



## NEWEFIN Project

New Employment Forms and Challenges to Industrial Relations – Reference: VS/2018/0046  
Improving expertise in the field of industrial relations



COUNTRY REPORT: Poland

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## **Foreword**

This report was prepared for the New Employment Forms And Challenges To Industrial Relations – NEWEFIN project, financed by the European Commission (DG Employment, Social Affairs and Inclusion, Employment and Social Governance – Social Dialogue – Agreement no. VS/20018/0046).

The report is based on both primary and secondary data. The primary quantitative data were resourced from yearbooks and webpages of Statistics Poland (Główny Urząd Statystyczny; stat.gov.pl), State Labour Inspectorate (Państwowa Inspekcja Pracy; pip.gov.pl) and European data bases (EUROSTAT). The secondary data were collected within 2019-2020 and consist of a series of semi-structured expert interviews with the representatives of Polish trade unions, employer’s organizations, but also with state officials and academics. Accessible academic and expert articles, books and reports were analysed respectively.

The report takes into account the legislation valid as of June 2020 and presents selected regulations adopted within the period 2009-2020, important for the work and employment conditions in Poland, together with the appropriate and most up to date statistical data.

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## **I. Introduction**

### **I.1. Methodology of the report**

The purpose of this report on Poland is to form a part of the “*NEWEFIN - New Employment Forms and Challenges to Industrial Relations*” project, supported by the European Commission - Application ref. VP/2017/004/0028 *Improving expertise in the field of industrial relations* (hereafter as: *NEWEFIN*) by answering questions regarding new forms of employment as from 2007 up to today. This socio-legal study is to provide information and explanation on such new forms in the context of industrial relations.

The aim of the *NEWEFIN* project is to deliver an EU-wide comparative socio-legal-economic analysis of how the challenges to labour law, generated by certain trends in labour market flexibility and rising non-standard/new forms of employment, are addressed through innovative policy responses and social dialogue. The idea is to cover the issue of growing non-standard/new forms of employment and the risks that these phenomena create for traditional industrial relations structures. The *NEWEFIN* project addresses the following non-standard/new forms of employment: temporary employment, triangular employment relations, (dependent/bogus) self-employment, posted workers, companies/subcontracting, and new jobs (i.a. platform work) in the gig economy.

The research questions are:

- What is the impact of these trends on the level of labour and social protection of workers?
- What are the risks to the sustainability and affordability of the welfare system?
- What are the consequences for industrial relations and the social dialogue in general?

The methodology of research reflected in this paper included analysis of existing legal framework, analysis of the most important case law and of legal doctrine. However, the research has not been limited to legal research methods. Additionally semi-structured interviews were conducted, as well as analysis of economic and statistical data. Available reports on Polish labour market have been analyzed together with other socio-economic studies.

## I.2. General overview

Polish labour market can be characterized as a relatively peculiar due to a phenomenon of an employment based, in great share, on civil law contracts. Such contracts do not have the same legal nature as labour contracts, therefore the persons employed on civil law contracts can be treated rather as workers as they do not possess labour guarantees as (regular) employees – law does not guarantee barely any labour protection for workers, no leave, maximum working time, stability of employment, etc., are secured. The group of workers working on civil law contracts consist of those who concluded mandate contract and those who signed contract of specified contract. Within this group are bogus self-employed people, as they have only one contracting party.

By the end of 2019 there have been more than 16 million people employed in Poland<sup>1</sup>. The employment rate of persons 15-64 amounted at 68,2 % (males 75,3 % and females 61,1 %). Regular employees have a dominant share in the Polish labour market<sup>2</sup>. The number of paid employees hired on the basis of labour contracts was nearly 12 million<sup>3</sup>. Four million people were self-employed<sup>4</sup>. 102 thousands of persons was employed by temporary employment agency.

One million people is working on the basis of civil law contracts, however only 10% on the basis of the specified contract<sup>5</sup>. The number of workers not employed on a basis of a labour contract has significantly diminished, as ten years earlier more than 2,5 million was working in such a scheme.

More than a half of those working on labour contracts are full-time employees – nearly 9 million people (55% of the workforce)<sup>6</sup>, 11,6% of the workforce is temporarily employed. It must therefore be noted that full-time employment is predominant on the Polish labour market.

The civil law contracts are often labelled as “junk/rubbish” contracts. Under the pretext of the freedom of contracting (Article 353<sup>1</sup> of the Civil Code) the legal requirements as regards working conditions and remuneration are being circumvented in practice<sup>7</sup>. One may say that

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<sup>1</sup> Exactly 16 117,1 thousand (data as of 25.06.2020), *Annual macroeconomic indicators Part III Labour market*, Statistics Poland, available at <https://stat.gov.pl/en/poland-macroeconomic-indicators/>.

<sup>2</sup> *Ibidem*.

<sup>3</sup> Exactly 11 791 900, see: *ibidem*.

<sup>4</sup> This number includes also employers.

<sup>5</sup> Due to i.a. strict social security controls.

<sup>6</sup> Exactly 8 901 000, *Rocznik Statystyczny Pracy 2019 [Yearbook of Labor Statistics]*, op. cit., p. 118.

<sup>7</sup> J. Jończyk, *Dwie doktryny zatrudnienia*, „Państwo i Prawo”, 7/2012, pp. 36-50.

within last 30 years two concepts are in conflict as regards Polish labour law: a doctrine base on the principle of freedom of contracts and a doctrine of collectivity in labour law.

### **I.3. Historical background**

The country report within NEWEFIN project covers a period of over 10 years (from 2009 till 2020). However, in order to explain and to get understanding of the developments of atypical forms of employment in Poland, one has to go back briefly into the past, namely last 30 years. In 1989, as a result of global political changes, collapse of the communist system, including Polish totalitarian communist state, Poland regained its independence and self-control. Sign of liberalization of communist central planning system in the economy (“real socialism economy” based on the principle of full employment) were present already in late 80s (especially 1988 with a new *Wilczek* law on economic freedom). But it was only Professor Leszek Balcerowicz, as a vice-prime minister and minister of finance, who introduced a so-called shock therapy for the Polish economy.

Rapid introduction of capitalist economy in Poland made a huge impact obviously on the labour market. There were many negative consequences of rapid economic transformation affecting the employment relations<sup>8</sup>. The unemployment was raising rapidly due to changing industrial landscape, employment insecurity became a huge problem as a consequence of restructuring and privatisation of state-owned companies. Leszek Balcerowicz introduced new legal measures aimed at putting pressure on wages (including a special kind of tax called “popiwiek”). Those phenomenons made employees aware of the fact that the transformation no longer allows the state to guarantee full employment and social security. Actually most Polish governments continued this liberal economic and labour policy, with more or less shifts towards giving more protection for employees and with different level of support for the flexibilization of the labour market. One of the main aims of this flexibilization was always a need to increase labour productivity in Poland<sup>9</sup>, which has been much lower than medium productivity in the EU member states.

The policy of Polish labour marker flexibilization has been however enacted for the first time officialy with the “Programme for Promoting Productive Employment and Decreasing

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<sup>8</sup> A. Krzętowska, A. Jagodziński, *Rynek pracy w Polsce w okresie transformacji – szanse i zagrożenia*, „Zeszyty Naukowe PWSZ w Płocku. Nauki Ekonomiczne”, tom XXIII, Płock 2016, p. 9-18.

<sup>9</sup> See: K.W. Frieske (ed.), *Deregulacja polskiego rynku pracy*, Warsaw 2003.

Unemployment” in 1997. The same government (a coalition of a post-communist leftist party SLD – Alliance of Democratic Left and PSL – Polish Peasants Party) prepared major changes to the Labour Code in years 2003-2004 under the leadership of vice-prime minister and minister of labour and social policy Professor Jerzy Hausner, but they have never been approved. It is only the time of European economic crisis that forced the public authorities to enact legislation which purpose was to flexibilize employment relations and to ease employer’s responsiveness to negative market trends<sup>10</sup>.

So-called “anticrisis legislation” was passed in 2009 (coalition government of PO – Civic Platform and PSL)<sup>11</sup>. The Anti-crisis Law entered into force on 22 August 2009 and, as a provisional act, was due to expire at the end of 2011. It introduced provisions on working time arrangements and access to public aid. Most of the arrangements were addressed to all entrepreneurs, while some only to those in “temporary economic difficulties”. Certain conditions should have been met to be considered as such entrepreneur, in particular: decrease in sales by at least 25% experienced over three consecutive months after 1 July 2008, compared to the same three months between 1 July 2007 and 30 June 2008 (in October 2010 the threshold was lowered to 15%<sup>12</sup>).

The anti-crisis legislation was used as a kind of austerity measure aimed at mitigation of negative effects of a global financial crisis. Therefore, as Professor Łukasz Pisarczyk rightly puts it, “(...) for a long time augmenting flexibility of the labour market was perceived in Poland as an immanent feature of a free market economy, required especially to foster competitiveness and as an indispensable contribution of employees in creating new economic deal”<sup>13</sup>. One shall also underline that “relatively low labour costs and medium level of labour

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<sup>10</sup> See more extensively: M. Kuruś, M. Wróblewski, *Dialogue for Advancing Social Europe. Report for Poland*, DIADSE project, Warsaw 2016; see also: E. Verhulp, R. Knecht, N.E. Ramos Martin, H. Bennaars, S. Steinmet, E. Koot, A. Kerr, R. Mooney, M. Kuruś, M. Wróblewski, A. Kun, L. Neumann, A. de Becker, J.R. Mercader Uguina, F.J. Gomez Abelleira, P. Gimeno Diaz de Aauri, A.B. Munoz Ruiz, D. Perez del Prado, M. Abrantes, M.P. Lima, *Dialogue for Advancing Social Europe – the DIADSE project*, "Pecsi Munkajogi Közlemények", X evfolyam, I. szám, 2017 június, p. 7-57.

<sup>11</sup> The Act of 1st July 2009 (Journal of Laws No. 125, item 1035) - ustawa z dnia 1 lipca 2009 r. o łagodzeniu skutków kryzysu ekonomicznego dla pracowników i przedsiębiorców (Dz. U. Nr 25, poz. 1035). The Act introduced amendments to some other acts, i.e. Act of 26 July 1991 on personal income tax; Act of 15 February 1992 on corporate income tax; Act of 20 April 2004 on promoting employment and labour market institutions; Act of 13 July 2006 on protection of employees claims in the event of insolvency of their employer.

<sup>12</sup> The Act of 29<sup>th</sup> October 2010 (Journal of Laws No. 219, item 1445), which amended respectively the Anti-crisis Law.

<sup>13</sup> Ł. Pisarczyk, U. Torbus, *Prekarious work in Poland. How to Tackle the Abuse of Atypical Forms of Employment* [in:] Kenner J., Florczak I., Otto M. (eds.), *Prekarious Work. The Challenge for Labour Work Europe*, Edward Elgar Publishing Limited 2019, p. 134.

market flexibility become permanent features of the dependent market economy developed in the course of capitalist reforms in Poland whose comparative advantages are based on institutional complementarities between skilled, cheap, labour, the transfer of technological innovations within transnational enterprises, and the provision of capital via foreign direct investment (FDI)”<sup>14</sup>.

## II. Precarization and segmentation of employment in Poland

What has already been mentioned above, Poland has a specific labour market. Out of over 16 million working people not all of them is doing their job on a labour contract, over a million is working on the civil contract basis or they are self employed (in many cases this is a bogus self-employment) with a low and medium level remuneration. This amounts to specific labour segmentation – employees’ rights are guaranteed by the Labour Code<sup>15</sup> and other labour legislation, workers’ rights are limited to the rights of a private party’s civil rights as established in the Civil Code<sup>16</sup>, with no labour specific legal protection.

The notion of the dual labour market, or more broadly, labour market segmentation, assumes the division of the labour force into more or less privileged categories of workers due to a range of structural, institutional, organizational and cultural factors, as well as workers characteristics that go beyond their marketable skills. The *precarization of employment* is defined as the mechanisms which create, reproduce and possibly extend the disadvantaged segment(s) of labour market in terms of: low wages, limited or no social security entitlements, low job security and other labour conditions less favourable than in standard employment contracts regulated, e.g. limited access to trainings.

In Poland this process is related to several factors: 1. the rapid increase of unemployment (till 2016) and the emergence of job and employment insecurity as a consequence of the restructuring and privatization of state-owned enterprises and public services; 2. the variety of measures aimed at putting pressure on wages, security and flexibilizing employment, to maintain the Polish economy competitiveness and counteract job losses; 3. the weakness of industrial relations actors and institutions, including low union and employer organizations density, the emergence of very low unionised private sector and union

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<sup>14</sup> M. Maciejewska, A. Mrozowicki, *Poland: country report*, PRECARIR VS 2014/0534, February 2016, p. 7.

