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## Criminal sanctions for infringement of provisions implementing the Platform Directive?

### Summary

The paper discusses the effectiveness of introducing criminal sanctions for violations of provisions implementing the Directive on improving working conditions in platform work. The analysis includes the obligation to establish “effective, proportionate, and dissuasive” penalties, provided in this and other labour law directives and the possibility to choose criminal sanctions to this end. The paper also examines the current practice of implementing criminal sanctions in Poland, highlighting such issues as low fines and limited deterrence. Challenges related to the place of committing a crime and the criminal liability of AI in algorithmic management systems are discussed. The conclusion suggests that the perspective of introducing criminal liability for breaches of the Platform Directive is a complex issue, requiring a comprehensive discussion on the system of criminal labour law in Poland.

**Keywords:** criminal labour law, enforcement of EU labour law, platform directive, AI liability

### 1. Opening remarks

Digital platforms have revolutionised how we interact, transact, and work. However, their rapid proliferation has also given rise to challenges related to rights of people employed by these platforms. The European Commission, in its communication on “A Strong Social Europe for Just Transitions”<sup>1</sup>, has emphasised the need for a regulatory framework that addresses the unique dynamics of the gig economy while safeguarding the rights of workers. The EU Directive on improv-

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<sup>1</sup> European Commission: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Strong Social Europe for Just Transitions*, COM(2020) 14 final, [https://ec.europa.eu/commission/presscorner/detail/en/fs\\_20\\_49](https://ec.europa.eu/commission/presscorner/detail/en/fs_20_49).

ing working conditions in platform work<sup>2</sup> is designed to address these concerns comprehensively. One of the primary objectives is to establish a fair and transparent environment for both workers and digital platforms. At the domestic level, the enforcement of workers' rights can be achieved through wide array of measures: civil, administrative and also criminal ones. The degree to which national criminal law addresses offenses against workers' rights varies among Member States. Some jurisdictions, such as Belgium or France, possess well-established criminal labour law systems, while others impose criminal sanctions primarily in severe cases, such as forced labour or human trafficking<sup>3</sup>.

The aim of this paper is to present current challenges in applying criminal penalties (mainly fines) for breach of provisions implementing the EU directives. First of them is the current practice of establishing and executing these sanctions reflected in the statistics of the Police and Labour Inspection, which show the limited extent of the actual severity of the criminal sanctions. The other two include the place where an offence is committed and the liability for the use of AI in algorithmic management systems.

Before presenting any detailed considerations, it is imperative to recognise that the establishment of criminal sanctions should not be an end in itself, and as long as alternative measures (civil or administrative) prove sufficient, criminal sanctions should remain the *ultima ratio* solution.

## **2. Obligation to establish “effective, proportionate, and dissuasive” penalties**

The majority of labour law directives incorporate a general mandate to establish a redress mechanism in case of a violation of their standards. In the Platform Directive, Article 25.5 introduces the obligation to “lay down the rules on penalties, applicable to infringements of national provisions adopted pursuant to provisions of this Directive or of the relevant provisions already in force concerning the rights

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<sup>2</sup> Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work (Text with EEA relevance), PE/89/2024/REV/1, OJ L, 2024/2831, 11.11.2024 (hereafter: the Platform Directive).

<sup>3</sup> J. Unterschütz: *Enforcement by Means of Criminal Law*. In: *Effective Enforcement of EU Labour Law*. Eds. Z. Rasnača, A. Koukiadaki, N. Bruun, K. Lörcher. Bloomsbury Publishing 2022, p. 116.

which are within the scope of this Directive. The penalties shall be effective, dissuasive and proportionate to the nature, gravity and duration of the undertaking's infringement and to the number of workers affected".

