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Functional concept of employer. Solution for the new employment landscape?

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1. New forms of employment

Employment relation is essentially characterized by the link existing between the worker and the undertaking or business (or their part) to which he is assigned to carry out his duties¹. The traditional approach, that reached its peak in mid- 20th century, was based on the concepts of personal subordination, continuity, fixed working time and bilaterality². The traditional “fordist” model of employment very well fit for industrial economy begun to with advent of deindustrialization and rapid development of service sector in mid ’70. The employers were changing their practice and started to rely more on subcontractors and temporary agency workers. At the same time employment model for their “regular workers” began to emphasise flexibility and versatility rather than stability and longevity of the

¹ CJEU judgment of 7 February 1985, C-186/83, *Botzen and Others v Rotterdamsche Droogdok Maatschappij BV*, § 15.

² N. Countouris, *The Changing Role of the Employment Relationship. Comparative Analyses in the European Context*, London 2007, p. 40, <https://doi.org/10.4324/9781315614472>.

contract³. This was a first step towards development and wider spread of non-standard forms of employment such as – at first – part-time work, fixed-term employment, contract work, and later telework, agency work and more recently work sharing, job sharing, interim management, casual work, voucher based work, portfolio work, collaborative employment and, las but not least, ICT based work and crowd employment⁴. At the same time, it is worth noting that the forms of work, often described as “new”, have a longer tradition. Still in the 19th century, many employees performed work in their homes, even if they were employed by large enterprises⁵. Telework in the form in which it is known now appeared in 1980⁶. Similarly, on-call work has a long tradition and is subject to evolution, which is manifested by the formation of the so-called “zero-hours contracts”, under which the employer does not guarantee the employee even a minimum number of working hours within a month⁷. Not only could the physical distance between employer and worker increase (as in case of telework), but also managerial distance typical for subcontracting chains could mask authority structure of the employment relationship⁸. Relations between the

³ K.V.W. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace*, Cambridge 2004, p. 68, <https://doi.org/10.1017/cbo9780511617089>; N. Countouris, *op.cit.*, p. 41.

⁴ Eurofound, *New forms of employment*, Publications Office of the European Union, Luxembourg 2015, p. 1–2. See also M. Koch, *Employment standards in transition: from Fordism to Finance Driven Capitalism*, in: M. Koch, M. Frits (eds.), *Non-Standard Employment in Europe: Paradigms, Prevalence and Policy Responses*, Basingstoke 2013, p. 35, <https://doi.org/10.1017/s0020859015000280>; B. Bercusson, *European Labour Law*, Cambridge 2009, p. 362.

⁵ J. Popma, *The Janus face of the “New Ways of Work”, Rise, risks and regulation of nomadic work*, Brussels 2013, p. 7, <http://dx.doi.org/10.2139/ssrn.2376713>.

⁶ M. Vartiainen, *Mobile Virtual Work – Concepts, Outcomes and Challenges*, in: J. H. E. Andriessen, M. Vartiainen, *Mobile Virtual Work: A New Paradigm?*, Berlin Heidelberg 2006, p. 20, https://doi.org/10.1007/3-540-28365-x_2.

⁷ A. Adams, M. Freedland, J. Prassl, *The “Zero-Hours Contract”: Regulating casual work, or legitimating precarity?*, ELLN Working Paper 5/2015.

⁸ N. Countouris, *op.cit.*, p. 59.

parties to the employment relationship are also more complex in triangular relationships such as employment via temporary work agencies⁹. In some countries appears the voucher-based work understood as “a form of employment where an employer acquires a voucher from a third party (generally a governmental authority) to be used as payment for a service from a worker, rather than cash”¹⁰. This work is often performed on the basis of fixed-term contracts or connected to specific project. Sometimes voucher workers and employers interact without intermediary organisations, but in some countries (like Belgium and France) intermediary organizations deal with recruitment and administration procedures¹¹.

Nowadays technological developments including widespread use of computers and especially smaller mobile devices, together with big data processing and geolocation techniques have given these changes a new dimension¹². Digital economy is growing very quickly in almost all fields of economy: retail, transportation, health, education and last but not least personal relationships in social media¹³. It also contributes to increased flexibility in employment or

⁹ Even though studies indicate a growing trend in the number of temporary workers and temporary agency workers in most EU Member States, this form of employment still plays a minor role in all European countries with an average 1.5% of total employment. See: Precarious Employment in Europe: Patterns, Trends and Policy Strategies. Part I. Patterns, Trends and Policy Strategies in Europe Study for the EMPL Committee, 2016 p. 110 [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587285/IPOL_STU\(2016\)587285_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587285/IPOL_STU(2016)587285_EN.pdf); N. Countouris, S. Deakin, M. Freedland, A. Koukiadaki, J. Prassl, *Report on temporary employment agencies and temporary agency work*, International Labour Office, Geneva 2016, p. 23. http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---ed_dialogue_msu/documents/publication/wcms_541655.pdf (accessed: 15.02.2018).

