverage rate under 80%, a framework of enabling conditions for

collective bargaining be provided, either by law after consulting the social partners or by agreement with them, and that an action plan be drawn up to promote it. The purpose of these actions is to increase collective bargaining coverage in the Member States and to facilitate the exercise of collective bargaining rights on wages.

### **5. MECHANISMS TO COMBAT BOGUS SELF-EMPLOYMENT UNDER INTERNATIONAL AND EU LAW STANDARDS AS A MEANS TO IMPROVE WORKING CONDITIONS**

Self-employment for the purpose of circumventing the law is a consequence of the limited scope of protection for self-employed workers. Bogus self-employment occurs when a person is declared – in order to avoid certain legal or tax obligations – as self-employed, even though the work they perform meets the conditions characteristic of an employment relationship. When establishing the existence of an employment relationship, account should be taken of the facts demonstrating the actual performance of work and not the way the parties describe their relationship.<sup>80</sup> The main reason for this practice is to reduce the broadly defined labour costs and public law burdens, including social security costs and taxes associated with the employment of workers under an employment relationship. Difficulties in assessing this situation are caused also by the increasing blurring of the boundaries between the employment relationship and self-employment. Countering this negative phenomenon should therefore be seen as a complement to the legal protection model for the self-employed and as a means of improving their condition. Both international and EU as well as national legislatures have in recent years introduced a number of legal regulations aimed at eliminating or at least clearly limiting bogus self-employment. These efforts notwithstanding, however, the scale of the problem remains considerable. This means that the existing legal solutions are not effective in combating bogus self-employment.

Because of the difficulties in ascertaining whether an employment relationship exists when the rights and obligations of the parties involved are not clear, or when attempts have been made to conceal the employment relationship, or if there are deficiencies or limitations in the legislation, its interpretation, or application, the ILO – at its ninety-fifth session, on 31 May 2006 – decided to adopt the Employment Relationship Recommendation, 2006 (No. 198). Pursuant to the provisions of this document, states should provide guidance to employers and workers in order to properly establish the existence of an employment relationship

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<sup>80</sup> This definition is set out in the preamble to Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union and in the proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work (COM(2021) 762 final).

and distinguish between employed and self-employed persons, and are tasked with effectively combating the disguised employment relationship.<sup>81</sup> The ILO considers this to be crucial, as such a situation has the effect of depriving workers of the protection they deserve. This is why the Recommendation proposes several mechanisms to combat bogus self-employment. First, it authorizes a wide range of actions to establish the existence of an employment relationship. Second, it prescribes the introduction of a legal presumption that an employment relationship exists when one or more of the specified indicators are present, which will be analysed in greater detail later. Third, it recommends enacting legislation, after prior consultation with the most representative employers' and workers' organizations, under which workers possessing certain characteristics should automatically, or by virtue of the fact that they are working in a certain sector, be considered as employed or self-employed. In addition, the Recommendation stipulates that consideration be given to explicitly defining the conditions to be applied to determine the existence of an employment relationship, such as, for example, subordination or dependence. According to the Recommendation, indicators of the existence of an employment relationship may also be the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials, and machinery by the party requesting the work. Other indicators may also be the periodic payment of remuneration or the absence of financial risk on the part of the worker. In addition, the Employment Relationship Recommendation prescribes ongoing monitoring of this state of affairs and the collection of any data that may contribute to reducing the incidence of this phenomenon in the future.

