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Successive Fixed-term Employment Relationships Concluded between the Same Employer and the Same Employee: Limitations Set by EU Law

Introduction

Fixed-term employment contracts or relationships are considered as a precarious form of work. Such an employment relationship means that the end of the relationship is established in advance by objective conditions such as: reaching a specific date, completing a specific task, or the occurrence of a specific event. Since the end of the employment relationship is stipulated in advance, the worker enjoys a lower level of protection compared to a worker in an employment relationship for an indefinite period. In particular, he/she is less protected by the law at the moment of termination of an employment relationship. According to national laws of many EU Member States, including the Czech Republic, an employment relationship terminates on reaching an established moment, no matter whether the worker concerned is on maternity leave, paternity leave, or parental leave, or is on paid sick leave. Moreover, he/she is not entitled to any severance pay, even if the reasons for termination (non-renewal) of an employment relationship are determined by the employer. For this reason, EU law provides several measures to prevent abuse of successive employment contracts or employment relationships for a fixed term between the same employer and the same worker. The purpose of this article is to analyze the EU legislation concerning the prevention of abuse of employment contracts or employment relationships for fixed and its implementation in Czech national law. It focuses on measures adopted to prevent the abuse of successive fixed-term employment relationships between the same employer and the same worker. Particular attention is paid to objective reasons justifying the renewal of such employment contracts or relationships and the interpretation of this concept in the case law of the CJEU.

1. Protection against abuse of successive employment relationships established for a fixed term in EU law

Protection of workers employed on the basis of employment contracts or employment relationships established for a fixed term in EU law is regulated by Council directive 1999/70/EC of 28 June 1999 concerning the Framework agreement on fixed-term work concluded by ETUC, UNICE, and CEEP (hereafter: Directive 1999/70). The purpose of this directive is to put into effect the Framework agreement on fixed-term work concluded on 18 March 1999 between social partners at the EU level.¹ It is apparent that the EU legislation concerning the protection of workers employed for a fixed term is a result of social dialog at the EU level. The Framework agreement on fixed-term work concluded between a cross-industrial organization of employers and workers is annexed to Directive 1999/70.

In the reasoning to the Framework agreement on fixed-term work, social partners recognized that contracts of an indefinite duration are, and will continue to be, a general form of employment relationship between employers and workers.² They also recognized that fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers. The Framework agreement on fixed-term work lays down minimum requirements for protection of workers employed for a fixed-term. Its purpose is to:

- a. improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination; and
- b. establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.³

A “fixed-term worker” is defined as a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event. The scope of application of this Framework agreement excludes employment contracts or employment relationships concluded between an employment agency and workers for the purpose of assigning workers to perform work for the user undertaking.⁴ The scope of application of the Framework agreement on fixed-term work includes workers in the public and private sectors, and no branch of activity is excluded from the scope of its application.

Measures to prevent abuse of successive employment contracts or employment relationships for a fixed term established between the same employer and the same

¹ Article 1 of the Directive 1999/70.

² However, the social partners declared that employment contracts of an indefinite duration contribute to the quality of life of the workers concerned and improve work performance.

³ Clause 1 of the Framework agreement on fixed-term work.

⁴ Protection of temporary workers (workers placed by an employment agency at the disposition of a user undertaking) is governed by the Directive of the European Parliament and of the Council 2008/104/EC of 19 November 2008 on temporary agency work.

worker are provided for by clause 5 of the Framework agreement on fixed-term work. For this purpose, Member States are obliged to adopt one or more of the following measures:

- a. objective reasons justifying renewal of such contracts or relationships;
- b. the maximum total duration of successive fixed-term employment contracts or relationships; and
- c. the number of renewals of such contracts or relationships.

It is apparent that the Framework agreement on fixed-term work confers on the Member States a wide margin of appreciation as regards its transposition into their national laws. The CJEU noted several times that “they have the choice of relying on one or more of the measures listed in Clause 5(1)(a) to (c) of the framework agreement, or on existing equivalent legal measures. In that way, Clause 5(1) of the framework agreement assigns to the Member States a general objective of preventing such abuse, while leaving to them the choice as to how to achieve it, provided that they do not compromise the objective or the practical effect of the framework agreement.”⁵ It is noteworthy that clause 5 of this Framework agreement shall not have direct effect in the Member States. This means that measures to prevent abuse of successive fixed-term employment contracts or relationships established between the same employer and the same worker laid down by the mentioned provision may not be cited before a national court or administrative authority.