<sup>15</sup> Act of 26 June 1974, Journal of Laws of 2019, item 1040 as amended.

<sup>16</sup> Act of 23 April 1964, Journal of Laws 2019, item 1145 as amended.



focus on employees with stable, employment contracts, strongly decentralised collective bargaining; 4. the side effects of the systemic adjustment of the Polish labour law to the EU regulations and European employment strategies which focused on flexible employment; 4. economic crisis of 2008 which triggered both bottom-up adaptive practices of employers aimed at counteracting instability by using flexible job contracts and top-down anti-crisis measures including those focused on supporting temporary, flexible employment<sup>17</sup>.

The Anti-crisis Law, enacted in order to counteract the crisis, introduced flexibilization measures on working-time allowed to be used by all entrepreneurs:

- Extending working hours settlement period to 12 months
- Flexibility of daily working time
- Fixed-time employment contract, and unlimited number of such contracts between the same parties, allowed for up to 24 months.

The Anti-crisis Law also included measures on working-time available only to entrepreneurs in temporary economic difficulties. Two options were introduced:

- Working-time reduction
- Economic downtime.

The effects of Anti-crisis Law were taken into account when another act was drafted, with a similar basic aim, i.e. supporting employment in temporary economic difficulties. The Act of 11<sup>th</sup> October 2013 on specific measures aiming at work-places protection<sup>18</sup> (referred further: Act on Protection) allowed to use of previously applied measures of working time reduction and temporary halt in operations.

The anti-crisis legislative package was followed by changes in the Labour Code. The Act of 12<sup>th</sup> July 2013<sup>19</sup> introduced important changes to provisions on working-time to make them more flexible. Above all, temporary regulation from the Anti-crisis Law was introduced to the Labour Code, i.e. the possibility of extending working hours settlement period up to 12 months, provided that technological regime or mode of work organisation made such a change reasonable and all general principles concerning safety at work are guaranteed.

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<sup>17</sup> M. Maciejewska, A. Mrozowicki, *The rise of dual labour market: fighting precarious employment in the new member states through industrial relations (PRECARIR). Country report: Poland*, CELSI Research Report no. 13, April 2016, p. 4.

<sup>18</sup> Ustawa o szczególnych rozwiązaniach związanych z ochroną miejsc pracy, Journal of Laws 2013, item 1291.

<sup>19</sup> Journal of Laws 2013, item 896.

The Act of 25<sup>th</sup> July 2015<sup>20</sup> adopted provisions aiming at limitation of unjustified use of temporary contracts. After the law entered into force<sup>21</sup>, the maximum period of a temporary work agreement between the same parties is 33 months, and 3 months for a trial period<sup>22</sup>. According to law, no more than 3 contracts may be concluded as temporary work agreements – as the fourth is treated as open-ended contract<sup>23</sup>. The aim of these new provisions was to limit abuse of atypical forms of employment, through reducing the asymmetric conditions for entering and solving permanent contracts and other types of contracts.

This amendment to the Labour Code also introduced uniformity with regard to the notice periods for indefinite (permanent) and fixed-term contracts<sup>24</sup>. The notice period for contracts concluded for a defined period of time has been aligned with the notice period for contracts concluded for an indefinite period, and depends on the aggregate period of service for a given employer. The parties to each permitted type of employment contract (i.e. trial period, fixed term or indefinite term) are able to terminate the contract with notice. It is not necessary any longer for a fixed-term employment contract to include express provisions enabling the parties to terminate the contract pre-expiry, as this right is now expressly provided for in the legislation. The right to terminate an employment contract no longer depends on the contract's duration. The length of notice period depends on the duration of employment with a given employer and not on the type of contract, as it was before. The minimum notice periods for fixed-term and indefinite employment contracts are then as follows: two weeks for service of less than six months, one month for service of six months or more, and three months for service of three years or more. There is no obligation to indicate the reason for termination in fixed-term contracts, thus it is still a more flexible form of an employment contract than an open-

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<sup>20</sup> Journal of Laws 2015, item 1220.

<sup>21</sup> 22<sup>nd</sup> February 2016.

<sup>22</sup> Violation of these provisions committed by an employer constitutes an offence, for which the labour inspector may impose a fine.

<sup>23</sup> Exemptions from this rule apply to fixed-term employment contracts established: 1. for the purpose of replacing an employee during his or her justified absence from work, 2. in order to perform casual or seasonal work, 3. to perform work for the time of one's term of office, or 4. where the employer indicates objective reasons for lying on his side.

<sup>24</sup> See the judgement of the Court of Justice of 13<sup>th</sup> March 2014, Case C-38/13, according to which the non-discrimination rule in the Fixed-Term Work Directive also applies to notice periods – encouraged legislative changes which allow the employees to be treated alike in comparable situations. Preliminary ruling concerned the interpretation of clauses 1 and 4 of the Framework Agreement on fixed-term work concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (Fixed-Term Work Directive, OJ 1999 L 175, p. 43). The request has been made in proceedings between a nursing assistant and her former employer, concerning the termination of a fixed-term contract.

ended one. Certainly anti-crisis legislation has opened doors to further legislative deregulation and flexibilization of the labour market in Poland. Different forms of non-labour type employment spread even more widely, which enhance the need of the transformation of the labour law system<sup>25</sup>. Such an attempt was done between 2016-2018, however the codification committee which prepared a draft of a new Labour Code did not succeed and for mainly political reasons, including the rejection of the collective part of the reform package, no major legislative labour reforms have been taken up to today.

The anti-crisis law, and accompanying and following legislation, was the first to put flexibilisation of the labour market as an official state policy. However one must remember the dualization of the labour market – into a market regulated by Labour Code and - in practice - a labour market regulated by economic freedom and civil contracts. Therefore one may notice that already existing liberal civil law labour market was accompanied by much more flexible regulated market under the rules of Labour Code and other labour regulations.

Obvious abuse of the flexibilization of the labour market (especially civil law contracts and fixed-term labour contracts) led to the segmentation of the labour market. The essence of segmentation is as follows: from one side we have a number of people working on full-time labour contracts, with all guarantees and privileges foreseen by the Labour Code and other respective laws, while from the other there are millions of people, doing similar jobs, but on “flexible” contracts (as described above), without legal labour protection to lesser or greater extent. The doctrine<sup>26</sup> use to call the first group as “insiders” and the second as “outsiders”, which well reflects the socio-legal reality.

**Atypical forms of labour contracts are one of six most important factors of low jobs quality in Poland in the long run.** According to *Job Quality Index* (JQI) only three EU countries (Greece, Romania and Spain) have lower jobs quality than Poland<sup>27</sup>. The quality of forms of employment and job security are measured in JQI by the share of workers who had temporary jobs because they could not find permanent work; and the share of part-time workers who could not find full-time jobs. Amongst them civil-law contracts and work contracts for a

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<sup>25</sup> See especially works by Professor Arkadiusz Sobczyk: A. Sobczyk, A. Sobczyk, *Wolność pracy i władza*, Warszawa 2015; A. Sobczyk, *Państwo zakładów pracy*, Warszawa 2017; A. Sobczyk, *Podmiotowość pracy i towarowość usług*, Kraków 2018.

<sup>26</sup> Ł. Pisarczyk, U. Torbus, [in:] Kenner J., Florczak I., Otto M. (eds.), *Precarious Work. The Challenge for Labour Work Europe*, Edward Elgar Publishing Limited 2019, p. 134-135.

<sup>27</sup> A. Piasna, *'Bad jobs' recovery? European Job Quality Index 20005-2015*, European Trade Union Institute, Working Paper 2017.06, Brussels 2017.

definite period are seen as a main prerequisite for such a situation<sup>28</sup>. Therefore, only non-standard work that was reported as involuntary is included as an indication of poor job quality. Moreover, a subjective dimension is added by including a measure of the self-perceived chances of losing one’s job in the next six months.

Ł. Pisarczyk rightly notes that “the performance of dependent work outside employment relationship is a distinctive feature of employment in most former Central European communist countries”<sup>29</sup>. However it seems that this feature is particularly visible and present in Poland.

Therefore it is worth noticing that in order to counteract unemployment in a particularly vulnerable group (young people) and at the same act to promote labour employment some reform have been implemented last years. Statistics confirms that entry into the labour market for young people has been always quite challenging, although – as mentioned above – within last years a significant positive trend might be observed:

**Table 1: Annual macroeconomic indicators Part III Labour market, Statistics Poland, data as of 25.06.2020**



<sup>28</sup> See more in: J. Sawulski, *Pokolenie '89. Młodzi o polskiej transformacji*, Warszawa 2019, chapter „(Nie)zwyczajna praca”, pp. 59-118.

<sup>29</sup> Ł. Pisarczyk, U. Torbus, *op.cit.*, [in:] Kenner J., Florczak I., Otto M. (eds.), *Precarious Work. The Challenge for Labour Work Europe*, Edward Elgar Publishing Limited 2019, p. 134.

In 2019 new regulations were adopted with an aim of professional activation of people up to the age of 26, i.e. one year older than those who, as a rule, complete their education and take up permanent employment. Pursuant to the act of 4 July 2019 the Personal Income Tax Act was amended to introduce a new „PIT Zero” relief, for the income from the most popular forms of employment organized by an employer – i.e. employment relationship, out work, cooperative employment relationship and mandate contracts – to an amount not exceeding PLN 85 528 in the tax year. In order to facilitate specific types of work, income from business activity, graduate internships, contracts for specified work or a mandate contract concluded with another natural person do not benefit from this exemption.

### **III. Labour market situation**

There are some well-established challenges that require state intervention, as i.a. an ageing society<sup>30</sup>, a clear mismatch of skills to the rapidly changing labour market, occurring dualism and three times higher unemployment among young people in comparison to the overall unemployment rate. Besides that, one of the biggest structural problem of Polish labour market is low labour participation, far below 75% EU target<sup>31</sup>. Although, in the analyzed period, since 2008, a trend of continued labour participation increase could have been observed. There are some factors to justify the process<sup>32</sup>, which – on the other hand – accelerated, for a time, unemployment rate statistics (below):

1. the disability pension system was tightened up, which resulted in a gradually declining number of beneficiaries;
2. abolition of military conscription in 2008 allowed the youngest persons (15-24) to be more active;
3. returning from other EU countries of some economic migrants, and other factors.

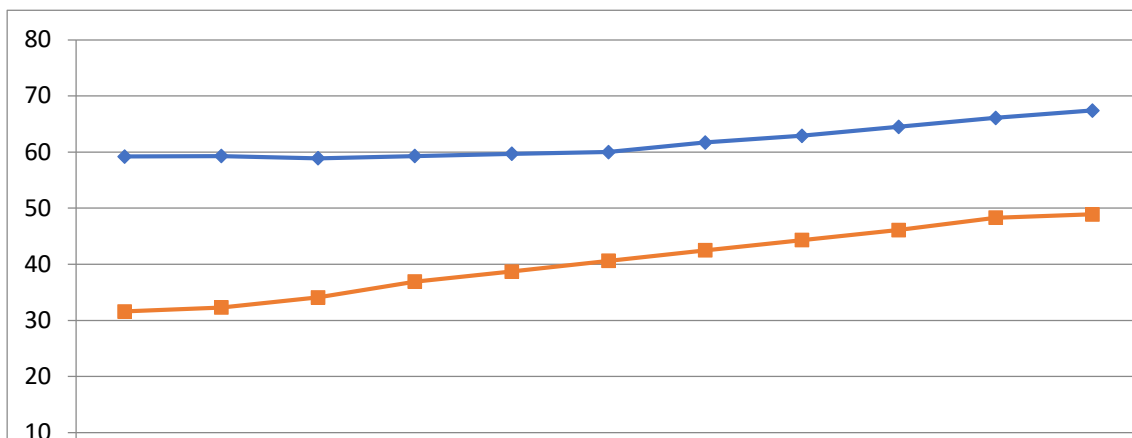
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<sup>30</sup> The age structure of the population is changing. The median age of the population in 2008 amounted to 37.5 years, comparing to 2000 when it was 35.4. In 2017 the median age in Poland crossed 40 years (40,2). Over the past several years, systematic decrease in the percentage of population in pre-working age (0-17 years) to was observed. At the same time there has been a weakening growth rate of the working age population and further increase in the number of people in retirement age.

<sup>31</sup> One of the EUROPE 2020 target for the EU for 2020 75% of the 20-64 year-olds to be employed.