The formulations applied in other EU labour directives vary, some compel Member States to prescribe provisions on sanctions for non-compliance with laws implementing the directive. Some of them (Directive 2014/67/EU, Directive 2008/104/EC, Directive 2006/54/EC) apply the terms "penalties" or "rules on penalties", indicating a potential distinction from "sanctions". However, this nuance is absent in other language versions consistently using the national equivalent, often derived from Latin, of "sanctions". The terms "penalties" and "sanctions" are to be considered synonymous, with neither delineating the character of the sanctions – whether civil, administrative, or criminal<sup>4</sup>. The directives generally emphasise the necessity for sanctions to be "effective, proportionate, and dissuasive" (Directive 2014/67/EU, Directive 2008/104/EC, Council Directive 2000/78/EC, Directive 2006/54/EC, Council Directive 2000/43/EC), except for Directive 2004/38/EC, which refers to "effective and proportionate" sanctions.

A Member State is therefore free to choose between civil, administrative and criminal penalties, or any combination of these. The EU usually does not oblige MS to impose procedural rules for workers who wish to pursue claims arising from the EU law in order to ensure the application of its provisions<sup>5</sup>. Still, in the case 68/88, the Commission v Greece<sup>6</sup> CJEU specified that the sanctions introduced must be effective, proportionate and dissuasive, and applied on the basis of the principle of equivalence with regard to infringements of national law. This also applies to criminal labour law provision, which should not be more lenient than other norms protecting comparable values. In subsequent rulings, CJEU added that Member States are entitled to introduce criminal sanctions, based on the principle of sincere cooperation<sup>7</sup>.

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<sup>4</sup> J. Unterschütz: *Enforcement by Means of Criminal Law...*, p. 107.

<sup>5</sup> See CJEU Judgment of 10 April 1984, Case 14/83. Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, ECLI identifier: ECLI:EU:C:1984:153.

<sup>6</sup> CJEU Judgment of 21 September 1989, Commission of the European Communities v Hellenic Republic, Case 68/88, ECLI:EU:C:1989:339.

<sup>7</sup> CJEU Judgment of 8 July 1999, Case C-186/98 Nunes and de Matos, ECLI:EU:C:1999:376.

It is possible that the Polish legislator will decide to apply criminal sanctions, probably fines, for breach of the laws implementing the Platform Directive. It is also very likely that the criminal conduct will be classified as offenses, similarly to these included in the Labour Code, or the Act on the Employment of Temporary Workers<sup>8</sup>.

One of the key factors in effective enforcement of the law are the relevant competent bodies. In the case of labour law the enforcement is often entrusted to labour inspectors. The role of labour inspection in criminal proceedings differs across Member States, depending on the nature and role of labour inspection, as well as the characteristics of criminal procedure. While labour inspectors possess expertise in employment conditions across various companies and sectors, their competence to prosecute misdemeanours may be limited<sup>9</sup>. In Poland the labour inspectors can apply various measures, including imposing fines or filing a motion to the court for a penalty in case of misdemeanours or notify the prosecutor's office of an offence. The fines are applied in a little less than 1/4 of the audited companies, which makes it rather a common sanction<sup>10</sup>.

### **3. Current (mal)practice of implementing criminal sanctions for infringement of provisions implementing the directives**

In order to consider to what extent criminal sanctions, such as fines, constitute effective penalties for infringement of labour law directives, let us take an example of the laws implementing other di-

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<sup>8</sup> Act on the Employment of Temporary Agency Workers of 9 July 2003 (Journal of Laws No. 166, item 1608).

<sup>9</sup> J. Unterschütz: *Enforcing UE Labour Law by Means of Administrative Law*. In: *Effective Enforcement of EU Labour Law*. Eds. Z. Rasnača, A. Koukiadaki, N. Bruun, K. Lörcher. Bloomsbury Publishing 2022, p. 95.