The Framework agreement on fixed-term work does not provide any specific penalties where instances of misuse have, nonetheless, been established. EU law leaves it to the Member States to adopt measures to ensure the protection of workers against abuse of successive employment relationships for a fixed term established between the same employer and the same worker. In the opinion of the CJEU, it is up to national authorities to adopt measures that are proportionate and sufficiently effective and that act as a sufficient deterrent to ensure that the measures taken pursuant to the Framework agreement are fully effective.⁶

Moreover, it should be born in mind that EU law does not lay down a general obligation of the Member States to provide for the conversion (alteration) of fixed-term employment contracts into contracts of indefinite duration. The CJEU determines that “if the national legislation in the public sector only, prohibits a succession of fixed-term contracts from being converted into an employment contract of indefinite duration – to be regarded as compatible with the framework agreement on fixed-term work, the domestic law of the Member State concerned must include, in that sector, another

⁵ Judgement of the Court of Justice of the EU of 14 June 2021 in case *EV v Obras y Servicios Públicos SA, Acciona Agua SA* (C-550/19), paragraph 46, or judgement of the Court of Justice of the EU of 13 January 2022 in case *YT, ZU, AW, BY, CX, DZ, EA, FB, GC, IE, JF, KG, LH, MI, NY, PL, HD, OK v Ministero dell'Istruzione, dell'Università e della Ricerca – MIUR, Ufficio Scolastico Regionale per la Campania* (C-282/19), paragraph 79.

⁶ See: Judgement of the Court of Justice of the EU of 14 June 2021 in case *EV v Obras y Servicios Públicos SA, Acciona Agua SA* (C-550/19), paragraph 82.

effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts.”⁷

The Framework agreement on fixed-term work leaves it to Member States to determine under what conditions fixed-term employment contracts or employment relationships shall be regarded as successive and shall be deemed to be contracts or relationships of indefinite duration. However, according to the interpretation in the case law of the CJEU, the margin of appreciation of the Member States is not unlimited, because it cannot in any event go so far as to compromise the objective or the practical effect of the Framework agreement on fixed-term work.⁸ In the opinion of the CJEU, “a national provision under which only fixed-term contracts that are separated by a period of time shorter than or equal to 20 working days are regarded as successive are contrary to the aim of the Framework Agreement on Fixed-term Work which is to prevent abuse of successive employment contracts or employment relationships established between the same employer and the same worker.”⁹

It should be noted that there is very rich case law of the CJEU relating to prevention of abuse of successive employment contracts concluded for a fixed term.¹⁰ In some decisions, the CJEU takes a quite restrictive view on the renewal of employment contracts or employment relationships for a fixed term established between the same employer and the same worker. However, in other judgements, the CJEU declines to provide a clear interpretation and leaves it to national courts to evaluate the existence of abuse of successive fixed-term employment contracts or relationships established between the same contracting parties.¹¹

1.1. Objective reasons justifying renewal of fixed-term employment contracts or relationships according to the CJEU

As I have mentioned, one of the measures adopted in order to prevent abuse of successive employment contracts or employment relationships established for a fixed term between the same employer and the same worker is the introduction of the concept of objective reasons justifying the renewal of such contracts or relationships.¹²

⁷ Judgement of the Court of Justice of the EU of 7 March 2018 in case *Giuseppa Santoro v Comune di Valderice and Presidenza del Consiglio dei Ministri* (C-494/14), paragraph 34, or judgement of the Court of Justice of the EU of 7 April 2022 in case *PG v Ministero della Giustizia, CSM – Consiglio Superiore della Magistratura, Presidenza del Consiglio dei Ministri* (C-236/20), paragraph 62.

⁸ Judgement of the Court of Justice of the EU of 4 July 2006 in case *Konstantinos Adeneler and others v Ellinikos Organismos Galaktos (ELOG)* (C-212/04), paragraph 82.

