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The Outsourcing of Services in the Light of the Labour Law — In Search of the Actual Employer

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The outsourcing of services constitutes an alternative to employment of in-house employees. Its use falls, in principle, within the framework of economic freedom. However, counteracting the socially undesirable effects of the use of the outsourcing of services remains a current and considerable challenge for the development of labour law. For, in its extreme form, it can serve as a mechanism for shifting the burden of employing in-house employees to another entity, while retaining the benefits of playing the role of the employer. Thus, the outsourcing of services becomes a tool for circumventing the labour law regime on the use of human labour, which is considered burdensome by many businesses. By ridding themselves of a whole range of obligations and the ensuing costs, businesses gain a competitive advantage over other entities that comply with the obligations assigned to the role of employer. Not only does such conduct imply negative consequences in terms of the protection of the persons actually performing the outsourced services, but it also implies adverse impacts in terms of compliance with the principles of fair market competition.

The present dissertation is devoted to a deliberation on the boundary between the use of service outsourcing strategies within the framework of economic freedom and outside this framework — ones utilized for the purpose of bypassing the labour law regime. In the latter case, the outsourcing of services may lead to the attribution of the status of employer to an inappropriate entity, which gives rise to important practical consequences. For several years now, the issue of identification of the actual employer in cases related to the use of the outsourcing of services has been the matter covered by numerous court rulings, presenting multiple interpretation difficulties for the judicature. In particular, these relate to the factual circumstances associated with the so-called "outsourcing affair", as a result of which the State Treasury suffered multi-million losses. In the labour law doctrine, the issue in question has not yet seen a comprehensive treatment within the framework of a monograph. Therefore, it constitutes a research gap of considerable practical significance, which justifies undertaking deliberations aimed at filling this gap.

This research has been carried out employing the formal-dogmatic method with elements of the comparative method. In a substantial part of the deliberation, the vertical comparative method is applied, serving to analyse the influence of European law on the Polish legal order, whereas the horizontal comparative method is used merely in an auxiliary manner, with the view to illustrating the solutions developed in foreign law as relates to the issues described in the dissertation. The complex nature of the issue addressed in this

dissertation is reflected in the interweaving of the interdisciplinary approach and the intra-disciplinary approach. The interdisciplinary approach is demonstrated through anchoring the arguments of a legal nature on the foundation of knowledge developed in the management sciences. On the other hand, the intra-disciplinary approach is reflected in the extensive inclusion of a civil law perspective, without which the analysis of market practices based on a contract concluded in such a legal regime would be meaningless. The dissertation also includes references to social security law institutions and, occasionally, to other branches of law.

In line with the adopted research postulate, within the current legal framework, the issue of the identity of the actual (*de facto*) employer in the outsourcing of services:

1) has not been regulated in a manner that is unequivocal and comprehensible for the entities to which this status is attributed;
2) does not ensure effective protection for the employees who actually perform the work under the outsourcing of services;
3) does not constitute a guarantee of observance of the principles of fair competition.

Regulating the issue in question in a manner that complies with the ILO's 2006 *Employment Relationship Recommendation* (R198) and with constitutional principles requires both a harmonization of the interpretation of the existing law and the legislator's revision of the content of the law.

The research aimed at confirming or refuting the thesis set out above has been divided into four parts that correspond to the respective chapters of the dissertation. It commences with introductory remarks, contained in the first chapter, which serve to acquaint the reader with the concept of outsourcing from the perspective of management sciences and, subsequently, from the perspective of legal sciences, with a particular focus on civil law and labour law. In addition to definitional issues, the section devoted to management sciences also includes an outline of the types and purposes of the use of the outsourcing of services. The section related to the legal perspective opens with highlighting several normative regulations, pertaining to various branches of law, which set out the requirements and restrictions placed on entities that practice outsourcing. Subsequently, an analysis is carried out concerning the contract for outsourcing of services and the role played by the service provider's employees in its implementation. Having turned to labour law, the concepts of the outsourcing of services and the outsourcing of employees are discussed, set against the background of legal institutions and market practices of similar nature.