<sup>10</sup> State Labour Inspection, Report on the activity of the State Labour Inspection in 2021. Warsaw 2022, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/83817DDCD5B7398EC12589E200495956/%24File/3435.pdf> (22.02.2024); State Labour Inspection, Report on the activity of the State Labour Inspection in 2022. Warsaw 2023, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/83817DDCD5B7398EC12589E200495956/%24File/3435.pdf> (22.02.2024); State Labour Inspection, Report on the activity of the State Labour Inspection in 2023. Warsaw 2024, <https://www.pip.gov.pl/o-nas/sprawozdania/sprawozdanie-z-dzialalnosci-pip-za-2023> (30.11.2024).

rectives regulating atypical work, such as the Directive 2008/104/EC on temporary agency work and the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. Both of them require adoption of the “effective, proportionate and dissuasive penalties”. The Directive 2008/104/EC is implemented by the act on employment of temporary workers<sup>11</sup>. It contains three articles, each with several types of offenses, and all of them are sanctioned by the fine of 1,000 to 30,000 PLN. The law on posting of workers<sup>12</sup> also encompasses three articles with a larger number of types of offenses prohibited under a fine of 1,000 to 30,000 PLN.

Offense cases are dealt with by the district courts. The function of the public prosecutor in the cases of offences under Section XIII of the Labour Code, offences under the act on employment of temporary workers and other offences against employee rights is performed by the labour inspectors. These bodies can also apply fine procedure in any offence falling within the sphere of their prosecution – and this also after full inquiry activities have been carried out, if, as a result of them, they decide that the penalty imposed by a fine is a sufficient legal reaction to the offence (Article 95 § 3 of the Code of Criminal Procedure). The amount of the fine imposed under the fine procedure by the labour inspector may not exceed 2,000 PLN. Such a penalty is not severe, nor does it act as a deterrent in many cases. The labour inspector may also submit a request for a penalty to the court, in which case the court may impose a fine within the limits of the statutory threat.

Reports on the activities of the State Labour Inspection cover also their role in prosecution offences. As mentioned above, imposing a fine or referring a case to court are among many legal instruments available to the inspectors. Table 1 below illustrates the number of fines, educational measures (e.g. instruction) and motions to the criminal court in the last six years since the publication of the last report, as well as the average amount of the fine.

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<sup>11</sup> Act of 9 July 2003 on the employment of temporary workers (i.e. Journal of Laws 2023, item 1110).

<sup>12</sup> Act of 10 June 2003 on the posting of workers in the framework of the provision of services (i.e. Journal of Laws 2024, item 73).

**Table 1.** Sanctions applied for offences found 2018–2023

Sanction \ Year/number	2018		2019		2020		2021		2022		2023	
	Number	%	Number	%	Number	%	Number	%	Number	%	Number	%
<b>Fines in PLN</b>	14,805	47.3	16,192	54.4	9,723	51.3	12,047	53.4	15,793	62.1	17,197	65.4
<b>Educational measures</b>	13,903	44.4	12,369	41.6	8,636	45.1	9,699	43.0	8,469	33.4	8,043	30.6
<b>Motions to the court</b>	2,573	8.2	1,188	4.0	707	3.7	827	3.6	1,151	4.5	1,063	4.0

**Source:** State Labour Inspection reports of 2021, 2022 and 2023.

It is clear that, while inspectors are increasingly turning to fines, attention should be paid to the level of fines themselves. It is striking that the average amount of fines imposed by the labour inspectors has remained practically at the same level for many years, despite the increase in prices of goods and services, as well as in the minimum wage. While in 2018 it accounted for 57% of the minimum wage (PLN 2,100), in 2022 it is already only 40% (PLN 3,010). Currently (November 2024, minimum wage PLN 4,300), it is merely 28% of the minimum wage.