¹⁰ Eurofound, *New forms of employment*, p. 82.

¹¹ *Ibidem*, p. 83.

¹² G. Valenduc, P. Vendramin, *Work in the digital economy: sorting the old from the new*, ETUI Brussels 2016, p. 46, <https://doi.org/10.2139/ssrn.2770405>.

¹³ OECD, *OECD Digital Economy Outlook 2015*, p. 16, http://www.keepeek.com/Digital-Asset-Management/oecd/science-and-technology/oecd-digital-economy-outlook-2015_9789264232440-en#.WoXnM2bOM_U (accessed: 15.02.2018); See also: OECD, *Measuring the Digital Economy: A New Perspective*, OECD Publishing, 2014 <http://dx.doi.org/10.1787/9789264221796-en>.

even, as C. Degryse states “developing a parallel labour market”¹⁴. “Digital work” is a broad term that covers different circumstances including use of digital devices by workers. In its recent typology of new forms of labour the Eurofound applies two terms: ICT based work¹⁵, crowdwork¹⁶, and “work on-demand via apps”¹⁷. Platforms and apps differ between themselves in terms of their role in connecting workers and clients, adjudicating tasks, the extent to which they exercise control over the work performed and the way they establish the terms of performing services including payment. One of the common feature they share is enormous flexibility for the platform’s clients, which results in commodification of labour and the “humans-as-a-service”¹⁸ approach.

2. New concept of employer

Dynamic development of new forms of employment puts into question the traditional concept of employer. In some cases, such as for

¹⁴ C. Degryse, *Digitalisation of the economy and its impact on labour markets*, ETUI Brussels 2016, p. 35, <https://doi.org/10.2139/ssrn.2730550>.

¹⁵ Ibidem, p. 73. This category of workers is referred sometimes to as „e-nomads”: Eurofound, *Fifth European Working Conditions Survey*, Publications Office of the European Union, Luxembourg, 2012, p. 95.

¹⁶ G.D. Saxton, O. Oh R. Kishore, *Rules of Crowdsourcing: Models, Issues, and Systems of Control*, “Information Systems Management”, (2013) Vol. 30, p. 2–20, <http://dx.doi.org/10.1080/10580530.2013.739883>. See also V. de Stefano, *The rise of the “just-in-time workforce”: on-demand work, crowdwork and labour protection in the “gig-economy”*, Geneva 2016, p. 1.

¹⁷ Taxonomy of digital work is still discussed by Academia. M.A. Cherry, *A Taxonomy of Virtual Work* (July 26, 2010). Georgia Law Review, Forthcoming, p. 9. <https://ssrn.com/abstract=1649055> (accessed: 15.02.2018); OECD, *OECD Digital Economy Outlook 2015*, p. 144–160; A. Aloisi, *Commoditized Workers. Case Study Research on Labour Law Issues Arising from a Set of “On-Demand/Gig Economy” Platforms (July 1, 2015)*, “Comparative Labor Law&Policy Journal”, Vol. 37, No. 3, 2016 <http://dx.doi.org/10.2139/ssrn.2637485>.

¹⁸ The expression was used by Jeff Bezos in the Opening Keynote at 2006 MIT Emerging Technologies Conference. Accessed: <http://video.mit.edu/watch/opening-keynote-and-keynote-interview-with-jeff-bezos-9197/> (accessed: 15.02.2018).

temporary employment relations it is the legislator who stipulates that the Temporary Employment Agency is the employer, while the user employer only provides for the arrangements inextricably linked to actual performance of work at the establishment. But these legal solutions do not always go in hand with actual organisation of work, not to mention worker's awareness as to the figure of their real employer, especially in cases when temporary workers are deeply integrated in user employer's establishment¹⁹. Similar problems appear in case of work on demand via apps and platform work. Even though in some platforms all or most of the functions is fulfilled by the platform itself, there are also models, wherein these are shared among different entities. Applying the functional definition of employer instead of looking for contractual bonds will allow also to distribute employers' obligation and at the same time attach obligations to different entities in accordance to the function they fulfil²⁰.