⁹ *Ibid.*, paragraph 84.

¹⁰ For more detail, see: A.P. van der Mei, *Fixed-term Work; Recent Developments in the Case Law of the Court of Justice of the European Union*, “European Labour Law Journal” 2019, vol. 11, no. 1, pp. 66–89.

¹¹ For more detail, see: C. de la Porte, P. Emmenegger, *The Court of Justice of the European Union and Fixed-term Work: Putting a Brake on labour Market Dualization?*, “Journal of European Social Policy” 2017, vol. 27, no. 3, pp. 295–310.

¹² For more detail, see: J. Komendová, *Objektivní důvody ospravedlňující opakované uzavírání pracovních poměrů na dobu určitou [in:] Atypická zaměstnání – cesta k vyšší zaměstnanosti?*, eds. J. Pichrt, J. Morávek, Praha 2015, pp. 105–114.

However, the EU law does not provide any definition of such reasons. According to the settled case law of the CJEU, “the concept of ‘objective reasons’, within the meaning of clause 5(1)(a) of the Framework Agreement, must be understood as referring to precise and concrete circumstances characterizing a given activity, which are therefore capable in that particular context of justifying the use of successive fixed-term employment contracts.”¹³ The CJEU requires that “those circumstances may result, in particular, from the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social-policy objective of a Member State.”¹⁴ The CJEU determines that “a provision, which is of a purely formal nature and does not justify specifically the use of successive fixed-term employment contracts by the presence of objective factors relating to the particular features of the activity concerned and to the conditions under which it is carried out, carries a real risk that it will result in misuse of that type of contract and, accordingly, is not compatible with the objective of the Framework Agreement and the requirement that it have practical effect.”¹⁵ In addition, the CJEU noted several times that “the renewal of fixed-term employment contracts or relationships in order to cover needs which are, in fact, not temporary in nature but, on the contrary, fixed and permanent, is not justified under clause 5(1)(a) of the Framework Agreement.”¹⁶

The existence of objective reasons justifying renewal of successive employment contracts or employment relationships established for a fixed term was upheld by the CJEU in situations of a temporary need for replacement staff, provided for by national legislation (replacement of an employee on maternity leave or parental leave).¹⁷ The dispute in the main proceedings concerned the establishment of thirteen employment relationships for a fixed term within a period of eleven years between the same employer and the same worker. In its judgement in this case, the CJEU did not decide whether such a number of successive employment relationships concluded for a fixed term constituted abuse and left it to the national court to assess, in the circumstances of the case in the main proceedings, whether the employment of a worker over a period of eleven years on the basis of thirteen successive fixed-term employment contracts complies with clause 5(1) of the Framework agreement on fixed-term work.¹⁸

In the opinion of the CJEU, objective reasons justifying renewal of employment relationship for fixed term may consist in university research by virtue of the nature of

¹³ See: Judgement of the Court of Justice of the EU of 4 July 2006 in case *Konstantinos Adeneler and others v Ellinikos Organismos Galaktos (ELOG)* (C-212/04), paragraph 69.

¹⁴ *Ibid.*, paragraph 70.

¹⁵ *Ibid.*, paragraph 72.

¹⁶ Judgement of the Court of Justice of the EU of 23 April 2009 in joined cases *Kiriaki Angelidaki and others v Organismos Nomarchiakís Autodioikísís Rethymnis* (C-378/08), *Charikleia Giannoudi v Dimos Geropotamou* (C-379/07), and *Georgios Karabousanos and Sofoklis Michopoulos v Dimos Geropotamou* (C-380/07), paragraph 103.

¹⁷ See: Judgement of the Court of Justice of the EU of 26 January 2012 in case *Bianca Küçük v Land Nordrhein-Westfalen* (C 586/10), paragraph 58.