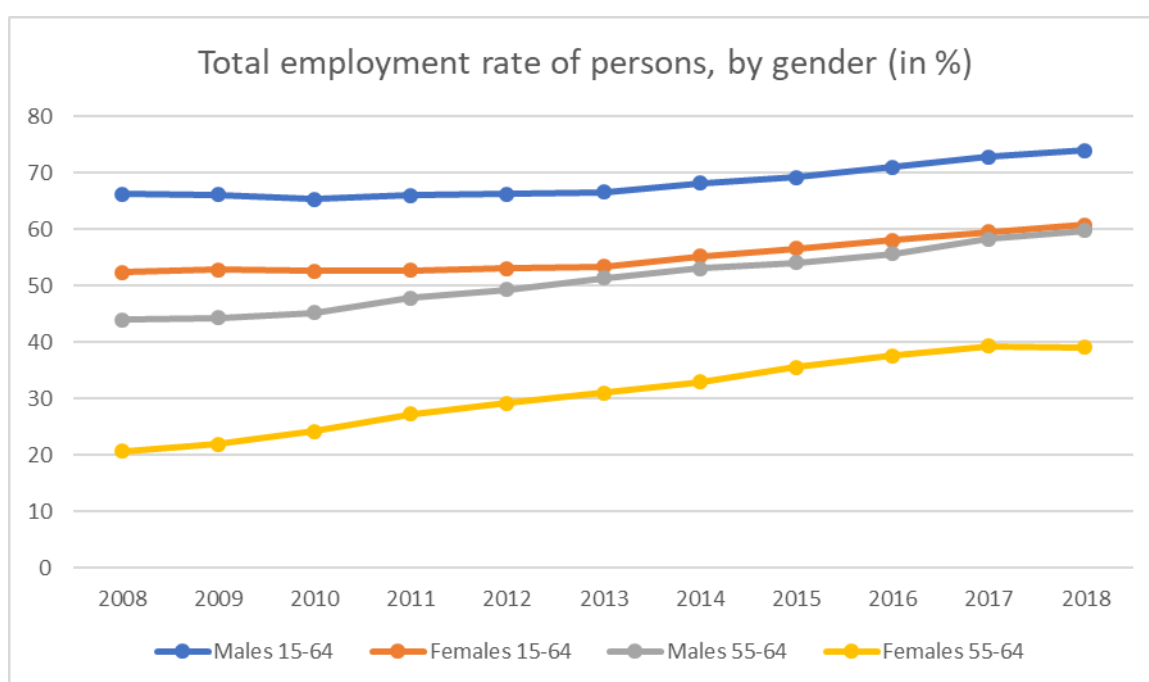
<sup>32</sup> See: P. Gajewski, *Labour Market Measures in Poland 2008-2013: the Crisis and Beyond*. Geneva: ILO, 2015, p. 8.

**Table 2: Total employment rate of persons by Labour Force Survey (by age, in %)**



Source of data: Statistics Poland (GUS), *Annual macroeconomic indicators. Part III, Labour Market*, updated: 11.04.2019.

**Table 3: Total employment rate of persons by Labour Force Survey (by gender, in %)**



Source of data: Statistics Poland (GUS), *Annual macroeconomic indicators. Part III, Labour Market*, updated: 11.04.2019

**Table 4: Employed persons in the national economy**

Year	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
In thous.	14 037.2	13 782.3	14 106.9	14 232.9	14 172.0	14 244.3	14 563.4	14 829.8	15 293.3	15 710.8	15 949.7
Previous year=100%	101.9	98.2	102.4	100.9	99.6	100.5	102.2	101.8	103.1	102.7	101.5

Source of data: Statistics Poland (GUS), *Annual macroeconomic indicators. Part III, Labour Market* and *Rocznik Statystyczny Pracy 2019 [Yearbook of Labor Statistics]*, updated: 30.06.2020.

Limited impact of the global recession on the Polish economy, and therefore on the Polish labour market in 2008-2010, could be clearly distinguished from those registered in the past (especially in 2001-2002) fluctuations in the level of employment and unemployment, when the economic downturn with a similar depth resulted in a much stronger labour market adjustments. During the crisis of 2008-2009 a significant increase in the number of people losing their jobs was not observed, a rise in unemployment resulted mainly from the reduction in demand for new workers, which affected mostly young people who should enter into the labour market. It is difficult to ascertain whether the drop in unemployment rate, especially from 2016, is a consequence of effective public policies or rather a reflection of a stable and prosperous economy. One has to take into account massive Polish migration to other EU countries, especially to Great Britain. The jobs they have left in Poland were filled in by employees from Ukraine. As for now GUS assesses that around 1.2 mln Ukrainian employees work in Poland.

**Table 5: Unemployment**

Year		2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Total registered unemployed persons (end of the year)	in thous.	1 473.8	1 892.7	1 954.7	1 982.7	2 136.8	2 157.9	1 825.2	1 563.3	1335.2	1 081.7	968.9
males	in thous.	640.4	926.3	939.9	922.5	1 037.6	1 058.4	885.5	747.2	622.9	486.2	426.3
females	in thous.	833.4	966.4	1 014.8	1 060.2	1 099.2	1 099.5	939.6	816.1	712.2	595.5	542.6
Total registered unemployment rate (end of the year)	in %	9.5	12.1	12.4	12.5	13.4	13.4	11.5	9.7	8.2	6.6	5.8
Total unemployment rate by LFS (last survey in the year)	in %	6.7	8.5	9.3	9.7	10.1	9.8	8.1	6.9	5.5	4.5	3.8
males	in %	6.0	8.2	8.9	8.8	9.3	9.1	7.6	6.8	5.4	4.4	3.6
females	in %	7.6	8.8	9.9	10.8	11.1	10.5	8.7	7.1	5.7	4.6	4.0
young persons (15-24)	in %	17.1	22.3	23.6	26.4	27.4	27.3	22.0	20.3	15.9	14.8	12.4
older persons (50+)	in %	5.3	6.3	7.3	7.1	7.1	6.9	5.9	4.7	3.9	3.0	2.8
Unemployment rate by LFS in urban areas (last survey in the year)	in %	6.9	8.6	9.5	9.7	10.2	9.8	7.8	6.5	5.1	4.0	3.5



males	in %	6.3	8.4	9.3	9.1	9.6	9.4	7.6	6.5	5.0	3.7	3.5
females	in %	7.6	8.9	9.7	10.4	10.9	10.3	8.1	6.5	5.3	4.4	3.5
Unemployment rate by LFS in rural areas (last survey in the year)	in %	6.4	8.2	9.0	9.8	10.0	9.7	8.5	7.6	6.1	5.2	4.2
males	in %	5.5	7.9	8.1	8.5	9.0	8.8	7.6	7.2	6.0	5.3	3.9
females	in %	7.7	8.7	10.2	11.6	11.3	10.9	9.8	8.2	6.3	5.0	4.8
Total long-term unemployment rate by LFS	in %	2.4	2.5	3.0	3.6	4.1	4.4	3.8	2.9	2.2	1.5	1.0
males	in %	2.0	2.2	2.9	3.3	3.7	4.0	3.6	2.9	2.2	1.6	1.0
females	in %	2.8	2.9	3.2	4.0	4.6	4.8	4.1	3.0	2.1	1.5	1.0

Source of data: Statistics Poland (GUS), *Annual macroeconomic indicators. Part III, Labour Market*, updated: 11.04.2019.

Minimum remuneration in 2019 was set up as 2250 PLN (around 500 EUR), medium remuneration in enterprise sector reaches 5000 PLN (4950,94 in the first quarter of 2019<sup>33</sup>; around 1200 EUR).

#### **IV. Non-labour employment and labour market flexibility**

The increasing tendency for more flexible employment in Poland has been replacing full-time, open-ended employment with various forms of different form of non-labour employment, atypical forms of employment and non-labour contracts (especially mandate contracts of a civil law nature). The report follows most common understanding of **non-standard employment (atypical forms of employment) as forms of employment other than**

<sup>33</sup> GUS communication as of 17 April 2019.

**full-time work with a labour contract for an indefinite period of time**<sup>34</sup>. Because of the peculiarity of relative popularity of civil law contract as a legal basis for employment the report assumes that the best notion is the notion of non-labour employment, in comparison to labour employment relying on labour legislation. People working on non-labour contracts will be consequently referred to as workers, those working on the basis of labour legislation – as employees.

**Non-labour employment** (non-standard employment, atypical forms of employment) – that is all forms of employment that do not benefit from the same degree of protection of an employee, especially against contract termination, as permanent employees with open-ended contracts which are regulated by the Labour Code and other labour protective legislation<sup>35</sup> – has become a **common feature of the Polish labour market**. The share of temporary contracts (including civil-law contracts) was on an upward trend since the early 2000s, and since 2006 it has been **fluctuating between 25% and 28%**, which is among the highest rates in EU countries. Fixed-term contracts are common way to ensure more flexible employment. Some companies apply them with the high rate of turnover as a way to loosen up labour costs. In recent years one may nevertheless observe a slight decrease in number of temporary employees, which now is ca. 20 % of total number of employees<sup>36</sup>.

The partial abuse of self-employment and contracts based on civil law, which are not governed by labour legislation, appear to be a cause of labour market segmentation and in-work poverty<sup>37</sup> – as they are predominantly offered to low-skilled workers or people from specific groups (especially young people) – which also reaches high numbers compared to other EU Member States.

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<sup>34</sup> Similar definition is accepted in the doctrine of Polish labour law, see: J. Męcina, *Social Dialogue in Face of Changes on the Labour Market in Poland. From Crisis to Breakthrough*, Budapest-Warsaw 2017, pp. 234, 238-239.

<sup>35</sup> Temporary employment: 1. fixed-term contracts and temporary-work-agency (TWA) employment, 2. casual contracts and 3. contracts for services regulated by commercial law but entailing conditions of work that are similar to those of employees (dependent self-employed workers, DSEWs). Definition as of *OECD Employment Outlook 2014*, see: [http://www.oecd-ilibrary.org/employment/oecd-employment-outlook-2015\\_empl\\_outlook-2015-en;jsessionid=6lag6c3oii481.x-oecd-live-02](http://www.oecd-ilibrary.org/employment/oecd-employment-outlook-2015_empl_outlook-2015-en;jsessionid=6lag6c3oii481.x-oecd-live-02).

<sup>36</sup> Employees with limited duration contracts accounts for ca. 14.0 % of all employees in the EU28, *Temporary employees as a percentage of the total number of employees*, EUROSTAT <https://ec.europa.eu/eurostat/web/lfs/data/database>

<sup>37</sup> See: EUROSTAT data: *People at risk of poverty and social exclusion* and *In-work poverty*, <http://ec.europa.eu/eurostat/web/income-and-living-conditions/data/database>.

One shall underline here the prevalent impact of the Supreme Court (SC) jurisprudence who actually shaped the concept of the civil law employment<sup>38</sup>. According to A. Sobczyk it was the SC who meet new challenges of the free competitive market, not the legal science<sup>39</sup>. One of the first relevant decisions is the SC judgment of 9 December 1999 (I PKN 432/99), where the SC claimed that “employment does not have to have labor character, labour can be fulfilled also on the basis of civil law contracts”. Such an attitude has been, later on, harshly criticized by some scholars as being based on an assumption that employment does not necessarily demand any social and subjective aspects and may be treated as an economic good, very similar to a commercial services. The concept approved by the SC has not covered at all the personal aspect of work (work is done by a human being with his/her physical, intellectual and emotional effort), including the dignity of protecting the employee and legitimizing the very foundation of the labor law. The purpose of the contract of mandate is to realize mandate holder’s need, while the purpose of the labor contract is to employ a person. What is emphasized by A. Sobczyk is that one can be either self-employed or be an employee. Contract of mandate can only hide the “work” behind the “mandate” (service).

Further SC judgments, elaborating the judgment of 9 December 1999, did not remedy the flaws of earlier jurisprudence. In the judgment of 7 October 2004 (II PK 29/04) the SC stressed that the Polish Constitution does not prohibit a judicial assessment and settlement that the work can be realized within the labor contract, but also on the basis of civil law contracts. Neither such differentiation violates the equal treatment secured by the Constitution. It is therefore worth noting that neither ILO recommendations<sup>40</sup> nor European Parliament resolutions<sup>41</sup> do not recognize a civil law contracts as an intermediary “third” form of employment. A. Sobczyk notes a peculiar alienation of a labor law doctrine from social values<sup>42</sup>.

Judicial legalization (recognition) of civil law contracts, as a effective regulation of occasional employment, has in practice played an important role in freeing labor law modernization. In the opinion of profound scholars this should invoke an urgent modification of

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<sup>38</sup> See more: M. Gersdorf, *Prawo zatrudnienia*, Warszawa 2013; A. Sobczyk, *Podmiotowość pracy i towarowość usług*, Kraków 2018, pp. 87-100.