A proposal to expand the concept of employer beyond the contractual party has been made by J. Prassl, who presents new "functional" concept of the employer, according to which there are five main functions of the employer:

[1] Inception and Termination of the Employment Relationship. This category includes all powers of the employer over the very existence of its relationship with the employee, from the 'power of selection', to the right to dismiss.

[2] Receiving Labour and its Fruits. Duties owed by the employee to the employer, specifically to provide his or her

¹⁹ J. Prassl, *The concept of employer*, Oxford 2015, p. 51, <https://doi.org/10.1093/acprof:oso/9780198735533.001.0001>; See also K. Håkansson, T. Isidorsson, R. Pond, E. Sol, Ch. Teissier, J. Unterschütz, F. Warneck, *The representation of agency workers in Europe at national and local level in France, Netherlands, Sweden, Poland and the UK*. Department for Work Science, University of Gothenburg, Sweden 2009. http://www.gu.se/digitalAssets/1272/1272408_Short_summary_RAW_Eng_090225.pdf (accessed: 15.02.2018).

²⁰ Ibidem, p. 156. Detailed analysis of Uber and TaskRabbit can be found in J. Prassl, M. Risak *Uber, Taskrabbit, & Co: Platforms as Employers?*, in: K. Ahlberg, N. Bruun (eds.), *The New Foundations of Labour Law*, Frankfurt 2017, <https://doi.org/10.3726/b11540>.

labour and the results thereof, as well as rights incidental to it.

[3] Providing Work and Pay. The employer's obligations towards its employees, such as for example the payment of wages.

[4] Managing the Enterprise-Internal Market. Coordination through control over all factors of production, up to and including the power to require both how and what is to be done.

[5] Managing the Enterprise-External Market. Undertaking economic activity in return for potential profit, whilst also being exposed to any losses that may result from the enterprise"²¹.

This concept of the employer "should be understood as the entity, or combination of entities, playing a decisive role in the exercise of relational employing functions, and regulated or controlled as such in each particular domain of employment law"²². However interesting this proposal might be, let us consider to what extent it could be recognised in the EU and Polish legal framework.

3. Concepts of undertaking and establishment in the EU law

The EU employment law does not define the notion of employer. A.M. Świątkowski argues that this is not needed because the employer is simply an entrepreneur employing workers who exercises the right of natural persons and other operators to move freely within the common market. The Author explains that since the scope of the concept of entrepreneur exercising the right to free movement within the European Union is broader than the term "employer" (every employer is an entrepreneur, while only some entrepreneurs provide services using engaging their employees) so it was not necessary for the CJUE to consider what was the scope

²¹ J. Prassl, *op.cit.*, p. 32.

²² *Ibidem*, p. 155.

of the right of free movement within the Union in the case of the other side of employment relations – employers²³. However, there are cases in the European Union's secondary labour law where it was necessary to define the employer, primarily as the subject of obligations regulated by Council Directive 2001/23 of 12.3.2001 on the approximation of the laws of the Member States relating to the protection of employees' rights in the event of transfers of undertakings.

Let us then proceed to brief review of notions closely related to the one of "employer": undertaking and establishment. In the EU law there is no single definition of undertaking; it is applied in so many areas covered by the Treaties, that it requires different interpretation for the purpose of each of them²⁴. Because of diverse understanding of the term "undertaking" in legal orders of EU Member States, EU law following the CJEU jurisprudence adopts autonomous notion of undertaking²⁵. As AG Maduro explained in FENIN the EC Treaty makes frequent reference to the concept, it does not define it and it has instead been clarified in case-law, which gives it a functional content²⁶.

The concept of undertaking for the purpose of the competition law was first interpreted by the CJEU in *Hydrotherm* as "[...] an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal"²⁷. This was further developed in *Höfner and Elser*²⁸, where the Court applied a comparative criterion

²³ A.M. Świątkowski, *Europejskie prawo pracy*, Warszawa 2015, p.74.

²⁴ G. Materna, *Pojęcie przedsiębiorcy w polskim i europejskim prawie ochrony konkurencji*, Warszawa 2009, p. 60; CJEU Judgment of 21 September 1999, Albany (C-67/96, ECR 1999 p. I-5751) ECLI:EU:C:1999:430, § 206.

²⁵ M. Hermann, F.J. Säcker, in: G. Hirsch, F. Montag, F.J. Säcker (eds), *Competition Law: European Community Practice and Procedure, Article-by-article Commentary*, London 2008, p. 408.

