

Dagmara Skupień, University of Lodz

Maciej Łaga, University of Gdansk

Łukasz Pisarczyk, University of Warsaw

## **Polish Labour and Social Security Law: The Impact of the Economic Crisis and Demographic Problems**

### **Introductory Remarks**

Over the recent years the Polish labour<sup>1</sup> and social security law has undergone a number of significant reforms. They have been caused by global phenomena that could be observed in all European countries as well as by some specific features of our socio-economic system.

Without a doubt one of the most important stimuli of the changes was the economic crisis. On the one hand, the results of the recession in Poland were relatively mild. On the other hand, there is still a visible difference in the economic and social development between Poland and the countries of the “old” European Union. One of the most important consequences is a relatively high level of unemployment (about 13%) and the emigration of numerous Polish workers. As a result, the legislator decided to modify the labour market towards greater flexibility. Another consequence of the crisis was the breakdown of the social security system, particularly in the field of old-age pensions. Moreover, Poland has found itself in a very difficult demographic situation, which forced the legislator to search for new methods that facilitate the reconciliation of professional and family life.

We should also not forget that one of the most important features of industrial relations in Poland is a significant decline in collective negotiations and collective agreements.

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<sup>1</sup> Polish labour law is codified: the Law of June 26, 1974 – the Labour Code, Journal of Laws 1998, No. 21, item 94, as amended, hereinafter referred to as “the Labour Code”, “L.C.” or “LC”.

Unlike in the majority of other European countries, only a small part of Polish employees are covered by the provisions of collective agreements. This provokes questions concerning the future of the social dialogue. Consequently, legislation cannot rely on social partners and relinquish the majority of protective measures. As a result, the Polish system is characterised by highly developed legislation and relatively limited room for social dialogue. To a certain extent, this may be treated as a heritage of the previous socio-economic system. The lack of a real social dialogue forces the legislator to search for specific legal measures that could help combat the consequences of the above-mentioned negative phenomena.

### **The Crisis of the Social Dialogue in Poland**

Collective labour relations in Poland are characterized by a low level of unionization of enterprises. In 2008, 17 % of employees were members of trade unions<sup>2</sup>. Afterwards, the unionization rate gradually fell down, reaching a mere 12 % in 2012<sup>3</sup>. Trade unions are the strongest in state-owned enterprises and public institutions (24%), and much weaker in private enterprises (7%). In certain sectors such as retail sales and services, trade unions are almost non-existent (2%)<sup>4</sup>. The right to establish and join trade unions is granted to employees, members of agricultural cooperatives, persons employed on agency contracts and in non-combatant military service. Moreover, the right to join trade unions (without the right to establish them) is granted to homeworkers, pensioners and the unemployed. The persons who work on the basis of civil law contracts such as contracts for service, as well as self-employed persons do not have the right to establish or to join trade unions. The coverage of employees by collective labour agreements is low<sup>5</sup>. In principle, the social dialogue takes place on the enterprise level<sup>6</sup>. However, the bargaining power of trade unions on this level was

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<sup>2</sup> Source: CBOS (Public Opinion Research Centre) communiqué, A. Mokrzyzewski, *Przynależność do związków zawodowych (Trade union membership)*, BS 21/2008.

<sup>3</sup> Source: CBOS research communiqué, *Trade unions and employee rights*, BS/52/2012.

<sup>4</sup> Ibidem.

<sup>5</sup> See also EIROOnline, Poland. Collective wage bargaining, <http://www.eurofound.europa.eu/> accessed on the 14<sup>th</sup> July 2014.

<sup>6</sup> For the historical background of such a situation, see M. Seweryński, *Polish Labour Law from Communism to Democracy*, Warsaw 1999.

weakened in times of crisis<sup>7</sup>. Multi-enterprise collective bargaining is rare and the procedure of extension of multi-enterprise collective agreements is not used<sup>8</sup>. Sector-wide collective bargaining is almost non-existent. The conditions of work and remuneration are set forth in internal regulations, negotiated with trade unions or in enterprises employing fewer than 20 employees (where internal regulations are not obligatory) in employment contracts.

On the central level, as a result of the tripartite social pact of 1993, the Tripartite Commission for Social and Economic Affairs was set up as a forum of social dialogue of the government with the most representative organizations of employers and trade unions. On the employers' side, four employers' organizations<sup>9</sup> are entitled to have a seat in the Tripartite Commission whereas the workforce is represented by three trade unions' organizations, namely NSZZ Solidarność, OPZZ and Forum Związków Zawodowych<sup>10</sup>. NSZZ Solidarność and OPZZ were conflicted due to historical and political reasons dating back to the communist time. Only recently, in the face of the crisis and austerity measures, these organizations were able to undertake common collective actions. Social dialogue on the voivodship level may be developed by the social partners with the regional authorities in the voivodship commissions of the social dialogue.