¹⁸ *Ibid.*, paragraph 55.

such work. "In that regard, the frequently limited nature of the duration of a researcher's tasks is linked to the type of services he or she must perform, which consist, *inter alia*, in the analysis of specific subjects, and in the carrying out of studies and research, the results of which are published at a later stage."¹⁹ Moreover, the CJEU upheld the existence of objective reasons justifying renewal of successive employment relationships for a fixed term with associate lecturers at universities who are specialists providing a professional service. In the opinion of the CJEU, such objective reasons consist in the need of an university "to entrust specialists with recognized competence who exercise a professional activity otherwise than in a university with the performance, on a part-time basis, of specific teaching tasks, so that those specialists can bring their knowledge and professional experience to the university, thus establishing a partnership between university teaching circles and professional circles."²⁰

2. Regulation of successive fixed-term employment relationships in the national law of the Czech Republic

In Czech national law, an employment relationship for a fixed term is governed by section 39 of Act no 262/2006 Coll. Labor Code, as amended (hereafter: the Labor Code). This Code prefers employment relationships of an indefinite period to employment relationships for a fixed term. Section 39(1) provides the legal presumption of an employment relationship for an indefinite period by stipulating that an employment relationship lasts for an indefinite period unless its duration has been agreed between an employer and an employee in writing.²¹ The duration of an employment relationship may only be agreed between an employer and an employee. An employment relationship for fixed term may not be established in law by a unilateral act.

2.1. Measures to prevent abuse of successive employment relationships agreed between the same contracting parties

With the objective of preventing abuse of employment relationships for a fixed term, section 39(2) of the Labor Code lays down rules for the maximum total duration of an employment relationship for a fixed term and the maximum number of their renewals between the same employer and the same employee.²² The period of a fixed-term

¹⁹ Judgement of the Court of Justice of the EU of 15 December 2022 in joined cases AQ, BO, CP (C40/20), AZ, BY, CX, DW, EV, FU, GJ (C173/20) v *Presidenza del Consiglio dei Ministri, Ministero dell'Istruzione, dell'Università e della Ricerca – MIUR, Università degli studi di Perugia*, paragraph 75.

²⁰ Judgement of the Court of Justice of the EU of 13 March 2014 in case *Antonio Márquez Samohano v Universitat Pompeu Fabra* (C-190/13), paragraph 48.

²¹ The written form of an agreement on the duration of an employment relationship entered into force on 1 October 2023.

²² For more detail, see: J. Komendová, *Implementace směrnice Rady 1999/70/ES o rámcové dohodě o pracovních poměrech na dobu určitou uzavřené mezi organizacemi UNICE CEEP a EKOS do právního*

employment relationship between the same contracting parties may not exceed three years and may be renewed no more than twice from the date of the first fixed-term employment relationship. Extension of the employment relationship for a definite period of time is also considered a renewal of the relationship. If three years have elapsed from the termination of the previous contract of employment for a definite period of time, the previous employment for a definite period of time between the same contracting parties shall not be taken into account. It is apparent that an employment relationship for a fixed term between the same contracting parties may last nine years in total (the first conclusion for maximum period of three years, and two renewals for three years). It is questionable, whether such regulation is really able to prevent abuse of employment contracts for a fixed term concluded between the same employer and the same employee.

However, the above-mentioned limitations for the maximum total duration of an employment relationship for a fixed term and the maximum number of renewals does not apply under stated conditions. First, it does not relate to an employment contract establishing a fixed-term employment relationship concluded between an employment agency and an employee in order to perform work for another employer (user undertaking). This corresponds to the minimum requirements arising from EU law, because as has been mentioned, the scope of application of the Framework agreement on fixed-term work includes only employment contracts or employment relationships concluded directly between an employer and a worker.

Second, the limitation of a maximum total duration of an employment contract for a fixed term and a maximum number of renewals of that contract relates to foreigners who are employed in the territory of the Czech Republic on the basis of a work permit. Provisions on measures to prevent the abuse of successive employment relationships for a fixed term shall not affect the provisions of special legal regulations, which assume that an employment relationship may last only for a period for which an employment permit, employee card, or blue card was issued.