**Table 2.** Fines imposed by the labour inspectors and the courts 2018–2023

Fines \ Year		2018	2019	2020	2021	2022	2023
<b>Amount of fines imposed by labour inspectors</b>	<b>Total in millions of PLN</b>	17.9	19.3	11.7	14.4	19.7	22.1
	<b>Average fine in PLN</b>	1,200	1,200	1,200	1,200	1,200	1,300
<b>Amount of fines imposed by the courts</b>	<b>Total in millions of PLN</b>	4.6	2.1	1.0	1.7	2.5	2.3
	<b>Average fine in PLN</b>	2,300	2,200	2,200	2,400	2,600	2,600

**Source:** State Labour Inspection reports of 2021, 2022 and 2023.

Even more telling is the average amount of fines applied by the courts, given that in this case the maximum statutory threat is 30,000 PLN (or more, depending on the type of offence). The average fine was 109% of the minimum wage in 2018, and in 2023 this proportion already dropped to 60.4%, making it ever more lenient. The courts also refrain from imposing the fines at their upper limit. Thus,

even if the legislator raises fines for certain offences against employee rights, in practice such punishment turns to be far from being severe, nor is it deterrent<sup>13</sup>. Introducing new offences in a law implementing the Platform Directive is not very likely to influence this trend, especially that in the past years several new laws were enacted, some of them with very high upper limit of the fines<sup>14</sup>.

What is more, even in the cases where the conduct of individuals acting on behalf of employers constitutes a crime, they will not be subject to strict and inevitable punishment. The number of convictions for offenses under Chapter XXVIII of the Criminal Code (Crimes against the rights of persons performing paid work) amounted to 269 in the year 2020. In the majority of cases, the offenders were penalised with fines (182 cases, with only 25 of them exceeding 5,000 PLN). In 24 cases, a sentence of restricted liberty was imposed, and in 63 cases, imprisonment. Among the latter group, six cases resulted in an absolute prison sentence, while the rest received suspended imprisonment (in one-third of the cases for a period of six months)<sup>15</sup>. This means that even in most severe cases of infringement of labour law that fulfil the elements of crime, the fines were exceptionally lenient and application of other penalties – rare.

Assuming that the EU law should not be a *lex imperfecta*, and measures for breaches of the EU law are necessary, the national legislator should consider methods that have historically ensured the effectiveness of national law concerning similar institutions when establishing sanctions. The statistics presented above clearly indicate that criminal measures might be proportionate, but not necessarily effective, and certainly not dissuasive.

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<sup>13</sup> Penalties imposed for offences under laws other than the Labour Code account for only a small percentage. In the case of the act on minimum wage for work, it is 1.9%, the act on promotion of employment (establishing offences consisting, *inter alia*, in illegal employment, also of foreigners) 1.9% and the remaining 6% of all penalties for offences. State Labour Inspection, Report on the activities of the State Labour Inspection in 2022, p. 284.

<sup>14</sup> The Act of 10 January 2018 r. on limitation of trade on Sundays, Holidays and some other days (Journal of Laws 2023, item 158, as amended), art. 10 introduced an offence punishable with a fine of 1,000–100,000 PLN.

<sup>15</sup> Police, Crimes against the rights of persons engaged in gainful employment (218–221), <https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-9> (22.02.2024).



The Platform Directive also requires to create penalties which will be “proportionate to the nature, gravity and duration of the undertaking’s infringement and to the number of workers affected”. The existing system of fines for misdemeanours in Poland allows the Court (or the labour inspector) to take into account various circumstances of the perpetrator’s action, but none of the legal acts in the area of employment law explicitly indicates such factors as these quoted above, especially the number of workers affected, as an element of offenses or the circumstances to be considered by the enforcing body.

The Labour Inspection also recommends to consider raising the upper limit of fines for committing offenses and increasing the upper limit of fines imposed by labour inspectors, and to make the amount of those fines dependent on the individual parameters of the employer, such as turnover or employment status<sup>16</sup>. They also indicate that fines (including the upper limit of the maximum amount) for most employers are rather lenient and inadequate to the scale of the violations committed. This leads some employers to simply find it worthwhile to pay the fines and continue violating the regulations<sup>17</sup>. This shows that failure to align fines with these parameters may render nominal penalties ostensibly ineffective, thereby undermining the integrity of the system.