²⁶ A.G. Maduro opinion in FENIN / Commission (C-205/03 P, ECR 2006 p. I-6295) ECLI:EU:C:2006:453.

²⁷ *Hydrotherm*, § 11.

²⁸ CJEU Judgment of 23 April 1991, *Höfner and Elser / Macrotron* (C-41/90, ECR 1991 p. I-1979) ECLI:EU:C:1991:161, § 21: "It must be observed, in the context of competition law, first that the concept of an undertaking

in order to establish economic nature of activity, which lies at the root of a functional and wide-ranging approach to the concept of an undertaking²⁹. The comparative criterion extends the concept of economic activity to include any activity capable of being carried out by a profit-making organization³⁰.

The second criterion developed by case law for the purposes of classifying an activity as economic in nature is participation in a market or the carrying on of an activity in a market context³¹. The CJEU maintains that “any activity consisting in offering goods and services on a given market is an economic activity”³².

In the judgements where it was necessary to establish whether a public body (or a private body subcontracted by a public one) should be regarded as an enterprise in the light of EU market competition rules the Court considered if the entities under scrutiny were fulfilling the “function” of an undertaking³³. The functional approach came down to examining whether the activity in question is – at least potentially – performed by private entities engaged in the supply of goods or services³⁴. The status of an undertaking is strictly connected to the existence of an entity pursuing its activity on its own account and bearing the risk of this activity.

encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity”.

²⁹ A.G. Maduro opinion in FENIN (C-205/03, ECR 2006 I-06295) ECLI:EU:C:2005:666, § 11.

³⁰ A.G. Maduro in FENIN § 12.

³¹ A.G. Maduro in FENIN § 13.

³² A.G. Maduro in FENIN, § 13. See also: CJEU Judgment of 12 September 2000, Pavlov and others (C-180/98, C-181/98, C-182/98, C-183/98 and C-184/98, ECR 2000 p. I-6451) ECLI:EU:C:2000:428, § 75; CJEU judgment of 19 February 2002, Wouters and others (C-309/99, ECR 2002 p. I-1577) ECLI:EU:C:2002:98, § 47, and CJEU Judgment of 24 October 2002, *Aéroports de Paris / Commission* (C-82/01 P, ECR 2002 p. I-9297) ECLI:EU:C:2002:617, § 79.

³³ AG Jacobs opinion in Albany (C-67/96, ECR 1999 I-05751) ECLI:EU:C:1999:28, § 214.

³⁴ See CJEU Judgment of 18 March 1997, *Cali & Figli / Servizi Ecologici Porto di Genova* (C-343/95, ECR 1997 p. I-1547) ECLI:EU:C:1997:160, §16; *Höfner and Elser / Macrotron*, § 21.

The EU law is not concerned with legal and organisational form of the economic activity³⁵. Any entity engaged in economic activity regardless of its legal personality (natural person, legal person or an entity without legal personality) or status (public or private) or the way in which it is financed (from private or state resources) can be considered an enterprise in the light of EU competition rules³⁶. In case of entities who undertake activity of a mixed character (eg. public and economic) each area of activity must be assessed separately³⁷. Individuals, too, may be classified as undertakings if they are independent economic actors on the markets for goods or services³⁸.

It is clear that the functional approach undertaken by the CJEU while considering the nature of an entity's activity is focused on its functions within the common market and not by any means towards its employees (which by the way the undertaking does not necessarily have to employ). In this context, it was not considered if the function of selling goods or offering services was fulfilled jointly by two or more entities. This being the case each unit should be considered as separate establishments.

The establishment is another term of EU labour law that cannot be defined by the reference to the laws of the Member states but instead needs to be interpreted in an autonomous and uniform manner in the EU legal order³⁹. The term appears in the EU sec-

³⁵ CJEU Judgment of 17 February 1993, *Poucet and Pistre / AGF and Cancava* (C-159/91 and C-160/91, ECR 1993 p. I-637) (SVXIV/I-27 FIXIV/I-27) ECLI:EU:C:1993:63.

³⁶ G. Materna, *op.cit.*, pp. 115–116, *Höfner and Elser / Macrotron*, § 21; Judgment of the Court of First Instance of 30 March 2000, *Consiglio Nazionale degli Spedizionieri Doganali v Commission* (T-513/93, RC 2000 II-01807) ECLI:EU:T:2000:91, § 36. CJEU judgement of 12 July 1984 *Hydrotherm* (170/83, RC 1984 02999) ECLI:EU:C:1984:271, § 11; CJEU Judgment of 23 March 2006, *Enirisorse* (C-237/04, ECR 2006 p. I-2843) ECLI:EU:C:2006:197, § 32.