<sup>39</sup> A. Sobczyk, *Podmiotowość pracy i towarowość usług*, Kraków 2018, pp. 87-88.

<sup>40</sup> ILO recommendation No. 198, point 8.

<sup>41</sup> EP resolution of 11 July 2007 (2007/2023(INI)).

<sup>42</sup> A. Sobczyk, *Podmiotowość pracy i towarowość usług*, Kraków 2018, p. 96.

the Labor Code, leading to simplification of some forms of labor employment<sup>43</sup>. From the above analysis one shall conclude that the Supreme Court jurisprudence enforced the application of the employment based on civil law contracts (so call “junk contracts”) in Poland, which was followed by both legal doctrine and legislation. In the opinion of A. Sobczyk, “in consequence, instead of meet a real problem, which is an inflation of so-called self-employment, we generate our own Polish pathology”<sup>44</sup>.

Non-regular, temporary jobs provide a useful buffer of adjustment and flexibility for employers in case of uncertain or fixed-term activities. However their massive application in Poland goes even further beyond these purposes. The employers tend to use such forms just because they are easy and cheap. Above all, they are generally less costly for an employer, which is especially attractive for those who do not need to build high-skilled, sustainable company human resources. It should be noted that sometimes this form of employment is a genuine, voluntary choice of a person. Quite often, however, it is forced and offered as the only accessible solution<sup>45</sup>. The data presented in reports prove that the amount of people choosing such a form of employment – for the reason they were not capable of finding other job – is rising through the last decade<sup>46</sup>. However one may say that is actually not a choice for them, rather a forced necessity. The main reason declared by those working on civil-law contracts was inability to find labour-employment. Such a conclusion is visible also in the interviews with academia experts, government and trade union representatives. Less significant is the workers’ taxation motif, which is relevant only as regards specified work contracts – in the case of such contracts 50% of the revenue (up 85 thousand PLN limit) can be deducted. However, as it was mentioned above, specified work contract currently amount to 10% of all civil law employment contracts in Poland.

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<sup>43</sup> A. Sobczyk, *Podmiotowość pracy i towarowość usług*, Kraków 2018, p. 100.

<sup>44</sup> *Ibidem*, p. 100.

<sup>45</sup> See: *Sytuacja zawodowa Polaków [Professional situation of Poles]*, CBOS: Warszawa 2015, nr 147/2015. According to this research on representative group of people almost half of the active population is employed under a labour-law contract of indefinite duration (49%), one-fifth (19%) has a fixed-term contract, one in eight (12%) conducts own business, and every eleventh is working (9%) is own farm. One tenth (10%) is employed under civil-law contracts. 5% are working without a formal contract. The majority (81%) is satisfied with the type of the contract, although it declines depending on the form of the contract: open-ended contract 94%, self-employment – 89%, farmers – 74%, fixed-term labour-law contracts – 70%, and only 53% are pleased to work on the basis of civil-law contract. On the other hand, 59% of the last group would not decide to change the type of agreement which would result in wage lowering because of additional public dues, one third however would rather have labour-law contract.

<sup>46</sup> M. Maciejewska, A. Mrozowicki, *Poland: country report*, PRECARIR VS 2014/0534, February 2016.

The current labour market situation regarding the use of atypical forms of employment did not change much during last decade. Performance of any work in atypical form of employment is being declared by 1.087 million people, which accounts for 14% of total number of working people. For 700 000 thousand people this form was their primary employment, 80,2% of them declared that working on civil-law contracts was not their choice; for self-employed – this concerned 51.3% people. In total, primary employment on civil-law contracts or self-employment without the possibility to choose another form of employment, accounted for 3.3% of all working people<sup>47</sup>.

Having acknowledged the labour market trend, the Chief Labour Inspectorate (PIP) took up special measures. Within the Inspectorate control duties have been found to be of the least concern for companies employing 250 or more people, while the biggest concern for small(micro) and medium-sized companies when trying to conclude civil-law contracts. This problem was most often confirmed in construction companies (48.9% audited contracts), engaged in the industrial processing (40.4%), in trade and repairs (32.3%), and transport and storage (30.4%)<sup>48</sup>.

## **V. Non-labour (atypical) forms of employment in Poland – legal framework**

### **V.1. Introductory remarks**

In Poland employment is not coherently regulated by legislation. Generally speaking **two forms of employment are present** (even if one may have doubts as regarding legality and fairness of such a dichotomy):

- **labour employment**
- **non-labour employment.**

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<sup>47</sup> See: GUS, *Pracujący w nietypowych formach zatrudnienia. Notatka informacyjna [Working in atypical forms of employment. Information note]*, 27.01.2016. Module research - based on a sample, lower scores obtained compared to the results based on administrative data.

<sup>48</sup> It must be noticed that findings made during the inspections are not survey based on a random sample. See: Państwowa Inspekcja Pracy (Chief Labour Inspectorate), *Ocena skali zjawiska zawierania umów cywilnoprawnych i zatrudnienie w szarej strefie [An assessment of a scale of phenomenon of civil law contracts and employment in a grey zone]*, 2016.

In the case of the Polish labour market, a full-time labour employment based on the contract on indefinite duration (open-ended contract) should be considered as the typical form of employment and as the dominant form of undertaking working activity.

Labour employment has a legal basis in the Labour Code<sup>49</sup> and other labour legislation, while a legal basis for non-labour employment is the Civil Code and other civil law legislation, providing for freedom of contracting. Labour employment is defined by Article 22 para. 1 of the Labour Code naming its specific characteristics (denoting the dependent nature of work performed under the contract) of “work of a specified type for the benefit of an employer and under their supervision, in a place and at the times specified by the employer; the employer undertakes to employ the employee in return for remuneration”. A feature common for all non-labour forms of employment is that relevant provisions of the Labour Code are not applicable to such forms of work. Non-labour employment is usually realized on the basis of typical contracts:

- contract of mandate/freelance contract<sup>50</sup> (which is most common),
- service contract (to which legislation regarding freelance contract is applied),
- specific-work/task contract (umowa o dzieło)<sup>51</sup>,
- temporary agency work<sup>52</sup>.

The differentiation described above could be compared to a British law concept of *an employee* and *a worker*<sup>53</sup>. An employee in Great Britain is a person working on a basis of contract of employment, while a worker is also a person working, but not being employed. Even if this concept is not fully reflected in the Polish legal system (at least verbally), for the reason of concision and clarity the report is using a term “employee” for those being in labour employment and a term “worker” for those being in non-labour employment.

The main reason the civil law contracts as a basis of (non-labour) employment has become so frequent on the Polish labour market is quite obvious – employers want to lower costs of the work force. Although the non-labour forms of employment are less beneficial to workers, the national legislator does not prohibit the use of non-labour atypical forms of

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<sup>49</sup> Article 25 of the Labour Code.

<sup>50</sup> Article 764 of the Civil Code.

<sup>51</sup> Article 627 of the Civil Code.

<sup>52</sup> Law of 9 July 2003 on employing temporary workers (Journal of Laws 2019 item 1563).

<sup>53</sup> See: A. Sobczyk, *Podmiotowość pracy i towarowość usług*, Kraków 2018, s. 155-163.

employment. Legal regulations limiting the use of such forms may be applied in principle only in order to combat the circumvention of the labour law. When applying civil contracts the employer is not bound by the labour legislation regarding i.a. minimum wage, paid leave and other laws protecting employees. E.g. the Labour Code provides that the third temporary contract between the same parties becomes *ex lege* an open-ended employment contract (all three contracts with a 3-month probationary period cannot exceed 36 months)<sup>54</sup>. As regards civil law contract it does not matter how many contracts between the same parties have been applied – there is no legal mechanism stabilizing a legal relationship between employer and a worker working on the basis of a civil law contract. It is also much easier to terminate a civil contract. However according to Article 304 of the Labour Code the employer is obliged to secure safe working condition not only to employees, but also to workers. The civil contract is more profitable (both for employees and employers) as regards social-security contributions which shall be paid to the state (to the State-Security Office – ZUS/Zakład Ubezpieczeń Społecznych) and in the case of a specified work contract also because of the tax legislation. However one shall take into account the fact that lower contributions for employees mean lower pension in the future (when reaching retirement age and other conditions). This is true especially for women, due to usually shorter contribution periods.

The content and requirements regarding labour employment are regulated by the Article 22 § 1 of the Labour Code. The Code requires to fulfill all the requirements as listed below:

- work of a specified type has to be done under the supervision and guidance of the employer,
- work is realized in a place and at the times specified by the employer (she/has must be at employer's disposal therein),
- the employer undertakes to employ the employee in return for remuneration,
- work has to be done by the employee personally,
- work is done regularly,
- work is realized at the risk of an employer.

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<sup>54</sup> Article 25<sup>1</sup> § 3 of the Labour Code.

All these legal elements constitute an employment relationship, regardless of a name of concluded contract<sup>55</sup>. The employment relationship not meeting all these requirements provided for by law will not be treated as a labour employment. On the contrary, a contract formally not named as a labour contract, however fulfilling all these legal requirements, shall be treated as a labour contract, thus securing all legal guarantees for an employee. However only the court can ultimately decide the contract shall be treated as a labour contract. The Labour Code (Article 22 § 1(2)) expressly prohibits replacing any labour employment contract by other civil-law contract under conditions specific to an employment relationship. Article 22 § 1 (1) of the Labour Code provides that “Employment under the conditions specified in § 1 is considered employment on the basis of an employment relationship, regardless of the name of the contract concluded between the parties”. It is then illegal to conclude any civil-law contract in conditions typical for a labour employment relationship. The doctrine recommends that the indicated ban shall also be applied to self-employment<sup>56</sup>. It seems that this is the only provision of the Labour Code that can be regarded as indirect prohibition directed to employers, the purpose of which is to stop forcing current employees to switch to non-labour forms of employment or imposing such forms on job candidates against their will.

One may question however the efficiency of such a legal regulation, regarding the data on non-labour employment and the level of satisfaction of the workers. In practice great number of civil contracts (especially mandate/freelance contracts) fulfill all the requirements set above in the Labour Code. So they should be treated as a labour employment, protected by the Labour Code and other labour legislation. **However in reality it is very difficult for workers to be recognized as (labour) employees.** They may approach the employer to change the legal nature of the contract, they may also ask for state help – Labour Inspectorate, which is entitled to recommend transformation of the civil law contract into a labour employment. The recommendation, if not followed, may end up in the court (labour inspectors can bring a claim on the basis of Article 631 of the Civil Procedure Code<sup>57</sup>). The lawmaker introduced a sanction for infringing the above-indicated prohibition. Such conduct is considered as an offence against the rights of an employee. Under the Article 281 point 1 of the Labour Code, an employer or persons acting on his behalf, concluding a civil-law contract with the constituent elements

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<sup>55</sup> See: judgement of the Supreme Court of 7 April 1999 (I PKN 642/98).

<sup>56</sup> Jaśkowski & Maniewska, *Komentarz aktualizowany do ustawy z dnia 26 czerwca 1974 r. Kodeks pracy. Ustawy towarzyszące z orzecznictwem. Europejskie prawo z orzecznictwem*, Warszawa 2016.

<sup>57</sup> Law of 17 November 1964, Journal of Law 2019 item 1460 as amended.



defined in the Article 22 § 1 of the Labour Code shall be liable to a fine of between 1 and 30 thousands PLN.

At the end of the day a worker may ask the court on the basis of Article 189 of the Code of Civil Procedure to declare that the legal relationship between the employer and the employee is actually of such a nature that it should be treated as a labour employment. The burden of proof is on the side of the claimant – there is no legal nor factual presumption that the employment is based on the labour legislation. Obviously the workers are much more willing to make such claims when the finish work for the employer. But even in these circumstances they often refrain to initiate judicial proceedings because the Social-Security Office will eventually approach the employee to pay all social-security overdues<sup>58</sup>. Therefore application of possible legal sanctions and remedies depends i.a. on employee's courage, awareness of his rights and profitability calculation either on proper knowledge and professionalism of the competent authorities<sup>59</sup>.