Trade unions hold an exclusive competence to organize collective actions and strikes. The number of strikes was not increased in the years following the outbreak of the crisis<sup>11</sup>. The peak rate of strikes was achieved in 2008 when it amounted to 12 765 and

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<sup>7</sup> See M. Seweryński, Kryzys i prawo pracy (Crisis and Labour Law) in *Prawo pracy. Refleksje i poszukiwania* (Reflections and Explorations), Księga Jubileuszowa Profesora Jerzego Wratnego (Liber Amicorum in Honour of Prof. Jerzy Wratny), ed. G. Uścińska, Studia i Monografie IPiSS, Warsaw 2013, p. 32.

<sup>8</sup> See J. Gardawski, A. Mrozowicki, J. Czarzasty, Trade unions in Poland, Report 123, ETUI, Brussels 2012, pp. 23-24 and D. Skupień, Legal framework for collective agreements and other collective agreements in Poland, in *Überbetriebliche versus innerbetriebliche Kollektivvereinbarungen*, 5. Arbeitsrechtlicher Dialog, ed. G. Ring, Baden-Baden 2012.

<sup>9</sup> These organizations are : Pracodawcy.pl, KPP Lewiatan, BCC, Związek Rzemiosła Polskiego.

<sup>10</sup> On the representativity criteria concerning the membership in the Tripartite Commission, see J. Gardawski, A. Mrozowicki, J. Czarzasty, Trade unions in Poland, Report 123, ETUI, Brussels 2012, p. 19-20.

<sup>11</sup> See J. Gardawski, A. Mrozowicki, J. Czarzasty, Trade unions in Poland, Report 123, ETUI, Brussels 2012, p. 21.

then it was smaller each year. In 2013 only 365 strikes were registered in Poland<sup>12</sup>. Instead, the main trade union organizations – OPZZ and NSZZ Solidarność organized street demonstrations and protests against austerity measures and the foreseen reforms concerning higher retirement age, minimum wage, atypical work and working time<sup>13</sup>. It should be also noted that last year a first general strike in thirty years was organized in the Silesian region in response to the austerity measures<sup>14</sup>.

In order to implement the EU directive 2002/14/EC, the Act on informing and consulting with employees was promulgated in 2006 which serves as a legal basis for setting-up of works councils. Since 2008, as a result of the judgment of the Constitutional Court, the works councils are not nominated by the trade unions and are elected by the whole workforce even in the unionized undertakings. Trade unions may present their own lists of candidates but otherwise do not have any influence on the functioning of works councils or any supervising powers over it. The number of works councils is low and according to the latest estimates it fell down since 2008 when it covered around 9 % of the employers who fulfilled the legal threshold of 50 employees<sup>15</sup>. In practice work councils do not play a significant role. Apart trade unions and works councils employers also consult and negotiate certain issues with the employee representatives selected according to the procedure established at the given workplace<sup>16</sup>. Polish employees are involved in the functioning of European Works Councils set up in the groups of undertakings operating in Poland. However, no European Works Councils under Polish law were set up so far even though some groups of undertakings fulfill the criteria. The collective labour law is regulated by different legal acts. In 2007, the codification commission presented the proposal of the

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<sup>12</sup> See the report of the National Employment Inspectorate of 2013, p. 19.

<sup>13</sup> See J. Czarzasty, Trade unions lead largest street protest in decades, EIRonline, <http://www.eurofound.europa.eu/eiro/2013/10/articles/pl1310029i.htm>, access on 21.07.2014.

<sup>14</sup> See A. Mrozowicki, First general strike in 30 years, <http://www.eurofound.europa.eu/eiro/2013/04/articles/pl1304019i.htm>, access on 21.07.2014.

<sup>15</sup> See J. Gardawski, A. Mrozowicki, J. Czarzasty, Trade unions in Poland, Report 123, ETUI, Brussels 2012, p. 25.

<sup>16</sup> L. Mitrus, Works Councils in Poland: Problems of Informing and Consulting Employees in Workers' Representation in Central and Eastern Europe. Challenges and Opportunities for the Works Councils' System, eds. R. Blanpain, N. Lyutov, Alphen aan den Rijn 2013, p. 154.

Collective Labour Code<sup>17</sup> which consolidated this branch of law but it was never promulgated.

### **Anti-Crisis Measures and the Flexibilization of the Employment Relationship**

Since 2008 the legislator has adopted a number of measures aimed at the flexibilization of the employment relationship. They involve the possibility of a temporary deterioration in working conditions on the one hand and more flexible organization of the process of work on the other (particularly in the area of working time). They are usually applied with the involvement of social partners and are introduced by means of collective agreements. The situation in Poland, however, is quite specific in that limited room is left for social partners and there is no real alternative to trade unions.