³⁷ AG Jacobs opinion of 23 March 2000 in *Pavlov and others*, (C-180/98, C-181/98, C-182/98, C-183/98 and C-184/98, ECR 2000 p. I-6451) ECLI:EU:C:2000:151, § 115.

³⁸ With respect to Italian customs agents, CJEU Judgment of 18 June 1998, *Commission / Italy* (C-35/96, ECR 1998 p. I-3851) ECLI:EU:C:1998:303.

³⁹ CJEU Judgment of 7 December 1995, *Rockfon / Specialarbejderforbundet i Danmark*, acting on behalf of *Søren Nielsen and others* (C-449/93, ECR 1995

ondary law in the area much closer to the subject discussed i.e. European labour law⁴⁰. The CJEU ruled in *Rockfon* that the term “establishment” appearing in Article 1(1)(a) of the Directive 75/129/EEC⁴¹ must be interpreted as designating, depending on the circumstances, the unit to which the workers made redundant are assigned to carry out their duties. It is not essential, in order to be an “establishment”, for the unit in question to be endowed with a management which can independently effect collective redundancies⁴².

The notion of establishment for the purposes of the application of Directive 98/59/EC was further explained in the judgment in *Athinaiki Chartopoiia*: an “establishment”, in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks⁴³. By the use of the words “distinct entity” and “in the context of an undertaking”, the Court clarified that the terms “undertaking” and “establishment” are different and that an establishment normally constitutes a part of an undertaking. That does not, however, preclude the establishment being the same as the undertaking where the undertaking does not have several distinct units⁴⁴. Given that the objective pursued by Directive 98/59 concerns, in particular, the socio-economic effects which collective

p. I-4291) ECLI:EU:C:1995:420, §25; CJEU Judgment of 15 February 2007, *Athinaiki Chartopoiia* (C-270/05, ECR 2007 p. I-1499) ECLI:EU:C:2007:101, § 23; CJEU Judgment of 30 April 2015, *USDAW and Wilson* (C-80/14) ECLI:EU:C:2015:291, § 45.

⁴⁰ Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies Official Journal L 225, 12/08/1998 P. 0016 – 0021 and the Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ 2002 L 80, p. 29), Article 2(a) and (b) of which also establishes a clear distinction between the term “undertaking” and the term “establishment”.

⁴¹ Replaced by the Directive 98/59/EC.

⁴² *Rockfon*, § 32.; *USDAW and Wilson*, § 47.

⁴³ *Athinaiki Chartopoiia* § 27.

⁴⁴ *USDAW and Wilson*, § § 51,52.

redundancies may have in a given local context and social environment, the entity in question need not have any legal autonomy (including management which can independently effect collective redundancies) nor need it have economic, financial, administrative or technological autonomy, in order to be regarded as an “establishment” nor must there be a geographical separation from the other units and facilities of the undertaking⁴⁵.

The examples of CJEU jurisprudence on the notions of undertaking and establishment demonstrate that the Court examines whether a given entity can be qualified as an undertaking in the common market or an establishment for the purpose set in the secondary EU labour law. Although the CJEU recognises that one undertaking may consist of two or more establishments, it does not consider that two establishments could perform various functions of the employer vis-a vis the same worker. But in reality, in complex corporate group structures the exercise of employer’s functions are increasingly shared between multiple entities⁴⁶. The problem of obligations of contractual and non-contractual employer in the context of transfer of undertaking were analysed by the CJEU in *Albron Catering*⁴⁷, where CJEU considered whether in the case of a transfer, within the meaning of Directive 2001/23, of an undertaking belonging to a group to an undertaking outside that group, it is possible to regard as a “transferor”, within the meaning of Article 2(1)(a) of that directive, the group company to which the employees were assigned on a permanent basis without however being linked to the latter by a contract of employment (“the non-contractual employer”), given that there exists within that group a undertaking with which the employees concerned were linked by such a contract of employment (“the contractual employer”)⁴⁸. Having in regard the purpose of the Directive 2001/23 the need to

⁴⁵ Athinaïki Chartopoïia, § 28, 29; Rockfon § 34, and point 2 of the operative part.

⁴⁶ J. Prassl, *op.cit.*, p. 13.