## **V.2. Non-labour employment/civil law employment – mandate contracts and specified work contracts**

These types of civil law contract is the most frequently applied in non-labour employment in Poland. The reason for popularity of such contracts are diversified. In addition to what has been already explained one shall note that the Law of 22 July 2016 on the amendment of law on minimum salary and certain other laws<sup>60</sup> introduced a minimum hourly rate for all working on the basis of freelance contracts or service contracts (to which regulations on freelance contracts apply). The law entered into force on 1st January 2017. It provides for some exceptions, however it covered most of the labour market regulated by such type of contracts. The contract parties are obliged to confirm the amount of hours of work and a register of hours is obligatory as well. The documentation must be kept by an employer for 3 years. The law also secures the hourly rate, i.a. by prohibiting employee's waiver. The labour inspection is entitled to control fulfillment of these requirements. The powers of the Chief

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<sup>58</sup> The Supreme Court confirmed legality of a legal action by Polish Public Television (TVP) against an employee who worked on a specific-task contract (civil law contract) and initiated legal action against it, claiming she worked as an (labour) employee. She had to pay over 17.000 EUR of social-security overdues as a result of a court judgment recognizing her work as a labour employment. See: <http://wyborcza.pl/7,155287,24025204,sad-najwyzszy-pracownicy-na-smieciowkach-nie-zwroca-pracodawcom.html> (access: 30.06.2020).

<sup>59</sup> J. Gołaś (2017), *Non-employee atypical forms of employment in Poland: sociological and legal perspectives*. "Ekonomia i Prawo" [Economics and Law], 16(3), pp. 301-312.

<sup>60</sup> Journal of Laws item 1265.

Labour Inspectorate were increased in 2017 so that it has responsibility for inspecting whether minimum hourly rates are observed within civil law contracts. The law provides also for an annual valorisation mechanism. Therefore from 1<sup>st</sup> January 2019 the hourly rate was 14,70 PLN (little more than 3 EUR) and was slightly higher (by 1 PLN) than in 2018.

In practice civil law contracts circumvent the labour legislation, by substitution of labour employment with non-labour employment (see chapters above). The purpose of the law of 22 July 2016 was to secure minimum remuneration for all working people, no matter what is the legal basis of the contract (be it civil law regulations, be it the Labour Code). However equalizing the minimum salary for both types of contracts the 2016 legislation has frozen the dualisation the Polish labour market<sup>61</sup>. In practice the number of mandate/freelance contracts has not declined.

### **V.3. Civil law contracts – conclusion and assesment**

It has actually been popular daily “Gazeta Wyborcza” [*Electoral Newspaper*] who began a public campaign showing negative aspects of junk contracts<sup>62</sup>. Wyborcza enlisted five main problem: 1) while part of the (labour) salary is exempted from enforced collection, there is no such protection for those working on the civil law contracts, 2) people working on civil contracts may initiate litigation before civil courts, not labour courts, while the costs of civil proceedings are much higher, 3) people working on civil contracts should be eligible to be a member of trade unions, 4) State Labour Inspection should have wide competences to control employer’s obligation as regards people working on civil law contracts, not only as regards those who work on labour contracts, 5) people working on civil law contracts shall be entitled to the same benefits regarding work-related accidents as those working on labour contracts.

One may notice that within last six years only one of the above-mentioned problems has been solved. Persons working on the basis of the civil law contracts for many years have been prohibited by law from joining trade unions. Only those being labour employed could have been members of a trade union. This situation has just recently changed. Polish Coalition of Trade Unions (OPZZ – *Ogólnopolskie Porozumienie Związków Zawodowych*) challenged

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<sup>61</sup> Interview with Professor Arkadiusz Sobczyk confirms it (interview dated on 24<sup>th</sup> April 2019).

<sup>62</sup> See the article “Dlaczego umowy śmieciowe są złe. Pięc grzechów głównych według Gazety Wyborczej” [*Why junk contracts are bad? Five deadly sins according to Gazeta Wyborcza*] of 13 January 2014, accessible online: [https://wyborcza.pl/1,155287,15262523,Dlaczego\\_umowy\\_smieciowe\\_sa\\_zle\\_Piec\\_grzechow\\_glownych.html](https://wyborcza.pl/1,155287,15262523,Dlaczego_umowy_smieciowe_sa_zle_Piec_grzechow_glownych.html) (date of access: 30.06.2020).

constitutionality of the law of 23<sup>rd</sup> May 1991 on trade unions<sup>63</sup> before the Constitutional Court (case K 1/13). OPZZ claimed that the law limiting freedom of establishing and joining trade unions as regards persons in non-labour employment violates Article 59 of the Constitution and ILO Convention No 87 – constitutional and international guarantees of freedom of association in trade unions. The second aspect of the case concerned the issue of accessibility of collective agreement for non-labour employed. OPZZ argued that constitutional and international guarantees do not differentiate between persons being in labour employment and non-labour employment. In the judgment of 2<sup>nd</sup> June 2015 the Constitutional Court shared the opinion of the claimant<sup>64</sup>. The Court declared that the Constitution protects all employed, what so ever is the legal basis of their employment. The same constitutional protection was applied by the Court to collective rights. According to the Court the constitutional notion of the employed is autonomous and cannot be limited by the provisions of the Labour Code, to which trade union law is referring to. The Court however underlined it has not assessed constitutionality of the Labour Code and the definition of the employee enshrined in its Article 2. It is only 1st January 2019 when the legislator finally executed the Court's judgment<sup>65</sup>. On this day amendments to the law on trade unions came into force, which granted the right to establish and join trade unions and to conclude collective agreement to workers engaged under civil law contracts and self-employed. The amendments were a direct consequence of a 2015 Constitutional Court ruling. As a result of the amendments, collective bargaining rights are now extended to all employed, as long as they do not employ others to perform the work and have rights and interests that can be represented and defended by a trade union.

Up to today in many cases where the essence of work task perform would argue for a labour-type employment people are hired on the basis of the civil law contracts. Such situations cannot be treated otherwise than a clear violation of law and an abuse. The characteristics of the work, fulfilled under direct supervision of the employer and other important element of the labour employment, should be decisive, not the employer's need to flexibility, lower costs and other problems resulting in no labour protection for many workers. It must be underlined here that all the interviewees called for sanation of the current state of affairs in Poland in that area. Such an opinion is also a majority opinion in the Polish legal doctrine.

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<sup>63</sup> Law of 23 May 1991 (Journal of Laws 2019 item 263 as amended).

<sup>64</sup> Judgment of 2 June 2015 in case K 1/13 (Journal of Laws item 791).

<sup>65</sup> Law of 5 July 2018 (Journal of Laws item 1608).

## **VI. Non-standard (atypical) labour employment contracts**

Non-standard labour employment contracts are recognized and regulated by the Labour Code and other labour law legislation.

### **VI.1. Flexible forms of working time management – labour employment**

Within the sphere of labour employment one may indicate flexible forms of working time management which differentiate them from the standard employment. One may indicate in particular<sup>66</sup>:

- flexible working time
- task working time
- telework

### **VI.2. Temporary employment**

Between 2002 and 2015, temporary employment in Poland more than doubled. Poland therefore for many years has been the country with the highest rate of temporary employment contracts in the EU – in 2016 the peak reached 28% of all labour contracts. However in 2018 it dropped to 24,3%, while Spain reached 26,9% (the EU average – around 14%)<sup>67</sup>. Therefore for the whole reported period the number of temporary contracts (labour contract concluded for a definite time) in Poland remained quite high. Employers in Poland preferred to employ temporary rather than permanent employees because of lower dismissal costs, tax wedges, and wages associated with temporary contracts.

One of the biggest problems as regards temporary contracts was (and still is) a relevant gap in job quality in comparison with permanent contracts. The three key dimensions of this gap were found to be the quality of salary, job security, and the quality of working timing. The extensive research done on temporary contracts in Poland prove much less profitable conditions connected with temporary jobs, which affect negatively the overall quality of temporary work<sup>68</sup>. Research authors' notice that although the gaps between temporary and permanent workers

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<sup>66</sup> See e.g.: E. Bąk, *Nietypowe formy zatrudnienia na rynku pracy*, Warszawa 2009, p. 11.

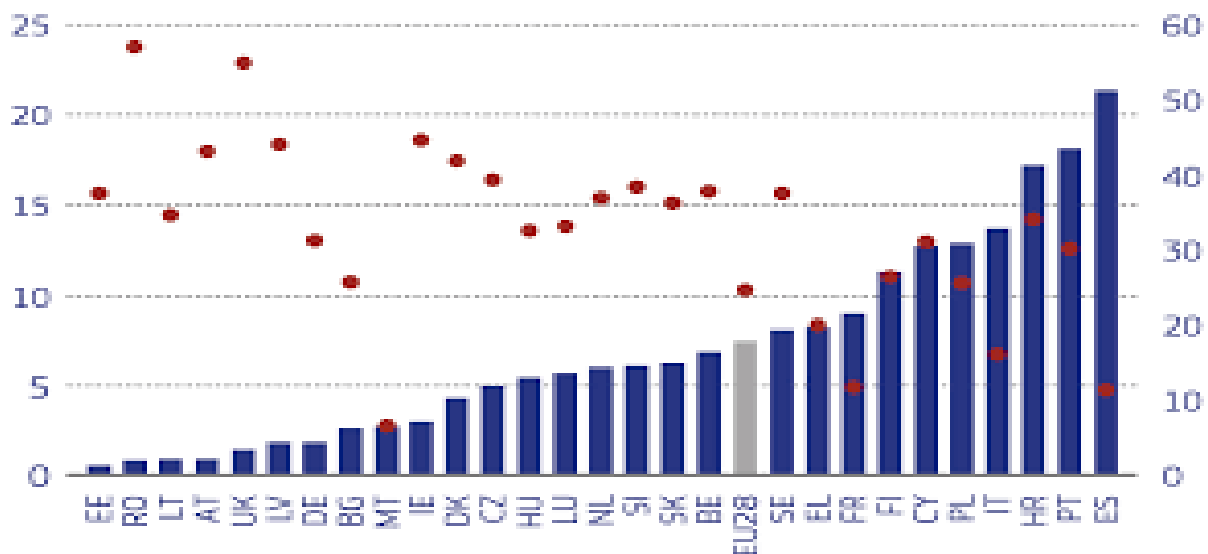
<sup>67</sup> Eurostat: <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20190524-1?inheritRedirect=true>

<sup>68</sup> P. Lewandowski, M. Góra, M. Lis, *Temporary Employment Boom in Poland – A Job Quality vs. Quantity Trade-Off?*, “IBS Working Paper” 04/2017, June 2017.

generally narrowed over the study period, they remained substantial. However during the reporting periods the only serious legislative reform restrained to establishing maximum number (3) and maximum time limit (33 months) of the labour temporary contracts. One shall underline, which is noticed also by trade unions and scholars, that such a period is still very long (nearly 3 years) and is not helpful in challenging the above-mentioned structural gap.

Poland, as it was explained above, took some steps in order to stabilize employment regarding repetition of temporary contracts (after 3 contracts the next one is automatically, *ex lege*, transformed into indefinite period contract). However the problem of involuntary temporary employment remains a serious challenge for the Polish labour market. While there is 14,2% share of employees on temporary contracts in the European Union, the number for Poland are higher – over 30% employees work on temporary contracts not because they want, but because they have to.

**Table 5: Involuntary temporary employees as a share of total employees (left) and transition rate towards permanent jobs (right)**



Source of data: *Joint Employment Report 2020*. As adopted by EPSCO Council on 8 April 2020, European Union, updated: 11.04.2020<sup>69</sup>

<sup>69</sup> Accessible online: <https://ec.europa.eu/social/main.jsp?catId=738&langId=pl&pubId=8270> (date of access: 11.04.2020).

One shall agree that “the sharp increase in share of temporary employment was not just an outcome of political strategies, legal changes and economic ideologies of successive governments. It was also a result of spontaneous adaptive practices of employers who resorted to atypical contracts to cope with unstable economic context and frequently changing legal regulations, as well as trade union actions which for a long time predominantly focused on their existing membership rather than the expansion to non-unionised, private companies. In short, the emergence and reproduction of the dual labour market with continuously expanding, precarious peripheries exercising competitive pressure on core workforce was an important and not fully unexpected consequence of both top-down and bottom-up practices of capitalist transformation in Poland”<sup>70</sup>.

The measures promoting (as described above) the application of temporary contracts were implemented, however did not bring much change. Between 2009 and 2014 there was only 1,9% of such contracts (for the age category 15-64 years), however it rose significantly for the group of youngest employees (15-24 years) by 8,4% between years 2008 and 2014<sup>71</sup>. The same trend is visible up to 2020.

## **VII. Brand new forms of employment**

Some totally new forms of employment emerged during last years in Poland. The company practice evolved much, not due to the legislation, but rather as a result of a business calculations. Different forms of job-sharing have not been thus specifically regulated. The practice has been adopted from other European Union countries and has been applied using the existing general labour law provisions. Very often standard part-time contracts are used, and the implicit job sharing is agreed upon informally by the employer and the employees. Such an approach is aimed at workers who cannot or who do not want to take up full-time employment. For example, due to care obligations, engagement in education or training, or limited ability to work. The employer and the employees jointly agree on the extent of each worker’s contribution, work schedules, substitution mechanisms and so on. However one may take notice that in majority of such situations it may not have been the choice or will of the employee, but

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<sup>70</sup> M. Maciejewska, A. Mrozowicki, *Poland: country report*, PRECARIR VS 2014/0534, February 2016, p. 7.