Third, section 39(4) of the Labor Code enables an employer to conclude an agreement with a trade union organization or to issue an internal regulation, if there are serious operational reasons or reasons arising from the special nature of work attributable to the employer on the basis of which an employer cannot be fairly required to propose to the employee who is to perform this work the establishment of employment relationship for an indefinite period, provided that different approach is proportionate to these reasons. In this case, a written agreement between the trade union organization and an employer or an employer's internal regulation shall provide:

- a. a more detailed definition of these reasons;
- b. the rules of the employer's different approach to establishing and renewing a fixed-term employment relationship;

- c. the group of employees of the employer who will be affected by such a different approach; and
- d. the period for which the agreement is concluded.

A written agreement with a trade union organization may be replaced by an internal regulation only in the absence of a trade union organization in the employer's firm.

2.2. Alteration of an employment relationship for a fixed term to an employment relationship for an indefinite period

As I have mentioned, EU law does not provide for an alteration (conversion) of an employment relationship for a fixed-term to an employment relationship for an indefinite period. Measures stipulating such an alteration fall within the scope of application of Member States. Czech national law provides for two situations in which an employment relationship concluded for a fixed-term changes into an employment relationship for indefinite period. These are:

1. an employee continues to perform his/her work after the expiry of the agreed period; and
2. the duration of an employment relationship is agreed for a fixed term contrary to limitations on the maximum total duration of an employment relationship or on the number of renewals of that relationship.

The first situation, where an employment relationship concluded for a fixed term changes into an employment relationship for an indefinite period, is regulated in section 65 (2) of the Labor Code. This provision lays down a legal presumption that if an employee continues to perform his/her work after the expiry of an agreed period and the employer is aware of this, such an employment relationship shall be deemed to change into an employment relationship for an indefinite period.

The second situation is regulated as one of the measures to prevent abuse of employment relationships agreed for a fixed term between the same contracting parties. It is provided for by section 39(5) of the Labor Code. Where an employer agrees with an employee on the duration of an employment relationship contrary to the limitations on the maximum total duration of an employment relationship or on the maximum number of renewals, and where the employee notifies the employer in writing before the expiry of the agreed period that he/she insists on being employed further by the employer, this shall imply that this is an employment relationship for an indefinite period. A motion for the determination as to whether the conditions stated by section 39(2) of the Labor Code on the maximum total duration of an employment relationship and the maximum number of renewals of that relationship have been met, can be filed within the competent court within two months from the date when the employment relationship was expected to terminate on the expiry of the agreed period. However, the Labor Code does not provide for who shall file a motion for the determination as to whether the conditions stated by section 39(2) of the Labor Code on the maximum total duration of an employment relationship and the maximum number of renewals of that relationship have been fulfilled. Moreover, the Czech

courts of higher instance (the Supreme Court and the Constitutional Court) provide different interpretations as to whether it is the employee who shall file such a motion after notifying the employer in writing before the expiry of the agreed period that he/she insists on being further employed by the employer, or whether it is the employer who shall file such a motion after receiving written notification from the employee.²³

Conclusions

The purpose of EU law is, in particular, to prevent abuse of successive fixed-term employment contracts or employment relationships established between the same employer and the same worker. The rules concerning the employment relationship for a fixed term are left to national laws of the Member States. With the objective of achieving the mentioned purpose, the Member States are obliged to adopt one or more of measures given in clause 5 of the Framework agreement on fixed-term work that comprise objective reasons justifying reestablishment renewal of employment contracts or employment relationships for a fixed term, the maximum total duration of such employment contracts or employment relationships, and the number of times they may be renewed. The measure discussed most frequently with regard to preventing abuse of successive employment contracts or employment relationships for a fixed term consists in the notion of objective reasons justifying renewal of such contracts or relationships, because EU law does not define this concept and does not provide any examples of such reasons. The CJEU interprets the notion of objective reasons justifying renewal of employment contracts or employment relationships for a fixed term with respect to the purpose of the Framework agreement on fixed-term work. In its opinion, objective reasons may consist in: a temporary need to replace permanent staff (because of maternity and parental leave or paid sick leave), the nature of university research (the analysis of specific subjects, carrying out of studies and research), or the nature of specific teaching tasks at university performed by an external expert. However, the national provision of a purely formal nature stipulating the establishment of an employment contract for a fixed term without any specification, presenting objective factors relating to the particular features of the activity concerned and to the conditions under which it is carried out, is not in compliance with EU law. As I have mentioned throughout this article, EU law does not provide for specific sanctions that may be imposed on employers for abuse of successive employment contracts or employment relationships for a fixed term. According to the settled case law of the CJEU, national authorities shall adopt measures that are not only proportionate, but also sufficiently effective and act as a sufficient deterrent to ensure that the provisions adopted pursuant to the Framework agreement on fixed term work are fully effective. Moreover, EU law does not provide for the alteration (conversion) of an employment