⁴⁷ Judgment of 21 October 2010, *Albron Catering* (C-242/09, ECR 2010 p. I-10309) ECLI:EU:C:2010:625.

⁴⁸ *Albron Catering* § 20.

protect employees in the event of a change of “employer”. The Court having analysed the circumstances of the case, where assignment of the employee to another company was, as opposed to temporary work, of a permanent character, concludes that a contractual link with the transferor is not required in all circumstances for employees to be able to benefit from the protection conferred by Directive 2001/23⁴⁹. In this situation, the Court also acknowledged that a situation where there is a plurality of employers, is possible within the employment relationship and in such a case the contractual employer not always must be given greater weight⁵⁰. Finally the CJEU concludes that “if, within a group of companies, there are two employers, one having contractual relations with the employees of that group and the other non-contractual relations with them, it is also possible to regard as a ‘transferor’, within the meaning of Directive 2001/23, the employer responsible for the economic activity of the entity transferred which, in that capacity, establishes working relations with the staff of that entity, despite the absence of contractual relations with those staff”⁵¹. The judgement certainly brings us closer to the functional concept of employer.

4. The concept of partial legal ability of the employer in the Polish labour law doctrine

The concept of establishment developed for the purpose of interpretation of the Directive Directive 98/59 and of Directive 2001/23 seems to be similar to the notion of employer in those legal systems, where the management concept of employer was adopted. The Polish Labour Code (article 2) contains definition of employer, which stipulates that the employer is any organizational unit even if it has no legal personality, and any natural person, if they employ

⁴⁹ Abron Catering § 24.

⁵⁰ Abron Catering § 25.

⁵¹ Abron Catering § 29.

employees. Unlike the ownership model of employer, which defines as a legal or natural person, being the owner of a work or having the right to dispose of property plant based on another title, this concept is based on the management model of the employer. This model identifies the employer with the organisational unit, whose leadership has a mandate to manage it and control it employed workers, regardless of whether this entity has legal personality or not. Key attribute of the employer is the ability of employers to hire their own behalf, which is a necessary and sufficient condition for the possession of the entity status of the employer⁵². The management model has been criticized in the literature not only in terms of financial responsibility of an employer dependent from other legal entity, but also in terms of conducting negotiations to conclude collective agreement or restructuring process⁵³. Nevertheless, neither of them explicitly allows to share the function of employer between two entities, without the need to establish which of them is the only contractual employer. At the core of the functional concept of employer presented by J. Prassl lies the assumption that more than one entities may perform employer's functions towards the same employee within one employment relationship. In the Polish labour law literature Z. Kubot develops the concept of partial legal capacity of employer based on the notion of serial legal ability in civil law⁵⁴. The construction described by Z. Kubot differs in scope and application form the functional concept presented by J. Prassl.

⁵² M. Nałęcz, "Artykuł 3", in: K. Walczak (ed.), *Kodeks pracy. Komentarz*, Warszawa 2017, SIP Legalis, accessed 17.03.2017.

⁵³ Z. Hajn, *Pojęcie pracodawcy po nowelizacji kodeksu pracy*, „Praca i Zabezpieczenie Społeczne” 1997, nr 5, s. 19–27; K. Walczak, *Pojęcie pracodawcy w polskim prawie pracy i wynikające z niego problemy praktyczne*, in: B. M. Cwiertniak (red.), *Aktualne zagadnienia prawa pracy i polityki socjalnej. (Zbiór studiów)*. T. 2. Sosnowiec 2013, p. 41–48. Z. Hajn *Pracodawca i organizacja pracodawców jako podmioty zbiorowego prawa pracy (wybrane problemy)*, in: G. Goździewicz (red.), *Zbiorowe prawo pracy w społecznej gospodarce rynkowej*. Toruń 2000, s. 137–172; Ł. Pisarczyk, *Pracodawca wewnętrzny* „Monitor Prawa Pracy” 2004, nr 12, s. 320.

⁵⁴ Z. Kubot, *Odcinkowe zdolności prawne*, „Praca i Zabezpieczenia Społeczne” 2012, nr 8; idem., *Odcinkowa zdolność pracodawcza spółki dominującej w grupie kapitałowej*, „Praca i Zabezpieczenia Społeczne” 2014, nr 9, p. 22.