#### **4. Place of committing a crime**

There are also other challenges to the criminal law as far as employment platforms are concerned. One of them is the place where the crime is committed. According to Article 5 of the Criminal Code, Polish criminal law applies to the perpetrator who committed an offense on the territory of the Republic of Poland, as well as on a Polish vessel or aircraft. The place of the criminal offense is determined by Article 6 § 2 of the Criminal Code, which states that the forbidden act is committed where the perpetrator acted or failed to act as required, or where the effect constituting the element of the crime occurred or was intended to occur according to the perpetrator’s intent. Therefore,

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<sup>16</sup> State Labour Inspection, Report on the activities of the State Labour Inspection in 2023. Warsaw 2024, p. 137, <https://www.pip.gov.pl/o-nas/sprawozdania/sprawozdanie-z-dzialalnosci-pip-za-2023> (30.11.2024).

<sup>17</sup> Ibidem.



while defining the place of committing the criminal offense it is crucial to determine first whether it has a formal or material character, i.e. whether the effect constitutes an element of the crime. In the case of formal offenses, the place of the offense is where the perpetrator acted or failed to act. This would be the place where an unlawful decision was made by a person acting on behalf of the employer (e.g., the place where the document or decision was issued) and delivered to its recipient (as without this we only have an attempt). However, for offenses of a material nature, the place of the offense is considered both where the perpetrator acted or failed to act and where the effect occurred or was intended to occur according to the perpetrator's intent. This includes both the place of decision-making by a person acting on behalf of the employer and the place where the employee is present. In the case of employment platforms and automated decision-making systems the main difficulty is to establish whether the relevant place is the one where the effect takes place (e.g. the worker is deactivated, the amount of remuneration is paid), or perhaps the one where the automated system was designed or activated in the platform.

The principle of territoriality is formulated in Article 3 § 1 and Article 4 § 2 of the Offenses Code. However, for this category of offences there are no norms similar to Article 109 and Article 11 § 1 of the Criminal Code concerning the commission of offenses abroad, so the perpetrator who commits an offense abroad is not liable under Polish criminal law. This may create difficulties in the case of digital employment platforms that are not registered in Poland and their activities are mainly carried out online or from another country.

## 5. Criminal liability of AI

Another problem that can only be vaguely outlined due to the limited scope of this paper is the criminal liability of Artificial Intelligence, or liability for the actions of Artificial Intelligence<sup>18</sup>. This is important because a significant number of employment platforms use AI in algo-

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<sup>18</sup> At present there is no legal basis for criminal liability of AI itself in the Polish legal system. W. Filipkowski: Rozdział IX. *Prawo karne wobec sztucznej inteligencji*. In: *Prawo sztucznej inteligencji*. Eds. L. Lai, M. Swierczyński. CH Beck, Warszawa 2020; This issue has been the focus of criminal law and new technology law for many years. See e.g. G. Hallevey: *Liability for Crimes Involving Artificial Intelligence Systems*. SpringerLink, 2015.

rhythmic management systems, and decisions made through or with the help of this tool may violate employee rights, such as the right to rest, the right to safe and healthy working conditions or the right to fair remuneration.

A fundamental issue here is the degree of the autonomy of AI systems. The scales adopted in the literature range from systems used as a tool, but it is the human who makes all decisions or approves them before execution, through intermediate solutions, to those where the system operates fully autonomously without human involvement<sup>19</sup>. Articles 7 of the Platform Directive imposes limitations on the processing of personal data by means of automated monitoring systems or automated decision-making systems, and Article 10 requires that digital labour platforms ensure sufficient human resources for the effective oversight and evaluation of the impact of individual decisions taken or supported by automated monitoring systems or automated decision-making systems. This means that even if the AI system works independently, a human supervises it and can stop the execution of a decision, take over the control or even shut down the system. Such a situation is problematic from the perspective of the attribution of criminal liability, as the harm (violation of workers' rights) can occur without human involvement<sup>20</sup>. In such cases the theory of criminal law proposes that the creator of the system should be held responsible for its operation. In doing so, the basic problem may be the demonstration of a causal link between the creator's action and its effect, especially if the system continues to learn from the data provided by the user<sup>21</sup>.