<sup>71</sup> M. Maciejewska, A. Mrozowicki, *Poland: country report*, PRECARIR VS 2014/0534, February 2016, p. 11.

rather a necessity arising from the fact those employees would not be otherwise employed at all<sup>72</sup>.

In practice two models on the labour market can be observed:

- two or more part-time positions are created from the start at the request of the employees or the employer;
- a previous full-time job is transformed into a shared position to be jointly filled by two or more employees.

The latter model is functioning most often with complementary skilled employees executing all work together. The EUROFUND report on new forms of employment presents an example from Kraków: “Job sharing in Kraków Regional Labour Office, Poland was formalised by assignment of the scope of duties in writing. Normally, a job description sets out the range of tasks, duties, responsibilities, permissions and authorisations ascribed to a position, while the scope of duties document ascribed tasks to a particular person, giving the full name of the employee concerned, the name of their line manager and the tasks they should perform. The line manager based the scope of duties on the general job description, tailoring it to the experience and capabilities of the job sharing employees. In this case, the employees had to perform one major task together but divided subtasks and were able to consult each other on progress and completion of work because some of their hours overlapped”<sup>73</sup>.

New emerging forms of employment are the result i.a. of a rapid economic development of Poland within last 30 years, development and implementation of new technologies, especially in digital sphere, Internet and mobile apps. New forms of employment bring about pros and cons. One of the biggest challenges is that those new forms are very often abused and lead to a breach of basic workers’ rights. New challenges and rising competitiveness of globalizing markets push employers to engage new, less costly and more flexible organization of work from one side, from the other some of the employees are also looking for more flexible jobs, allowing i.a. combining platform or gig work with a temporary contract. It happens that new forms put workers in worse position than traditional employees, as regards different legal guarantees and protection, however they also may facilitate job creation, economic activation of the unemployed and economically inactive, as well as improvement of working conditions. These processes have transformed the traditional employment relationship, and traditional industrial

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<sup>72</sup> See: M. Maciejewska, A. Mrozowicki, *Poland: country report*, PRECARIR VS 2014/0534, February 2016.

<sup>73</sup> *New forms of employment*, EUROFUND (2015), Publications Office of the European Union, Luxembourg, p. 34.

relations are being replaced by new solutions – unconventional patterns and forms of work or irregular provision of work.

According to typology proposed by Eurofund<sup>74</sup> one may indicate several elements which differ new forms of employment from a traditional labour contract:

- relationships between employers and workers are different from the established one-to-one employment relationship (e.g. crowd-work, platform jobs),
- provision of work on a discontinuous basis or for very limited periods of time rather than on a continuous or regular basis,
- networking and cooperation arrangements between those providing work (the self-employed or working on the civil contract), in particular freelancers, going beyond the usual types of relationships along the supply chain or the traditional conduct of project work<sup>75</sup>.

Amongst different kinds of brand new forms of employment only few have been seen and applied in Poland:

1. job (employee) sharing,
2. crowd-work or platform work (UBER, Hojo Clean, TakeTask),
3. interim management (in a form of a managerial contract regarded as a civil law contract),
4. casual work (also in form of home-based work, employment under a civil law contract),
5. temporary agency work (employee leasing),
6. portfolio work (performed either by the self-employed or under civil law contracts),
7. mobile work (performed either by the self-employed or under civil law contracts; therefore cannot be treated as a tele-work which is regulated by the Labour Code).

The report explains and refers to some of them, which seem the most important and problematic.

### **VII.1. Employee and job sharing**

*Employee sharing* (sometimes called as an *employees leasing*) can be explained as a specific form of employment in which a group of employers (bind by capital, but not

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<sup>74</sup> Eurofound, *Overview of new forms of employment – 2018 update*, Publications Office of the European Union, Luxembourg 2018.

<sup>75</sup> See: D. Owczarek (ed.), *New forms of Work in Poland*, Institute of Public Affairs, Warsaw 2018, p. 11 and further.



necessarily) hires workers jointly and is jointly responsible for them<sup>76</sup>. There no explicit regulation in the labour legislation as regards such a mechanism, thus employers operate within the existing legal frameworks and freedom of contracting.

A report by D. Owczarek and others enlists a strategic employee sharing, where a group of employers forms a network hiring one or several workers to be sent on work assignments with the employers' companies. The second option is an *ad hoc employee sharing*, when an employee is leased by a company of origin to another company (e.g. to organize and execute a project, task) and after finalizing returns. This form is less stable and may be less bearable for an employee, however work on a specific project may be in his/her interest as well.

These mechanisms has much in common with TAW, however employees rotate between employers much more frequently. Such a work may not be very comfortable for an employee since he is not bound by company's culture, he may be treated as an outsider which surely enhances work alienation. Access to employment benefits, such as interesting trainings or convenient holidays planning was also raised as a problematic issue in the interviews. However for employers this flexible model seems to have only positive aspects, employees can be hired in times of high workload in a company. In the time of business slowdown they leave the workplace. It helps employers to survive low activity periods without substantial costs, it may also easy the cooperation in geographically close regions. Such an attitude may however invoke an impression of treating employees as a good or service, not as a dignified human workforce, especially if lended employee earn less than in company of origin (particularly when Polish company leases an employee to other EU country). It is a much wider problem, which became a reference point for an academic analysis<sup>77</sup>. There also other visible problems, which can have negative effect on employee's situation – some of the employers' rights are being used in practice, including in cases of leasing an employee between companies from Poland and other countries. Therefore both employers organizations, which was expressed in the interviews, and practicing lawyers<sup>78</sup> are looking forward new legislation which could solve those problems. It

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<sup>76</sup> See: *Ibidem*, p. 13.

<sup>77</sup> See a very interesting book on that problem by Professor Arkadiusz Sobczyk, *Podmiotowość pracy i towarowość usług*, Kraków 2018.

<sup>78</sup> See opinions expressed in the article *Wypożyczenie pracownika nie zawsze jest legalne [Employee's leasing is not always legal]* in "Gazeta Prawna" [*Legal Daily*] accessible online: <https://serwisy.gazetaprawna.pl/praca-i-kariera/artykuly/815931,wypozyczenie-pracownika-nie-zawsze-jest-legalne.html> (date of access: 30.06.2020); see also: I. Struczyńska, *Praca tymczasowa a nietypowe formy zatrudnienia: outsourcing pracowniczy oraz leasing pracowniczy. Konstrukcje i regulacje prawne. Kiedy outsourcing prawniczy może zostać uznany za sprzeczny z przepisami prawa?*, accessible online: [www.pip.gov.pl](http://www.pip.gov.pl)

seems that such an expectation is legitimate, especially that there is scarce national court's interpretation regarding those relevant problems.

One shall notice that there is scarce legal regulation in Poland regarding seasonal work (not necessarily in agriculture). Therefore the codification committee, working under the auspices of Ministry For Labour, Social Policy and Family, which prepared in 2018 a draft of the new Labour Code (which, mainly for political reasons, was not officially debated in the legislative process), foreseen a new type of a labour contract – a contract for a seasonal work (Article 25<sup>3</sup> of the draft). However the purpose of the seasonal contract was to meet mainly needs in agriculture is could be also used in other situation. The proposed regulation limited such a contract to 50 days maximum and their number per year to three. The proposal provided additional guarantees for employees in case of abuse of the contract.

*Job sharing* is a kind of a contract which neither regulated in Polish legislation. However it is used by companies in Poland as a flexible employment mechanism. One shall describe it as a situation where a full-time position is filled by several (usually – two) employees or speaking differently – the tasks assigned to a position are executed by several persons. Since there is specific legislation in Poland regarding job sharing ordinary labour law is applied (part-time contracts). As job sharing is not recognized by legislation it is difficult to assess actual usage of the mechanism by employers. According to researches this form is being used by 11% of companies in Poland<sup>79</sup>. Job sharing potentially is a flexible tool, useful for an employer, and often profitable for employees. However all the profits regarding the use of such schemes remain in the hands of the labour contract parties, since no legislation, as already mentioned, was enacted.

## **VII.2. Interim management**

Interim management is a situation when a company hires a person (usually an expert) to fulfill certain task or project. In contrast with TAW such scheme is aimed at experts with specialized knowledge, experience, competences, usually leading a project or development of new product. He/she can be hired as independent contractor or “leased” from another company (entity). In case of an expert there is no stability of employment – the expert usually leaves the company when the project is finished or the purpose of his work achieved. In case of the managers employment is usually more stable. The manager is bound by his duties, his

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<sup>79</sup> D. Owczarek (ed.), *New forms of Work in Poland*, Institute of Public Affairs, Warsaw 2018, p. 15.

employment depends much on the long run profits being made for the company. His work is often related to some additional financial benefits which play an incentive role. The interim management relies on self-employment or on civil law (managerial) contract, with a practice of regulation the specific bonus, as explained earlier. In Poland such practice exists for the reported period, with no specific recommendations or expectation from social partners.

### **VII.3. Intermittent/casual work**

Intermittent job cover different types of contracts which refer to some kind of temporary, often seasonal, work. In Poland the closest type is the *contract of outwork* (*praca nakładcza*), which is regulated by labour legislation. It is an intermediary form between labour contract and a specified work contract, the worker is remunerated on the basis of the work actually done, however he/she is granted with labour protection. The remuneration cannot be lower than minimum pay, or the half of the minimum pay if the contract of outwork is an additional job. The guarantees cover also protection regarding dismissal. The legal protection is specified in Council of Minister regulations enacted on the basis of Article 303 of the Labour Code<sup>80</sup>. One may add, that the contract of outwork is also similar to tele-work, regulated by the Labour Code, however there is no employer's supervision in the former.

The contract of outwork is not a new venture in Poland. On the contrary, it was a popular form of work in the communist times, especially in the 70s and 80s. So called *praca chałupnicza* was usually an additional work, done in home, you could do to increase your monthly budget. Currently the number of persons engaged in outwork is counted in several thousands. The popularity of outwork contracts has fallen down dramatically as from 2009, when the Social Insurance Office (ZUS) asked to pay (current and years back) social insurance fees for the outwork. In the opinion of ZUS outwork work was a bogus employment aimed at saving costs only, in relation to basic employment. Decisions of ZUS were uniformly accepted in jurisprudence by the Supreme Court (SC)<sup>81</sup>. However it is not only SC jurisprudence which make outwork to an end, but it is also – as it was made clear in the interview with trade union representative – an issue of development of new technologies and new employer's expectation. This what make outwork no longer needed in Polish employment realities.

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<sup>80</sup> See: Council of Ministers' regulation of 31 December 1975 on labour rights of persons regarding contract of outwork (Journal of Laws No. 3 item 19 as amended).

<sup>81</sup> See i.a. S.C. judgment of 6 March 2007, I UK 302/2006 or SC judgment of 26 July 2012, I UK 27/12.

#### VII.4. On-call work (including zero-hours contracts)

On-call work differs fundamentally from a classic labour contract, where the employer is obliged to provide the employee with work and to pay the employee for his readiness to work. In case of on-call work, on the contrary, the employer is not obliged to ensure the employee with regular work but he can call him/her on demand (therefore sometimes the mechanism is called *work on demand*). One of the best known type of on-call work is a *zero-hours contract*, which is defined as “an employment contract between an employer and a worker, which means the employer is not obliged to provide the worker with any minimum working hours and the worker is not obliged to accept any of the hours offered”<sup>82</sup>. Therefore the employee cannot be certain whether and when he/she will get a work to do, it depends on the business fluctuations and interrelated work demand. It is a kind of a contract under which: 1) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker; and (2) there is no certainty that any such work or services will be made available to the worker.

Currently there is no legislation in Poland regarding such types of employment. One may even have legitimate doubts if it is compatible with the existing legal framework. However those doubts are relevant for labour-type employment only. Freedom of contracting allows civil law contracts, as mandate contract, to operate in such a scheme. One shall remind that the works of the codification committee, working between 2016 and 2018, covered also a type of a contract similar to *zero-hours contract*. As it was already mentioned the draft Labour Code was not officially presented for legislative process, however the drafters reacted for the economic need for such a legal scheme in Poland. The economic needs of employers are quite obvious. However one shall bear in mind that on-call work may deepen the precarization phenomenon. The report on atypical forms of employment in Poland points that, “on the one hand, it offers a very high level of flexibility to employers, while the security and stability of work is not guaranteed for workers. As a result, it is difficult to predict the exact working time, working hours and the amount of remuneration”<sup>83</sup>. Therefore it is reasonable to consider all factors before taking a legislative decision how to regulate such contracts. At the same time it is very dubious that the current lack of any labour-type legislation as regards this type of employment relations work well for workers.