First of all the structure of employer's partial legal capacity is different in individual and collective labour law. In individual labour law the notion of partial legal capacity is applied to the specific employment relationships where the right to conclude and resolve employment contract is attributed by the law to an entity other than employer within the meaning of article 3 LC (e.g. director of a public health care institution is employed by an entity that established the institution⁵⁵). In this case partial legal capacity applies to a narrow scope of rights and obligation (usually only concluding and resolving employment contract) attributed only to the controlling entity⁵⁶. In consequence, legal capacity of the direct employer is excluded in this regard, but covers all other rights and obligations stemming from the employment relationship. This roughly corresponds to the first employer's function described by J. Prassl⁵⁷. However, according to Z. Kubot there is no legal basis for applying this construction to individual employment relationships to temporary employment agencies or within company capital groups⁵⁸.

Different approach is taken within the domain of collective labour relations. Z. Kubot admits that the notion of an employer in collective labour law is broader than the one in the individual labour law, and may include other entities, for example the controlling company⁵⁹. In contrast to individual labour relations the transfer of certain rights and obligations from a subsidiary to a parent company may be provided by the legal act (such as Code of Commercial Companies) or on the basis of a management contract for a sub-

⁵⁵ Article 46.3 of the law on health care activity (Ustawa z dnia 15 kwietnia 2011 r. o działalności leczniczej, consolidated text Dz.U. z 2018 r. poz. 160).

⁵⁶ Z. Kubot, *Odcinkowa zdolność prawna pracodawcy w stosunkach pracy*, in: L. Florek, Ł. Pisarczyk (eds.), *Współczesne problemy prawa pracy i ubezpieczeń społecznych*, Warszawa 2011, p. 183; idem, *Zróżnicowanie konstrukcji odcinkowych zdolności prawnych pracodawcy*, „*Studia Iuridica Lublinensia*” 2015, vol. XXIV, no 3, p. 202.

⁵⁷ Inception and termination of employment contract. J. Prassl, op.cit., p. 49–50.

⁵⁸ Z. Kubot, *Odcinkowa zdolność pracodawcza spółki dominującej w grupie kapitałowej*, p. 19.

⁵⁹ Ibidem, p. 20; Z. Kubot, *Odcinkowe zdolności prawne*, p. 16–22.

sidiary⁶⁰. This is based on the notion of “Constitutional” or “owner” employer developed by the jurisprudence on the basis of article 20 and 59.2 of the Constitution (referring to social dialogue and concluding collective agreements)⁶¹. Therefore sharing legal capacities between parent and controlled company is restricted to the area of collective bargaining and collective disputes, where the employer is trade union’s partner in social dialogue⁶². Zdzisław Kubot explains that the division of competences may be based on the separation of their parts, but a small part of the labour competencies belonging to the management board of the parent company may be of key importance: e.g. parent company defines the maximum rate of increase of remuneration of employees of the subsidiary in a given year. Then the management board of a subsidiary negotiating an increase in remuneration of employees in a given year, or even carrying negotiations in a collective dispute, may not exceed the ratio determined by the management board of the parent company⁶³.

This approach however does not seem to allow the trade union organisation in controlled company to engage in negotiations directly with the parent company, where the decisions are actually made. Similar stance was taken by the CJEU in *Fujitsu Simens* concerning consultation obligations within the framework of Directive 98/59 on collective redundancies⁶⁴. CJEU concludes that “the only party on whom the obligations to inform, consult and notify are imposed is the employer, in other words a natural or legal person who stands in an employment relationship with the workers

⁶⁰ Idem, *Odcinkowa zdolność pracodawcza*, p. 20.

⁶¹ The parent company is qualified in the resolution of the Supreme Court of May 23, 2006, I PZP 2/06 (OSNP 2007 / 3-4 / 38) as a constitutional employer. This concept was constructed by the Supreme Court pursuant to art. 20 and art. 59 par. 2 of the Constitution of the Republic of Poland.

⁶² Z. Kubot, *Zróżnicowanie konstrukcji odcinkowych*, p. 208, idem, *Rola spółki dominującej w sporze zbiorowym pracowników spółki zależnej. Część II*, “Praca i Zabezpieczenie Społeczne” 2014, No 12, p. 14.

⁶³ Idem, *Odcinkowa zdolność pracodawcza*, p. 21.

⁶⁴ Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12/08/1998 P. 0016 – 0021.

who may be made redundant. An undertaking which controls the employer, even if it can take decisions which are binding on the latter, does not have the status of employer”⁶⁵. This approach however is not consistent, as shown above in reference to Albron case.

