NEW EMPLOYMENT FORMS AND CHALLENGES TO INDUSTRIAL RELATIONS – NEWEFIN

Policy brief Poland

Mirosław Wróblewski

Magdalena Kuruś

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1. Introduction

By the end of 2019 there have been more than 16 million people employed in Poland. The employment rate of persons 15-64 years old amounted at 68,2 % (males 75,3 % and females 61,1 %). Regular employees have a dominant share in the Polish labour market.

However more than one million people is still working on the basis of the **civil law contracts** (including 10% on the basis of the specified work contract), in spite of all legal changes. 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. Nonetheless, under the pretext of the freedom of contracting, the legal requirements as regards working conditions and remuneration are being circumvented in practice. Therefore Polish labour market is subject to specific dualization of employment standards. Out of over 16 million working people 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 medium level remuneration or close to minimum salary. This amounts to specific labour segmentation – employees' rights are guaranteed by the Labour Code and other labour legislation, workers' rights are limited to the rights of a private party's civil rights as established in the Civil Code, with no labour specific 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 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 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.

2. Legal framework and legislative changes

Labour employment standard in Poland is defined by the Article 22 § 1 of the Labour Code. To be employed on a labour contracts several requirements have to be fulfilled: work of a specified type has to be done under the supervision and guidance of the employer, work must be realized in a place and at the times specified by the employer, 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. This definition during the economic crisis of 2008 and further has not been changed. However the legislator implemented ideas which allowed to treat labour requirements more flexibly, to exempt for some time or even – in business terms – to circumvent strict labour legislation.

Legislative changes in the reported period **balanced between flexibilization of employment and enforcement of labour rights**. The most visible example of the fist trend is so-called "anticrisis legislation" which was passed in 2009. 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".

The anti-crisis legislation was used as a kind of austerity measure aimed at mitigation of negative effects of a global financial crisis. Therefore 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. One shall also underline that **relatively low labour costs and medium level of labour market flexibility become permanent features of the dependent market economy developed in the course of reforms in Poland**.

The Act of 11th October 2013 on specific measures aiming at work-places 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 12th July 2013 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.

The Act of 25th July 2015 adopted provisions aiming at **limitation of unjustified use of temporary contracts**. After the law entered into force, the maximum period of a temporary work agreement between the same parties is 33 months, and 3 months for a trial period. According to law, no more than 3 contracts may be concluded as temporary work agreements – as the fourth is treated as open-ended contract. 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**. 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 provided for in the legislation. The minimum notice periods for fixed-term and indefinite employment contracts are 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 more flexible form of an employment contract than an open-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. Such an attempt was done between 2016-2018, however the codification committee which prepared a draft of 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 – 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.

One shall pay attention to the Supreme Court (SC) jurisprudence which actually shaped the concept of the civil law employment. According to A. Sobczyk it was the SC who meet new challenges of the free competitive market, not the legal science. 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 nor European Parliament resolutions 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.

Judicial legalization (recognition) of civil law contracts, as an 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 the Labor Code, leading to simplification of some forms of labor employment. 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".

The Law of 22 July 2016 on the amendment of law on minimum salary and certain other laws 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 provides for some exceptions, however it cover 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 law also secures the hourly rate, i.a. by prohibiting employee's waiver. The labour inspection is entitled to control fullfillment of these requirements. The powers of the Chief 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 1st January 2019 the hourly rate was 14,70 PLN (ca. 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. 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. In practice the number of mandate/freelance contracts has not declined.

In 2019 new legal 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 faciliate 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.

New law, so-called **"Uber law**", in 2019 was enacted by the Parliament as an amendment to the Act on Road Transport, Act on Road Traffic and Act on Drivers' Working Time, and came into force January 1st 2020. The amendment's purpose was to create equal requirements for all workers engaged in business activities related to the carriage of passenger. One of its main goals was also to enable fair competition among carriers, provide a higher level of safety for passengers and legalize ridesharing mobile applications. The law changed the definition of a taxi cab, which now acknowledges the existence of mobile applications (unlike the previous 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 license to provide passenger transport services.

Article 3 of the Act of 2nd March 2020 on special solutions regarding preventing, counteracting and fighting with COVID-19, other contagious diseases and crisis situations invoked by them 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 an employer to ensure materials and equipment needed for a mobile work. The logistics of the mobile work is also an obligation of 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. Such regulations might be adopted for 180 day-limit.

3. Labour market effects and social partners' responses on new forms of employment

Social partners can make an impact on industrial relations in Poland through tripartite dialogue. The formal structure – Tripartite Commission – was replaced in 2015 by a new body – Council of Social Dialogue (RDS). 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 raise the minimum pay up to 2000 PLN as from January 1st 2017. This put the RDS in an awkward position since it accepted the raise of 150 PLN less only a 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 in recent years one of the trade unions – NSZZ "Solidarność" – is much more influential than 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 labor 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 unionization in Poland (around 11 %), with the fact trade unions are traditionally strong in big industry, where great majority of workforce is labour-employed.

It is worth noticing that the situation has changed relevantly during the COVID-19 pandemic. Employers started to engage trade unions 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.

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 the 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 their impact on the labour market is different. 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".

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 trade unions any significant rise in the union's membership is not observed. In the opinion of some of the interviewees trade unions do not have interest in taking care of those working on civil contracts, 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.

The opinion that "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" seems to capture the situation very adequately. 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".

4. Recommendations

a) to establish common (universal) standard of employment and social protection as regards labour and non-labour employment;

b) to establish legislation securing employment, safe and healthy working conditions and social protection to workers as regards new types of employment – especially platform workers;

c) to enhance state authorities (especially State Labour Inspection) in order to attain actual oversight over employment standards, including counteracting discrimination, especially as regards platform work;

d) to promote unionisation, especially vis-à-vis civil contract and platform workers;

e) to foster the role of social partners in the recommended above changes in labour law and social protection reforms;

f) to foster new forms of social dialogue, including different constellations of actors, new types of business and employment.