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<sup>82</sup> *Temporary contracts, precarious employment, employee’s fundamental rights and EU employment law*, Study for the PETI Committee 2017, The European Union PE 596.823.

<sup>83</sup> D. Owczarek (ed.), *New forms of Work in Poland*, Institute of Public Affairs, Warsaw 2018, p. 17.

## VII.5. Mobile work

In principle mobile work is a work fulfilled within original labour or non-labour contract, however not in the premises of the employer but done from outside (usually from home). Therefore it may sometimes be very similar to tele-work (in home). However what differentiates mobile work is a fact it is based on ICT equipment (with the use of remote communication technology, cloud computing systems, interconnected IT infrastructure, including access to company digital systems online) and the work is done like it would be done in the employer's place (office, premises). That also includes working hours – employee should be accessible for an employer during work hours and fulfill his duties under his supervision. Obviously such a work will be organized differently in situation the civil law contract is a basis for relations between an employer and a worker or a worker is self-employed. Mobile work therefore needs a regular contact with the headquarters, with supervisors and with team colleagues. ICT infrastructure allows such contacts today, nearly as close as a daily contacts in the office/other premises. This lessens the negative effects of work alienation and rare contact with an employer and mates in the case of an ordinary home-work.

D. Owczarek enlisted four different types of mobile work in Poland<sup>84</sup>: 1) full mobility – with frequent relocations and multiple locations, different shift work patterns and a combination of individual and team workplaces (e.g. journalists, salespersons); 2) work on site, but with frequent relocations – working at one place and relocating to another after completing the tasks (e.g. construction site workers); 3) multi-site jobs – working in a number of permanent workplaces that vary according to the needs (ad-hoc mobility; e.g. experts, specialists), 4) the Internet as the workplace, where work mobility is limited, but at the same time workers can work from different locations and deliver their work (before the COVID-19 pandemic the most frequent use was visible as regards software or graphic designers, architectural designers or engineering designers).

Totally surprisingly lock-down introduced in Poland in March 2020, due to COVID-19 pandemic, proved mobile work being very effective. Actually working online has become an urgent need both for private and public sector (especially public administration). Until pandemic there was no direct reference to mobile work in Polish legislation (apart from tele-work enshrined in the Labour Code). Therefore an introduction by the parliament the possibility

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<sup>84</sup> D. Owczarek (ed.), *New forms of Work in Poland*, Institute of Public Affairs, Warsaw 2018, p. 18.

to work at distance (mobile work) at the beginning of the pandemic in Poland is somehow revolutionary.

Article 3 of the Act on special solutions regarding preventing, counteracting and fighting with COVID-19, other contagious diseases and crisis situations invoked by them<sup>85</sup> introduced a possibility, if needed to counteract COVID-19, for every employer to send the employee, for a limited time, to mobile work. Such a possibility may be used in case if the employee possesses technical capabilities and competences, has a suitable space for a mobile work and the work assigned allows for it. The law calls for the employer to ensure materials and equipment needed for a mobile work. The logistics of the mobile work is also an obligation of the employer. The employee may use his own IT equipment, however only when all company secrets and personal data are protected. According to Article 3 para. 6 of the Act the employee may be obliged to register his working activities, with dates and time of their realization. The employer may order mobile work, but he can also withdraw such an order before prescribed time.

One shall notice that the space problems turned out to be especially difficult – for some employees having children it has been almost impossible to jointly take care of home online education and mobile work – all of it in the same hours. Secondly, Polish schools did not provide neither pupils nor parents with any IT equipment – therefore parallel use of IT equipment was not feasible. The legislation forwards the decision into the hands of the employer only and to his assessment of the situation and pandemic dangers. This rises in some cases doubts as regards arbitrary use or non-use of the legislation on mobile work. One shall also notice that the legislation offers mobile work only to employed on a labour contract – it does not cover other forms of employment, neither civil law contract based jobs, neither self-employed workers. Those persons may apply for a mobile work only within regular legal framework and freedom of contracting, remembering the fact they are the weaker part of the contract.

Many other problems are visible in daily news regarding pandemic situation on the labour market and analyzed by scholars<sup>86</sup>, however – because of the width and complication of the problem – a separate research is needed.

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<sup>85</sup> Journal of Laws item 374 as amended.

<sup>86</sup> See an interview with labour law specialist Karol Muszyński PhD who concluded in rather sad manner the experiences regarding mobile work during the pandemic: *Employees do not interest anybody no longer. This discuss blew up*, “Gazeta Wyborcza” 11 July 2020, accessible online: <https://wyborcza.pl/7,156282,26117635,dr-muszynski-pracownicy-juz-nikogo-nie-interesuja-ta-dyskusja.html> (date of access: 11 July 2020).

The above-mentioned provisions of the Act were enacted for a prescribed time. After 180 days from the day of its entry into force (Article 36 para. 1 of the Act) the Act will cease to be a part of the legal system. However this is a sunset clause which can be overruled by a decision of the parliament, especially in the eventuality of the new wave of the pandemic. It is worth to also notice that the President of Poland proclaimed, during the electoral campaign before July 2020 election, a legislative initiative to enshrine the mobile work legislation into the Labour Code after the end of COVID-19 pandemic<sup>87</sup>. In the opinion of President A. Duda the pandemic law regarding mobile work proved to be effective, flexible and therefore profitable for social partners - employees and employers.

## **VII.6. Crowd employment (including platform work)**

Crowd employment is known under many different names (also i.a. sharing economy, gig economy), in practice crowd employment is popular as a platform work, that is the employment with a use of a digital tool, connecting those who seek service or work to be done (clients) and those who are willing to take on the work. Digital development and new technologies are therefore a precondition for this type of employment. Popularity of Uber and Uber EATS in major Polish cities<sup>88</sup> shows that so many clients use the services provided by these mechanisms through mobile apps, however with a very limited awareness of the phenomenon of the new model of employment. This is not a very easy issue, since there is a debate whether Uber can be treated as a shared economy at all<sup>89</sup>. Therefore it is not surprising that regulation of such platform is not an easy task.

Up to date there are no specific legislation as regards platform employment in Poland. The platform workers are either working under civil contracts scheme or they are self-employed. Obviously Uber does not employ drivers, they have to pay social security by their own consequently.

There is however one exception in the general lack of legislation regarding platform work in Poland – legislation regarding Uber passed by the parliament in 2019. After Uber developed its activity in cities and became popular the taxi companies realized the rising

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<sup>87</sup> See: <https://serwisy.gazetaprawna.pl/praca-i-kariera/artykuly/1485245,praca-zdalna-koronawirus-kodeks-pracy-duda.html> (access: 04.07.2020).

<sup>88</sup> Obviously there are also other popular, and not only in cities, platforms in Poland like: Bolt (transportation services), MTurk, Hojo Clean or TakeTask.

<sup>89</sup> See: K. Gy'odi, *Uber vs Licensed Taxi Drivers: A War Between Technological Standards*, Working Paper DELab UW, No. 2(2017), September 2017, p. 5.

competitiveness of its services<sup>90</sup>. Uber entered Poland in 2014 as the first mobile transportation application and gradually developed its business in Cracow, Gdańsk and other areas. According to Office and Consumer Protection office (UOKiK) data in 2016 there have been more than 40 thousand Uber drivers in Poland<sup>91</sup>. Therefore we have seen, in particular in 2019 in Warsaw, at least several protests (even city blockage) organized by taxi drivers against Uber operation. Taxi drivers called the government to enact legislation prohibiting Uber's operation, especially without any conditions. In order to become a driver on the platform, Uber does not require a taxi license. On the contrary taxi drivers must have taxi license and pay for it. Therefore in their opinion no legal requirements, as opposed to costs invoked by taxi companies, put Uber drivers in a much better competitive position. Obviously the drivers have to meet requirements of the Uber platform<sup>92</sup>, however the costs of the operation are lower than traditional taxis.

The Ministry of Infrastructure finally, being under such constant pressure, drafted a so-called "Uber law" in 2019. New law was enacted by the parliament as an amendment<sup>93</sup> to the Act on Road Transport<sup>94</sup>, Act on Road Traffic<sup>95</sup> and Act on Drivers' Working Time<sup>96</sup>, and came into force January 1<sup>st</sup> 2020.

The amendment's purpose was to create equal requirements for all workers engaged in business activities related to the carriage of passenger<sup>97</sup>. One of its main goals was also to enable fair competition among carriers, provide a higher level of safety for passengers and legalise ridesharing mobile applications. The new law changed the definition of a taxi cab, which now acknowledges the existence of mobile applications (unlike the old definition) and reads as follows: a taxi cab is a "motor vehicle, properly equipped and marked, intended for carriage of persons in a number not exceeding 9 (together with driver) and their hand luggage, for a fee determined on the basis of a taximeter or mobile application" (Article 3 the Act on Road Transport). From 2020, both carriers (drivers) and intermediaries are obliged to obtain a relevant licence to provide passenger transport services. Consequently, any person wanting to

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<sup>90</sup> In the case of Poland there are two available Uber transportation services: Uber POP and the more expensive Uber Select.

<sup>91</sup> Very many of them are Ukrainians.

<sup>92</sup> The requirements are published on Uber webpage: <https://www.uber.com/pl/pl>

<sup>93</sup> Law of 16 May 2019, Journal of Laws item 1180.

<sup>94</sup> Law of 6 September 2011, Journal of Laws 2019 item 2140 as amended.

<sup>95</sup> Law of 20 June 1997, Journal of Laws 2018 item 1990 as amended.

<sup>96</sup> Law of 16 April 2004, Journal of Laws 2019 item 1412 as amended.

<sup>97</sup> Although the definition of the passenger is disputable in Polish law, see: M. Wróblewski, *Prawa pasażerów/podróżnych w orzecznictwie Trybunału Konstytucyjnego (wybrane zagadnienia)*, [in:] P. Cybula (ed.), „Prawne aspekty podróży i turystyki – historia i współczesność. Prace poświęcone pamięci Profesora Janusza Sondla”, Kraków 2019, pp. 593-608.



become or continue their service as a driver for a ridesharing app like Uber or Bolt is legally required to obtain a licence. Intermediaries are obliged to verify whether the driver they plan to hire or cooperate with has a valid licence. Failure to do so may result in a fine of up to PLN 10,000 (approx. EUR 2,300) imposed on the intermediary. Acting as an intermediary without a licence, on the other hand, is punishable by a fine of PLN 40,000 (approx. EUR 9,200). The amendment does not include any other relevant regulation concerning platform employment as regards Uber.

The new law, explained above, is an exceptional in that sense that its sole purpose was to regulate Uber operation in order to satisfy taxi drivers and enhance passenger's security, it did rationalized also the functioning of the business. However the Polish legislator did not use the opportunity to consider a need of any other regulation regarding crowd/platform employment. Therefore platform work in Poland lacks labour employment in a similar way as it might be sad about the civil contracts employment and bogus self-employment.

As an example of the problem one shall point at the Uber EATS workers' situation in Poland. It is foreigners (most often of Indian origin) who work for that platform, often under difficult conditions<sup>98</sup>. Usually they are self-employed, but there are many cases where the status of their employment is not clear. It is therefore the Commissioner for Human Rights in June 2019 asked the State Labour Inspection (PIP) to conduct a control of the Uber EATS' operation in Poland<sup>99</sup>. PIP established Uber EATS Poland did not hire the couriers neither in labour nor non-labour employment, however Uber provides "support to cooperating entities" in delivering services accessible in the Uber app. PIP confirmed that couriers are self-employed or use so-called "non-registered activity"<sup>100</sup>. PIP underlined that one cannot trace employment bond between Uber and the workers, the relation was assessed as close to economic activity/cooperation. Such a scheme makes PIP unable to effectively defend workers' rights.

Uber EATS' case shows i.a. that state institutions (PIP) seem helpless when challenging new forms of employment. So, they have to be enforced (better staffed and equipped with legal measures, including fighting discrimination no matter the legal nature of employment is) and legislation which hampers effective protection of workers has to be reconsidered (like the laws

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<sup>98</sup> See e.g.: P. Szotak, *Pracowałem na czarno w Uber Eats [I have been working off the books]*, „Gazeta Wyborcza” 09.08.2019.

<sup>99</sup> Case III.7041.6.2019, Commissioner's states accessible online: <https://www.rpo.gov.pl/pl/content/gip-do-rpo-co-pozwala-kurierom-ubera-obchodzic-obowiazek-zezwozenia-na-prace> (date of access: 30.06.2020).