5. Concluding remarks

Various forms of work organisation, such as agency work or diverse shape the digital work is taking, may pose a challenge to the traditional singular concept of employer. The role of platform was extensively analysed by AG Szpunar in the Uber case⁶⁶, where he states that “Uber [...] controls the economically significant aspects of the transport service offered through its platform. While this control is not exercised in the context of a traditional employer-employee relationship, one should not be fooled by appearances. Indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect, makes it possible to manage in a way that is just as – if not more – effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders”⁶⁷. Even though AG Szpunar finally refrains from defining the status of Uber drivers, he refers to the judgement of London Employment Tribunal, where they were qualified as workers⁶⁸.

In individual employment relations of a complex structure adopting a concept based on reciprocity of rights and duties⁶⁹ would also allow to cover wider group of persons performing paid work by the

⁶⁵ CJEU Judgment of 10 September 2009, *Akavan Eriytisalojen Keskusliitto and others* (C-44/08, ECR 2009 p. I-8163) ECLI:EU:C:2009:533 § 57–68.

⁶⁶ Opinion of AG Szpunar of 11.05.2017, *Asociación Profesional Elite Taxi* (C-434/15, ECLI:EU:C:2017:364).

⁶⁷ AG Szpunar in *Asociación Profesional Elite Taxi*, § 51–52.

⁶⁸ London Employment Tribunal of 28 October 2016, *Aslam, Farrar and Others -v-Uber* (Case 2202551/2015); AG Szpunar in *Asociación Profesional Elite Taxi*, § 54.

⁶⁹ J. Prassl, *op.cit.*, p. 202.

notion of employment. Searching for subordination as a central feature of employer- employee relationship would no longer be necessary in situations when employers' role is limited e.g. only to inception of employment contract.

The problem of division of the employer is also important in the case of certain capital groups, in particular when connections between the parent company and subsidiaries are so strong that from an economic point of view these companies are in a sense "part of" the mother company (especially when the parent company has a 100% share in the share capital of the daughter companies)⁷⁰. While some functions of the employer such as concluding employment contract and organising work will be performed by the contractual employer, collective grievances and negotiations on collective agreements will be the domain of the mother company.

National labour law doctrine following the Supreme Court jurisprudence provide solutions applicable in the area of collective labour law, where the "ownership" concept of employer supported by the "constitutional" notion of employer may prevail over the "management" one. The efforts to see beyond the notion of employer provided by the Labour Code may lead to the conclusion that the existing notion does not allow to fulfil main goals of regulations in the sphere of collective labour law: maintaining social peace⁷¹. Collective labour agreements, normative agreements and other bilateral agreements of social partner organizations and social pacts signed by parties and participants of legal transactions regulated by collective labour law provisions should be negotiated and concluded with the aim of introducing, maintaining and restoring social peace in labour relations⁷². By adopting functional concept of employer, which allows to include not only one entity but a combination of entities as a party to employment relation⁷³ would facilitate reali-

⁷⁰ P. Czarnecki, *Odpowiedzialność pracodawcy a rozwój struktur holdingowych*, Warszawa 2014, p. 221.

⁷¹ J. Unterschütz, *Naczelne zasady zbiorowego prawa pracy w multicentrycznym porządku prawnym*, Gdynia 2016, p. 174.

⁷² A.M. Świątkowski, *Gwarancje prawne pokoju społecznego*, Warszawa 2013, p. 279.

⁷³ J. Prassl, *op.cit.*, p. 217.

sation of this goal by enabling trade unions negotiations at the appropriate level.

STRESZCZENIE

Funkcjonalna koncepcja pracodawcy.
Rozwiązanie dla nowych form zatrudnienia?

Nowe formy zatrudnienia skłaniają ku refleksji nad zdefiniowaniem na nowo pojęcia pracodawcy. Funkcjonalna koncepcja pracodawcy w sytuacji, gdy funkcje pracodawcy w praktyce realizowane są przez dwa lub więcej podmiotów pozwala na objęcie ich wszystkich jej zakresem. Celem tego opracowania jest przedstawienie tej koncepcji w świetle orzecznictwa TSUE i wybranych przykładów literatury krajowej.

Słowa kluczowe: pracodawca; przedsiębiorstwo; zakład; prawo pracy

SUMMARY

Functional concept of employer.
Solution for the new employment landscape?

New forms of employment lead to a reflection that the concept of the employer needs to be redefined. In a situation when the employer's functions are in practice carried out by two or more entities, the functional concept of the employer allows to cover all of them. The aim of this study is to present this concept in the light of the CJEU jurisprudence and selected examples of national literature.

Keywords: employer; undertaking; establishment; labour law

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