The problem of the use of self-employment in conditions characteristic of an employment relationship was also highlighted by the European Economic and Social Committee (an EU advisory body), which issued an Opinion on the abuse of the status of self-employed in 2013. (opinion of the European Economic and Social Committee on 'Abuse of the status of self-employed' (own-initiative opinion) (OJ C 161, 6.06.2013, p. 14)). When articulating its position, the Committee noted that a number of European countries had attempted to clarify legal distinctions and to develop a detailed definition of "employment relationship" on the basis of various criteria. According to the Committee, an employment relationship is

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<sup>81</sup> According to the Recommendation, a disguised employment relationship may involve the use of another form of contractual arrangements concealing the true legal status, bearing in mind that a disguised employment relationship occurs when the employer does not treat a person as an employee by concealing their true legal status as an employee in order to reduce labour costs.

characterized by the performance of work in return for remuneration, with any profits arising from this paid work belonging to the client. Another important indicator is the fact that the work is performed under the control of another party. Moreover, it is material when remuneration is the worker's sole – or main – source of income and when they bear no economic risk. For this reason, the Committee considered that credible legislation and a definition of bogus self-employment would be helpful for the genuine self-employed. By contrast, sham self-employment should be combated by improving the registration of work and monitoring the real position on the labour market. In the opinion of the Committee, the economic dependence on the client (which is often the former employer) indicates the continuation of the employment relationship. Furthermore, the Committee identified eight criteria that may reveal an employment relationship between the parties.<sup>82</sup>

The EU has also recently addressed the problem of bogus self-employment. This can be seen, among others, from the provisions of the preamble to Directive 2022/2041 cited above, which not only define this negative phenomenon, but also justify with it the introduction of certain protective guarantees for self-employed workers. Similar theses can be found in the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work (COM(2021) 762 final) (<https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:52021PC0762>). The European Commission noted that as many as nine out of ten platforms currently operating in the EU classify those working through them as self-employed, leaving them particularly vulnerable to poor working conditions and insufficient access to social protection. In addition, it has been established that due to this misclassification, self-employed persons cannot enjoy the rights and protections to which they would be entitled as employees. These rights include the right to a minimum wage, working time regulations, occupational safety and health protection, equal pay between men and women, and the right to paid

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<sup>82</sup> According to the Opinion, when considering the employment status of a person who is nominally self-employed and is *prima facie* not considered as an employee, it shall (can) be presumed that there is an employment relationship and that the person for whom the service is provided is the employer if at least five of the following criteria are satisfied in relation to the person performing the work: they depend on one single person for whom the service is provided for at least 75% of his income over a period of one year; they depend on the person for whom the service is provided to determine what work is to be done and where and how the assigned work is to be carried out; they perform the work using equipment, tools, or materials provided by the person for whom the service is provided; they are subject to a working time schedule or minimum work periods established by the person for whom the service is provided; they cannot sub-contract their work to other individuals to substitute themselves when carrying out work; they are integrated in the structure of the production process, the work organization, or the company's or other organization's hierarchy; their activity is a core element in the organization and pursuit of the objectives of the person for whom the service is provided; and they carry out similar tasks to existing employees, or, in the case when work is outsourced, they perform tasks similar to those formerly undertaken by employees.

leave, as well as improved access to social protection against accidents at work, unemployment, sickness, and old age. Therefore, Article 3 of the Proposal obliges the Member States to have in place appropriate procedures to verify and ensure the correct determination of the employment status of persons performing platform work, so as to allow persons that are possibly misclassified as self-employed (or any other status) to ascertain whether they should be considered to be in an employment relationship – in line with national definitions – and, if so, to be reclassified as workers. In the opinion of the document's authors, this will ensure that false self-employed have the possibility to obtain access to working conditions laid down in Union or national law in line with their correct employment status. Moreover, the provision clarifies that the correct determination of the employment status should be based on the principle of the primacy of facts, i.e. guided primarily by the facts relating to the actual performance of work and the remuneration. When ascertaining the employment status of a person, the use of algorithms in platform work and not the way in which the relationship is defined in the contract should be taken into account. Where an employment relationship exists, the procedures in place should also clearly identify who is to assume the obligations of the employer. Two proposed provisions are relevant here from the point of view of mechanisms to combat bogus self-employment. Article 4 of the proposed act introduces – similarly to ILO Employment Relationship Recommendation, 2006 (No. 198) – the institution of legal presumption. According to the provision, an employment relationship exists between the digital labour platform and a person performing platform work, if the digital labour platform controls certain elements of the performance of work. Member States are required to establish a framework to ensure that the legal presumption applies in all relevant administrative and legal proceedings and that enforcement authorities, such as labour inspectorates or social protection bodies, can also rely on that presumption. Furthermore, the article defines criteria that indicate that the digital labour platform controls the performance of work. The presumption must be applied if at least three criteria are met. These criteria are the following:

- a) the digital labour platform sets upper limits for the level of remuneration;
- b) the digital labour platform requires the person performing platform work to respect specific rules with regard to appearance, conduct towards the recipient of the service, or performance of the work;
- c) the digital labour platform supervises the performance of work, including by electronic means;
- d) the digital labour platform restricts the freedom to organize one's work, including through sanctions, by limiting the worker's discretion to choose their working hours or periods of absence;
- e) the digital labour platform restricts the freedom to organize one's work, including through sanctions, by limiting the worker's discretion to accept or to refuse tasks;

- f) the digital labour platform restricts the freedom to organize one's work, including through sanctions, by limiting the worker's discretion to use subcontractors or substitutes;
- g) the digital labour platform restricts the possibility to build a client base or to perform work for any third party.

Moreover, Member States are required to ensure effective implementation of the legal presumption through supporting measures, including: disseminating information to the public, developing guidance, and strengthening controls and field inspections, which are essential to ensure legal certainty and transparency for all parties involved (Article 4b of the Proposal). Moreover, the act stipulates that the legal presumption should not have retroactive effects, i.e. should not apply to factual situations before the transposition deadline of the Directive. Under Article 4a(2) of the Proposal, the Member States may grant competent national administrative bodies a discretion not to apply the presumption when: a) those authorities are verifying compliance with or enforcing relevant legislation on their own initiative, and b) it is manifest that the person performing platform work is not a platform worker. Then, Article 4a(3) of the proposed act ensures the possibility to rebut the legal presumption in relevant legal and administrative proceedings, i.e. to prove that the contractual relationship at stake is in fact not an "employment relationship" as defined by the law, collective agreements, or practice in force in the Member State in question, with consideration to the case-law of the CJEU. It prescribes that the burden of proof that there is no employment relationship will be on the digital labour platform. The drafters of the Directive expect the above provisions to benefit both the false and the genuine self-employed working through digital labour platforms. According to the draft, those who, as a result of correct determination of their employment status, will be recognized as workers will enjoy improved working conditions – including health and safety, employment protection, statutory or collectively bargained minimum wages, and access to training opportunities – and gain access to social protection according to national rules. Conversely, genuine self-employed people working through platforms will indirectly benefit from more autonomy and independence as a result of digital labour platforms adapting their practices to avoid any risk of reclassification of the worker's status. Regardless of the optimism presented by the proposal's proponents, it should be noted that the above concept of presumption of an employment relationship has been criticized in labour law doctrine for years. Moreover, such a construction is opposed by employers' organizations (including, above all, representatives of the Polish Confederation Lewiatan),<sup>83</sup> which take the view that the introduction of the presumption of an employment relationship in the proposed form will have far-reaching negative consequences for the labour

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<sup>83</sup> See: <https://docplayer.pl/224832057-Stanowisko-konfederacji-lewiatan-do-projektu-dyrektywy-w-sprawie-poprawy-warunkow-pracy-platfomowej-com-2021-762-final.html>.