Chapter 2 is devoted to the issue of the use of outsourcing of services as an alternative to employment of in-house employees. The discussion commences with a description of the status of an employer as recognized in the labour law and its comparison with the status of a service recipient. The focus subsequently turns to the need to protect the persons who actually perform the work in the context of the outsourcing of services. For, the adopted research postulate requires a juxtaposition of the perspectives of both parties to the employment relationship. The subject of a significant part of the deliberations becomes the search for the employer, and comments upon the function that the proper identification of this entity plays in the legal system. These are carried out taking into account two important currents of developments observable in the labour market that hinder the search for an employer: the distancing of the beneficiary of the work from the employer, and the increasing influence of the client upon the manner in which the employee performs the work. The deliberations also contain the author's definition of the notion of actual (*de facto*) employer, which specifies the entity that is to be regarded as the employer of a given employee in the light of the labour legislation, notwithstanding the fact that from the content of the declarations of intent made in writing, under the given facts, it would appear that the status of the employer has been attributed to another entity. By the term "actual (*de facto*) employer" I also mean an entity that, although being the employer according to the content of the declarations of intent made in written form under the given facts, has acquired the status of employer in a manner different from that provided for by the labour law, i.e., in particular, it has entered into an already existing employment relationship by way of a general succession and not by way of conclusion of a new employment contract. The deliberations culminate with remarks as to how to identify the actual employer, as well as remarks regarding the mechanism for pursuing, through judicial proceedings, the protection of workers' rights versus the appropriate entity. In the last part of the Chapter, options are presented for guaranteeing the protection for employees actually performing work under the outsourcing of services, constituting an alternative to the zero-one approach to assigning employer status applied in the Polish law.

After laying the foundation in Chapter 1 and building upon it the structuring framework for further deliberations in Chapter 2, the subsequent chapters are devoted to filling this framework with content of a more specific nature. The criterion for allocating the issues between these chapters is the legal basis for the attribution of the status of an actual employer. Chapter 3 describes the cases where this status is attributed by way of a general succession on the part of the employer, which may or may not follow the outsourcing of tasks and functions.

Given the laconic nature of the Polish legal norm establishing the institution of transfer of undertakings or part thereof, extensive references have been made to the EU-focused interpretation. The so-called "apparent employee outsourcing", which is a controversial practice used in business transactions, has also been analysed from the legal perspective. In addition, a reflection is provided upon the implications of recognizing as an actual employer an entity other than that to which this status has been ascribed by the entities involved in cooperation within the framework of the outsourcing of services.

Chapter 4 is devoted to the issue of the assumption of the actual employer status by the service recipient as a result of the conclusion of an implied contract of employment directly with the employee actually carrying out work for that service recipient. A detailed analysis of the respective features of the employment relationship in the *de facto* relation between the employee and the service recipient, notably the employer's management, has been carried out on the grounds of factual situations linked to the use of outsourcing of services. Special attention is devoted to the controversial phenomenon of employee outsourcing. This chapter, likewise, concludes with remarks on the effects that the determination of the actual employer entails in the legal transactions.

In conclusion, I express the view whereby the research carried out in the course of work on the present dissertation has confirmed the validity of the research postulate set out in the introduction. The present state of knowledge reflects a high level of legal uncertainty that adversely affects employees seeking protection of their rights, violated through the use of outsourcing as a mechanism to evade the provisions of the labour law. It also creates the risk that entrepreneurs entering into outsourcing relationships are considered to be the actual employers, unaware of the potential, and very significant, practical implications of being attributed this status. Furthermore, the currently applicable interpretation of the provisions of the law does not definitively exclude the possibility for businesses to undertake actions aimed at circumventing the labour law regime through the use of the outsourcing of services, enabling them to gain competitive advantages at the expense of protection of persons who actually perform the work for their benefit. Regulating the issue in question, in a manner consistent with the ILO's *Recommendation 198* and with constitutional principles, requires *de lege lata* a harmonization of the manner of interpretation of the existing law, in particular with respect to the concept of "employer's management", and *de lege ferenda* – an expansion of the content of Articles 22 and 23^1 of the Labour Code.

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