In response to the first symptoms of the economic slowdown, the government started discussions with umbrella organizations, members of the Tripartite Commission for Social and Economic Affairs, on potential anti-crisis measures. The consultations with social partners led to the emergence and development of the so-called 'anti-crisis package'. The anti-crisis package consisted of thirteen postulates addressed to the government by the social partners. The pact was divided into three parts, namely remuneration and social benefits, labour market and employment relationships and lastly, economic policy. The first part contained such postulates as social support for the poorest families affected by the crisis, increase in welfare benefits for persons dismissed due to the crisis, tax exemption on allowances paid by trade unions and on benefits from company social funds, and elaboration of the methods of gradually bringing the minimum wage to 50 % of the national average wage. The second part contained specifically measures aimed at making working time more flexible, such as 12-months' working time reference period and the introduction of flexible working time as a means of supporting the reconciliation of family and professional duties, but also the legal determination of the normative character of the social benefit packages (*pakty socjalne* - agreements concluded with trade unions in case of transformation of

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<sup>17</sup> In the same year, the proposal of the Individual Labour Code was presented.

state-owned enterprises into commercial companies or in other cases of change of the ownership or the structure of the enterprise) and the stabilization of employment through the constraints on the fixed-term employment contracts. The third part consisted of two postulates: the introduction of accelerated amortization for enterprises and subsidies for employment as an alternative to collective dismissals<sup>18</sup>.

The agreement of social partners served then as the basis for the adoption of the legislative act concerning the alleviation of effects of the economic crisis on employees and enterprises (later called Anti-Crisis Act)<sup>19</sup>. This act was one of examples of the negotiated legislation in Poland. It entered into force in 2009 and was applied until 31.12.2011. Formally, it was repealed on the 21<sup>st</sup> November 2013 by the Law of 2013 on specific measures relating to the conservation of the posts of work<sup>20</sup> (art. 33). The most important provisions of the Anti-Crisis Act concerned the flexibility of working time and work organization, modifications in the use of the fixed-time employment contracts, rules concerning a stoppage of work for economic reasons, rules concerning the payment of social benefits in case of the stoppage for economic reasons or the reduction of the working time as well as rules concerning the co-financement by the State of the vocational training<sup>21</sup>.

However, not all the postulates of the ‘anti-crisis package’ were fulfilled. In opinion of trade unions, the adopted act was not satisfactory as it responded mainly to the needs of employers<sup>22</sup>. The government was also criticized that it took over only these

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<sup>18</sup> See the complete list of postulates: J. Czarzasty, Government accepts anti-crisis package submitted by social partners, EIROOnline, <http://www.eurofound.europa.eu/eiro/2009/06/articles/pl0906019i.htm>, access on the 3<sup>rd</sup> July 2014.

<sup>19</sup> Ustawa z dnia 1 lipca 2009 r. o łagodzeniu skutków kryzysu ekonomicznego dla pracowników i przedsiębiorców, Journal of Laws No. 125, item 1035.

<sup>20</sup> Ustawa z dnia 11 października 2013 r. o szczególnych rozwiązaniach związanych z ochroną miejsc pracy, Journal of Laws item 1291.

<sup>21</sup> See also J. Stelina, Prawo pracy a kryzys gospodarczy (*Labour law and the economic crisis*), PiP 3/2010, p. 12-13.

<sup>22</sup> For details see i.a. Anna Kwiatkiewicz, National Fiche: Poland, Joint Study of the European Social Partners ‘The Implementation of Flexicurity and the Role of the Social Partners’, p 17. It was also criticized in the legal writing for this reason, see J. Stelina, Prawo pracy a kryzys gospodarczy (*Labour law and the economic crisis*), PiP 3/2010, p. 19.

initiatives of the social partners which were consistent with its own policy<sup>23</sup>. The social dialogue was especially undermined by the refusal of the government to approve of the minimum wage negotiated by the social partners in 2010-2011<sup>24</sup>.

The anti-crisis package, despite the initial hopes for the further development of the national-level bipartite social dialogue, was so far the last agreement signed in the Tripartite Commission for the Economic and Social Affairs. In the mid-2013, the dialogue in the Tripartite Commission was suspended due to the refusal of trade unions to discuss with the government<sup>25</sup>. The trade union organizations reproached the government especially that it neglected the social dialogue and that the amendments to the Labour Code making the working time more flexible were promulgated in spite of the negative opinion of the trade unions. The trade union organizations made their return to the works of the Tripartite Commission dependent on the demission of the Minister of Labour and Social Policy and the withdrawal of the amendments on working time<sup>26</sup>. The proposals of the reform of the functioning of the Tripartite Commission were also presented. So far, no progress in this area has been achieved.