market and the economy. The opponents of this concept believe that it is the result of an archaic approach to the existing economic conditions and a failure to see the heterogeneity of the market and the inherent risks (Gersdorf 2019, 35–41). Moreover, the introduction of the presumption of the existence of an employment relationship even contradicts Polish constitutional principles: freedom of economic activity (Article 20 of the Polish Constitution), freedom to choose and to pursue their occupation (Article 65(1) of the Polish Constitution), freedom (Article 31(3) of the Polish Constitution), and equality before the law (Article 32 of the Polish Constitution). In addition, this construction would excessively interfere with the principle of freedom of contract, which, after all, applies in many European countries. In my view, the introduction of a presumption of the existence of an employment relationship would be a bad solution. It would generate a number of legal problems resulting from serious interference with the aforementioned constitutional principles underlying the functioning of many EU countries. In addition, it should be pointed out that the adoption of such a concept could consequently lead to a paralysis of the judiciary in many countries due to the increase in the number of cases in this area. Moreover, all this could result in a flight from platform employment and the resulting development of shadow economy. Therefore, the introduction of effective mechanisms to combat bogus self-employment should be seen as a complement to the legal model for the protection of the self-employed. Consequently, it is necessary to consider what measures are needed to increase the effectiveness of the mechanisms already in place. I believe that the scale of this negative phenomenon can be reduced by consistently complying with the current legislation in this area and developing clear guidelines for establishing the relevant legal relationship. In addition, granting certain guarantees to the self-employed and defining appropriate criteria for the right to this protection will effectively discourage “employers” from resorting to bogus self-employment. This is vital, as curbing this pathology could lead to a situation in which a certain proportion of those currently operating as self-employed would have an established employment relationship and be able to benefit from the full range of protection as employees. The remaining self-employed would only be entitled to a limited standard of protection, which I feel would be appropriate.

## 6. CONCLUSION

This chapter considers self-employment under international and EU law. The analysis of this issue leads to the following conclusions. Firstly, there is no comprehensive (model) approach to self-employment under international and EU law. The recent regulations adopted by the EU, which are cited in this chapter, confirm this conclusion. These acts focus only on selected protective

guarantees. Moreover, it is often the case that these regulations – albeit adopted at short intervals – are inconsistent with each other and address self-employment in different ways. In addition, international and EU rules on self-employment are fragmented. Rarely do they explicitly refer to this category of working persons. Most often, the self-employed are covered by protective standards that, at international level, are guaranteed to all working people, regardless of the basis on which they provide work (right to protection of life and health, protection of remuneration for work, protection in the area of non-discrimination and equal treatment, right to rest, protection in terms of collective rights). International law places more emphasis on the need to protect those working outside an employment relationship (including the self-employed) than EU law, which grants protection mainly to employees. It should be noted that Union law focuses primarily on the differences between employment based on an employment relationship and self-employment, and consequently singles out these concepts to grant specific protective guarantees. Secondly, there is no uniform definition of self-employment under international and EU law. The term is construed in various ways, which results in numerous interpretations as well as statistical problems, particularly in the context of establishing a standard of protection for this group of working people. Attempts so far to define the term in international and EU law have focused exclusively on defining the characteristics of the employee and the self-employed. As I mentioned earlier, EU jurisprudence in particular explores the differences between these categories. Several lists of the aforementioned characteristics have been developed over the years. According to them, a self-employed person is first and foremost an individual who performs work (services) outside the subordination and authority of another person and is free to determine their own working conditions, time, and place of work. The European Commission and the EESC call for a harmonized definition of self-employment to be used in the EU and in the individual Member States in order to guarantee adequate legal protection, particularly as the concept of “bogus self-employment” is defined in the preambles to some EU legislation. Thirdly, the protective standards regulated in a number of international and EU instruments cover all “working people”, using the term in a broad sense (“workers” or “travailleurs”). This justifies granting the self-employed a range of rights in areas such as health and life, remuneration for work, non-discrimination and equal treatment, parenthood, leisure, and collective rights. Fourthly, the above discussion has confirmed that self-employment is currently a very popular form of paid work and may effectively continue to reduce the role of the traditional employment relationship in the future, as can be seen, for example, in the development of work provided through digital platforms. Therefore, taking into account the growing scale of self-employment as well as the growing awareness of the rank and importance of fundamental human rights under international and EU law regulations, the authorities of individual states should grant appropriate protective guarantees to this group of working persons.

An effective mechanism to combat bogus self-employment, by which many people are currently deprived of protection in the field of professional work, will likewise play an important role in this area.

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