<sup>100</sup> Non-registered activity is based on the provision of 6 March 2018 Entrepreneurs' law (Journal of Laws 2019 item 1292 as amended) – according to Article 5 para. 1 an activity with an income below 50% of the minimum salary is not treated as an economic activity.

regarding incomes less than 50% of minimum pat, which exempt some activities from any state labour oversight).

### **VII.7. (Bogus) self-employment**

Self-employment, especially when in practice it is a bogus self-employment, should be also considered as a (equally) popular form of non-labour employment, engaging substantial part of working population in Poland. However, it has to be emphasized here that, for the purpose of this report, that self-employment should be understood only as undertaking working activity solely by self-employed individuals not employing other employees (i.e. own-account workers)<sup>101</sup>.

Sham contracts (bogus self-employment) are generally utilised so that the employer may avert the costly burdens of guaranteeing employee benefits, such as paid leave (holiday, maternity, etc.), having to pay the employer's social security contributions and income taxes on wages, who lack the bargaining power to safeguard their rights as workers<sup>102</sup>.

### **VIII. Social partners' attitude towards atypical forms of employment**

In Poland, economic activation and creation of new jobs (including self-employment) constituted one of the main subjects of social dialogue and government programmes in the period 2007-2020. On the contrary, accessible studies show “a very limited mutual impact between use of the analysed [atypical] forms of work and broadly conceived collective employment relations, as well as a very low interest of the social partners in this issue”<sup>103</sup>. However the interview conducted within the project do not entirely confirm the researchers' conclusions as regards “the lack of any potential responses from representative organisations of the social dialogue to the rise of new forms of work in the nearest future”<sup>104</sup>, one must underline that the only real problem and challenge noticed by social partners is an issue of civil law based contracts. That is no surprise since the question of civilized legal and social protection of workers is already long debated in Poland.

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<sup>101</sup> J. Gołaś, *Non-employee atypical forms of employment in Poland: sociological and legal perspectives*; accessible online: <http://apcz.umk.pl/czasopisma/index.php/EiP/article/view/EiP.2017.021/13317>

<sup>102</sup> *Employees vs Independent Contractors*, An L&E GLOBAL Publication 2017.

<sup>103</sup> D. Owczarek (ed.), *New forms of Work in Poland*, Institute of Public Affairs, Warsaw 2018, p. 73.

<sup>104</sup> *Ibidem*.

Between social partners obviously trade unions were more interested in the regulation and betterment of the situation of civil contract workers. Some of the trade union engaged more actively in the campaign against so-call “junk contracts”. The poster presented below is an example of such a social campaign of the trade union NSZZ “Solidarność” [the Independent and Self-Governing Trade Union “Solidarity”]. The poster claims “Sisyphus. I do not want to start every day from scratch. Stop junk contracts”.



It is however sad that today, when the problem of civil contracts as a legal basis of employment is still visible and present, one does not see such an interest in counteracting junk contracts any longer. Trade union neither are active in cooptation new member working on such contract, even if they can affiliate from the beginning of 2019 (see in detail above).

Social partners can make an impact on industrial relations in Poland through tripartite dialogue<sup>105</sup>. The formal structure – Tripartite Commission – was replaced in 2015 by a new body – Council of Social Dialogue (RDS)<sup>106</sup>. The trade unions stepped down practically from the Commission because of the lack of trust toward liberal government of Civic Platform (PO). The President of the Republic Bronisław Komorowski took then an official legislative initiative to renew the social dialogue by establishing the RDS. After Law and Justice party (PiS) won parliamentary elections in 2015 the RDS was treated as a real body, with real powers. However this attitude did not last for a very long time. One of the major breakthroughs was the government’s unilateral proposal to rise the minimum pay up to 2000 PLN as from January 1<sup>st</sup> 2017. This put the RDS in an awkward position since it accepted the rise of 150 PLN less only few weeks earlier. Such a move send a clear sign to the society that the government acting unilaterally is more generous than tripartite dialogue. The RDS however survived this crisis. The legislation affecting industrial relations is being discussed, but the most important government’s proposal do not leave much room for negotiations. Here one shall confess that one of the trade unions – NSZZ “Solidarność” – is much more influential than the other social partners, having strong impact on the ministries’ operation. Therefore the social dialogue is not always effective through formal channels. Such a mechanism obviously affects development of labour policy and industrial relations in Poland.

The research and interviews reveal very limited impact of social dialogue and social partners’ initiatives on development of new types of employment in Poland. Firstly, the social partners are not very interested in them generally, secondly, at least for the trade unions workers do not form an important part of the labour market. One shall remember generally low level of unionisation in Poland (around 11 %), with the fact trade unions are traditionally strong in big industry, where great majority of workforce is labour-employed.

It worth noticing that the situation has changed relevantly during the COVID-19 pandemic. Employers started to engage trade union in mobile work consultations and other forms of more flexible work necessary in the lock-down. However taking this new trend into account it seem unavoidable to analyze this development in more detail in a similar way NEWEFIN project does.

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<sup>105</sup> See: J. Męcina, *Social Dialogue in Face of Changes on the Labour Market in Poland. From Crisis to Breakthrough*, Budapest-Warsaw 2017 and M. Kuruś, M. Wróblewski, *Dialogue for Advancing Social Europe. Report for Poland*, DIADSE project, Warsaw 2016.

<sup>106</sup> Law of 25 July 2015 on the Council of Social Dialogue and other institutions of social dialogue (Journal of Laws 2018 item 2232 as amended).

## IX. Labour market effects

Since the early 2000s, unemployment in Poland declined significantly (from 3.4 million in 2002 to 1.3 million in 2015) while total employment increased (from 13.5 million in 2002 to 15.8 million in 2015). Of 2.1 million total net jobs created between 2002 and 2015, 2.0 million were temporary jobs. The parallel reduction in unemployment and the dominant contribution of temporary jobs to net employment growth resulted in Polish policy-makers taking an ambiguous stance of towards temporary contracts. Almost all of the net growth in employment (2002-2015) was attributable to temporary jobs. Certainly employers, using temporary contracts with lower dismissal costs etc., were more willing to take on more economic risk which eventually led to faster GDP growth and lowering of unemployment.

Due to relative novelty of some of the new types of employment it is extremely difficult to present a comprehensive and wide-ranging opinion regarding all the issues and problems therein. However one shall try to explain and deliver an overview of major areas. Each type of employment has its particularities and therefore they impact on the labour market is differentiated. New forms of work are most often associated with an increase in autonomy and a sense of control over one's work. One shall agree that “the challenge, however, is the question of access to organizations representing workers (trade unions, works councils, etc.) or to collective agreements, which should be seen as a negative phenomenon – just as the broader trend of corrosion of industrial relations in Europe. More flexible forms of work can also translate into difficulties in meeting social needs at work and social inclusion in the workplace. In addition, new forms of work in most cases also lead to increased intensity of work and increased levels of stress, which seems to be the reverse of greater flexibility and autonomy. In most cases, new forms of employment curb the use of work-related bonuses and occupational welfare solutions, which are characteristic of traditional labour markets in the developed capitalist economies of western EU countries”<sup>107</sup>.

Most workers, employed in atypical forms, do not belong to trade unions, which makes them more vulnerable to economic crisis (like that caused by COVID-19 pandemic) and employer's abusive actions. Although since the beginning of 2019 some of them (those working on the basis of civil law contracts) might become members of the trade unions one cannot notice any significant rise in the union's membership. In the opinion of some of the interviewees trade unions do not have interest in taking care of those working on civil contracts,

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<sup>107</sup> D. Owczarek (ed.), *New forms of Work in Poland*, Institute of Public Affairs, Warsaw 2018, p. 24.

neither they promote association in the trade unions. However bitter and unfair such an opinion may be seen the numbers do confirm no changes in the level of unionization in Poland.

One shall agree that still in Poland “the main challenge facing labour law in its current form is the protection of the *status quo* with regard to workers’ rights (...) and the state has a key part to play in creating the institutional ramifications necessary for maintaining the balance between business’ need for flexibility and workers’ need for security”<sup>108</sup>. It is also true that “a double system of norms is called for, with one part dedicated only to workers with an employment contract, but the other consisting of core labour rights, i.e. norms applying to all workers, including those without an employment contract”<sup>109</sup>.

## X. Conclusions

The new forms of work, listed above, occur in Poland, although – in comparison to typical employment – still on a relatively limited scale (apart from Uber and Uber Eats which are daily seen phenomenon in major Polish cities). The characteristics of online platforms, like network effects, nearly zero marginal costs and reduction of transaction costs enabled the rapid growth and spread of sharing economy services. However the new forms of employment become more and more popular. It seems that it happens only partially at the cost of the typical employment. Quite often new forms gain popularity because a worker cannot obtain typical employment in Poland, that is why it is hard to even call this fact as a “popularity of new forms”. But in many cases workers prefer greater flexibility of the new forms, which i.a. allows for an easier cohesion between private/family and professional life (*work-life balance*)<sup>110</sup>. Often new types of employment (e.g. platform work) becomes an additional employment, which allows to obtain additional income. Sometimes, especially when more autonomous work is suitable for a worker, it becomes a basic source of earnings.

Practical use of the tele-work, which was introduced into the Polish Labour Code already in 2007, has been disappointing. It seems that, apart from obvious sectors like call

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<sup>108</sup> J. Męcina, *Social Dialogue in Face of Changes on the Labour Market in Poland. From Crisis to Breakthrough*, Budapest-Warsaw 2017, p. 220.

<sup>109</sup> C. Varga, cited by: J. Męcina, *Social Dialogue in Face of Changes on the Labour Market in Poland. From Crisis to Breakthrough*, Budapest-Warsaw 2017, p. 280.

<sup>110</sup> This is also visible in reports prepared by the Polish Commissioner for Human Rights, see the report on *work-life balance*, accessible online: <https://www.rpo.gov.pl/pl/content/potrzebne-s%C4%85-dalsze-dzia%C5%82ania-u%C5%82atwiaj%C4%85-ce-godzenie-r%C3%B3l-rodziny-i-zawodowych> (date of access: 30.06.2020).

centers, employers did not have much trust in that form, or rather – one has to sincerely admit – they did not have sufficient trust to employees to make tele-work a widely applied form of employment. However the situation as regards mobile (distant) forms of work changed dramatically in 2020 due to COVID-19 pandemic. Polish legislator reacted quite quickly allowing mobile work to be applied universally. Actually the conditions, under which such an employment can take place, have been sketched vaguely, leaving decision of its application to the hands of employers. However consultations, as one may observe in media, with trade unions and employees were not rare. Leaving much room for application of mobile work, with all the problems explained in previous chapters, was a pretty good idea. One will see whether the plans to prolongate such legislation after the pandemic be implemented.

Here one has to underline that any discussion on the new forms of employment mean nothing in comparison to discussion of **labour market dualization – between labour and non-labour employment based on civil law contracts**. Even if the steps civilizing the non-labour employment (obligation to pay social insurance fees) have led to gradual resignation from civil law based employment contracts their number is still significant. People working under such scheme are the first to be dismissed in times of economic crisis, they work barely no social protection, no collective rights etc. Civil law contracts allow actually to circumvent nearly the whole protective labour legislation at the expense of workers. That is why this segmentation of the labour market is something which is peculiar for Poland and characterizes Polish labour market. Such a conclusion arises from all the interviews.

What is needed is the new legal framework that would provide a fair balance between the labour rights for the workers and the flexibility and freedom of establishment for employers. However trivial it may sound (similar balance is also needed between workers doing their job on the basis of totally new forms of employment and interest of employers or owners of digital platforms) the need to establish more fair and equal model of employment for all is indispensable to counteract negative effects of the labour market, such as polarized labour market, dualization and fragmentation of the labour market, growing number of junk contracts, waste of human capital, rising unemployment within the most disadvantaged group of workers, rising pressure for state protective social policy. Current employment policy lead to growing precarity of non-labour workers, where being employed in fixed-full-time job is harder and becomes almost unachievable.

The study an interview revealed also the realitive weakness of the social dialogue regarding the issue of atypical forms of employment. That is visible for both issues – brand new types of employment and the question of “junk” contracts.

The study recongized the need to revisite labour market regulations and labour rights vis-à-vis the COVID-19 pandemic. It seems that the pandemic reveals more clearly weaknessess of the Polish labour market, but at the same it – quite unexpectedly – it became a laboratory of effectiveness of digital forms of work (like mobile work). One can only hope the government and social partners will analyze thos positive trends and associated challenges to increase flexibility, labour rights and economic growth profitable for all.



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