Obviously, if the violation occurred due to an erroneous decision of the person who had the duty to verify and finally approve the decision made on the basis of AI actions, this person should bear criminal liability. It is also possible that a person acting on behalf of the employer, whose responsibilities included monitoring the system and identifying threats, will be held responsible. Such an individual may be considered a "guarantor" within the meaning of Article 2 of the

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<sup>19</sup> See R. Rejmaniak: *Autonomiczność systemów sztucznej inteligencji jako wyzwanie dla prawa karnego*. "Roczniki Nauk Prawnych" 2021, vol. XXXI, no. 3, pp. 98–99.

<sup>20</sup> R. Rejmaniak: *Autonomiczność systemów sztucznej inteligencji...*, p. 103.

<sup>21</sup> R. Rejmaniak: *Autonomiczność systemów sztucznej inteligencji...*, p. 104.

Criminal Code, i.e. a person who was obliged (usually by the law) to prevent the unlawful effect to happen. A guarantor is not liable for causing it, but for not preventing it. Therefore, "criminal liability for an effect crime committed by omission is justified when the failure to act by the guarantor could have prevented the consequence, with simultaneous recognition that refraining significantly facilitated the occurrence of this result"<sup>22</sup>. Certainly, the key factor here is establishing the objective possibility of preventing the consequence, i.e., whether the individual was able to identify the threat and could have averted it<sup>23</sup>.

## 6. Conclusion

The considerations presented above lead to the conclusion that criminal liability for the breach of provisions of the law implementing the platform Directive is a complex issue, given especially the specific features of employment platforms, such as the use of AI systems in the automated decision-making process and the fact that one enterprise may operate in many countries and only on the Polish territory. Efficiency of these provisions depends also on the level of co-ordination of criminal law throughout the EU. Another challenge is a very limited effectiveness of criminal provisions introduced in the laws implementing comparable directives. The review of the amounts of fines provided by the law, and the practice of the Labour Inspection and the criminal courts leads to a conclusion that the sanctions are neither effective, proportionate, nor dissuasive. Obviously, some of the existing crimes and offenses against worker's rights could be applied also for platform workers, e.g. these sanctioning the breach of H&S provisions or concluding civil contract instead of employment contract. Yet, to some extent, criminal provisions sanctioning the breach of the Platform Directive should deviate from the current practice and prompt a complex discussion on the system of criminal labour law in Poland.

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<sup>22</sup> D. Tokarczyk: *Obowiązek gwaranta w prawie karnym*. "RPEiS" 2014, vol. 74, no. 4, p. 211.

<sup>23</sup> R. Rejmaniak: *Autonomiczność systemów sztucznej inteligencji...*, p. 106.

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## **Sankcje karne za naruszenie przepisów wdrażających dyrektywę platformową?**

### **Streszczenie**

Artykuł omawia skuteczność wprowadzenia sankcji karnych za naruszenia przepisów wdrażających dyrektywę dotyczącą poprawy warunków pracy w pracy platformowej. Analiza obejmuje obowiązek ustanowienia „skutecznych, proporcjonalnych i odstraszających” kar, przewidziany w tej oraz innych dyrektywach prawa pracy, a także możliwość wyboru sankcji karnych w tym celu. Artykuł bada również dotychczasową praktykę stosowania sankcji karnych w Polsce, zwracając uwagę na takie kwestie, jak niskie grzywny i ograniczona siła odstraszająca. Omówione zostały także wyzwania związane z miejscem popełnienia przestępstwa oraz odpowiedzialnością karną sztucznej inteligencji w systemach zarządzania algorytmicznego. W konkluzji zasugerowano, że perspektywa wprowadzenia odpowiedzialności karnej za naruszenia dyrektywy platformowej stanowi złożony problem, wymagający kompleksowej dyskusji na temat systemu karnego prawa pracy w Polsce.

**Słowa kluczowe:** karne prawo pracy, egzekwowanie unijnego prawa pracy, dyrektywa platformowa, odpowiedzialność SI