²³ For more detail, see: J. Komendová, R. Zapletal, *Podmínky realizace zákonné přeměny pracovního poměru na dobu určitou ve světle judikatury*, "Právní rozhledy" 2021, roč. 29, č. 18, pp. 628–634.

relationship established for a fixed term to an employment relationship for an indefinite period.

Czech national law prefers employment relationships for an indefinite period to employment relationships for a fixed term. The employment relationship for a fixed term may only be established on the basis of a written agreement concluded between an employer and an employee. Employment relationships concluded for a fixed term between the same employer and the same employee are subject to limitations laid down by Council Directive 1999/70. The Czech legislator has implemented all three measures provided for in clause 5(1) of the Framework agreement on fixed-term work to prevent abuse of successive fixed-term employment relationships. The maximum total duration of an employment relationship for a fixed term may not exceed three years from the date of establishment of this employment relationship. The employment relationship for a fixed term concluded between the same contracting parties may be renewed twice. However, the limitations mentioned concerning the maximum total duration of an employment relationship for a fixed term and the number of renewals of the relationship between the same employer and the same employee are subject to certain exceptions. In particular, many employers use the possibility of concluding a written agreement with a trade union organization or of adopting internal regulations stipulating serious operational reasons or reasons arising from the special nature of work attributable to the employer, on the basis of which an employer cannot be fairly required to propose to the employee who is to perform this work the establishment of an employment relationship for an indefinite period, provided that this different approach is proportionate to the reasons given.

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Summary

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Successive Fixed-term Employment Relationships Concluded between the Same Employer and the Same Employee: Limitations Set by EU Law

Fixed-term employment relationships are considered as one of the flexible types of employment. However, successive employment relationships for a fixed term concluded between the same employer and the same employee should not be abused for the purpose of excluding the protection of an employee related to the termination of an employment relationship. This article discusses protection against the abuse of successive employment relationships concluded for fixed term. The first part analyzes minimum requirements for the protection of workers arising from EU law. Particular attention is paid to objective reasons justifying the renewal of successive employment relationships concluded for a fixed term between the same employer and the same worker, and the interpretation of this concept in the case law of the CJEU. The second part evaluates the legislation of the Czech Republic adopted with the purpose of implementing EU law on this issue.

Keywords: abuse, employment contract, fixed-term employment relationship, objective reasons, renewal.

Streszczenie

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Kolejne umowy o pracę na czas określony zawierane między tym samym pracodawcą a tym samym pracownikiem – ograniczenia określone w prawie UE

Umowy o pracę na czas określony są uważane za jeden z elastycznych typów zatrudnienia. Jednakże kolejne umowy o pracę na czas określony zawierane między tym samym pracodawcą a tym samym pracownikiem nie powinny być nadużywane w celu wyłączenia ochrony pracownika związanej z rozwiązaniem stosunku pracy. Niniejszy artykuł jest poświęcony ochronie przed nadużywaniem kolejnych umów o pracę na czas określony. W pierwszej części opracowania zostały przedstawione minimalne wymagania dotyczące ochrony pracowników wynikające z prawa UE. Szczególną uwagę poświęcono obiektywnym powodom uzasadniającym odnawianie kolejnych umów o pracę na czas określony zawieranych między tym samym pracodawcą a tym samym pracownikiem oraz interpretacji tego pojęcia w orzecznictwie TSUE. W drugiej części dokonano oceny ustawodawstwa Republiki Czeskiej, przyjętego w celu wdrożenia prawa unijnego dotyczącego tej kwestii.

Słowa kluczowe: nadużycie, umowa o pracę, umowa o pracę na czas określony, obiektywna przyczyna, odnowienie.