On the enterprise level, the employers may conclude so-called ‘crisis agreements’ which have a normative character. According to Article 9<sup>1</sup> of the Labour Code (in force since 2002), an employer if it is justified by the financial situation, may conclude an agreement concerning the suspension in totality or in part of the labour law provisions regulating the rights and duties of the parties to the employment contracts except the provisions of the Labour Code and of other legally binding acts. The suspension may thus concern the clauses of the employment contracts and the workplace internal regulations and agreements. The ‘crisis agreement’ may be

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<sup>23</sup> See J. Czarzasty, Mixed reaction to anti-crisis legislation, EIROnline, <http://www.eurofound.europa.eu/eiro/2009/09/articles/pl0909019i.htm>, access on the 13<sup>th</sup> July 2014.

<sup>24</sup> See J. Czarzasty, Minimum wage under debate, <http://www.eurofound.europa.eu/eiro/2011/10/articles/pl1110019i.htm>, access on 21.07.2014, for the details on the minimum wage negotiations’ procedure see D. Skupień, The minimum wage in Poland, in: Staatliche Eingriffe in das System der mindestentgelte im internationalen Vergleich, ed. G. Loeschnigg, Vienna 2013.

<sup>25</sup> See, Poland. Trade Unions suspend their participation in the tripartite Commission [http://www.labourlawnetwork.eu/national\\_labour\\_law\\_latest\\_country\\_reports/miscellaneous/prm/192/v\\_\\_detail/id\\_\\_3226/category\\_\\_27/index.html](http://www.labourlawnetwork.eu/national_labour_law_latest_country_reports/miscellaneous/prm/192/v__detail/id__3226/category__27/index.html)

<sup>26</sup> See J. Gardawski, Social dialogue reaches critical juncture, <http://www.eurofound.europa.eu/eiro/2014/02/articles/pl1402029i.htm>, Access on 21.07.2014.

concluded by the employer with the trade union or in case no trade unions are functioning in the enterprise, the employers' representatives elected according to the given enterprise's practice. The 'crisis agreement' may be concluded for a period no longer than three years. The condition of the 'financial situation' is understood in the legal writing as a situation in which the worsening of the financial conditions of the employer may have a negative effect on the employment relationships or may lead to the winding-up of the enterprise<sup>27</sup>. According to the same rules, in the light of Article 23<sup>1a</sup> § 1 of the Labour Code, if it is justified by the financial situation of the employer whose enterprise is not covered by the collective labour agreement or employing less than twenty employees, an agreement may be concluded on the application of the less favorable conditions of employment than the conditions resulting from the employment contracts concluded with these employees for the time and period determined in this agreement but no longer than for three years.

The 'crisis agreements' may also concern the suspension of the clauses of the collective labour agreement concluded on the enterprise or multi-enterprise level (Article 241<sup>27</sup> § of the Labour Code). Such an agreement shall be concluded by the parties to the given collective labour agreement or in case of the suspension of the multi-enterprise collective agreement – by the parties entitled to conclude an enterprise collective labour agreement with a given employer. During the validity period of the 'crisis agreement', the conditions of work resulting from the suspended collective labour agreements are not applied. In case of the 'crisis agreements' suspending other provisions than the provisions of collective labour agreements, these agreements shall be transmitted to the national inspectorate of labour. The agreements suspending the collective labour agreements shall be registered in the register of collective labour agreements held by the National Inspectorate of Labour. It should also be mentioned that since the 1<sup>st</sup> January 2004, 'crisis agreements' concluded with employee

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<sup>27</sup> Zob. Z. Hajn, *Inne niż układ zbiorowy pracy nazwane umowy normatywne jako instrument zakładowego dialogu społecznego (Normative collective contracts other than collective labour agreement as an instrument of the workplace social dialogue)*, in *Zakładowy dialog społeczny (Workplace social dialogue)*, red. J. Stelina, Warsaw 2014, p. 192.

representatives other than trade unions do not have to be approved by the voivodship commissions of the social dialogue any more.

The next important element of the reform was the introduction of more flexible rules concerning working time, including longer reference periods. Since 2013 so-called annualization of working hours has been a permanent element of the labour law system (regulated by the Labour Code). As a rule, the Labour Code accepts maximum 4-months reference periods. In many instances they are introduced unilaterally by the employer without any participation of employee representatives (as an element of the organisation of the process of work)<sup>28</sup>. Longer reference periods (up to 12 months) may be applied if this is accepted by employee representatives – by means of collective agreements. Once again, they are concluded with trade unions. But if there are no trade unions, agreements may be concluded with employee representatives elected according to the rules determined in a given enterprise (establishment). The annualization of working time is intended to help the employers to limit the costs of their activity and to organise the process of work in a more flexible way.

Another important solution which constituted a response to the economic recession is the second Anti-Crisis Law enacted in 2013 and providing for the suspension of the employment relationship and the shortening of working hours (with a proportional reduction in remuneration). In both cases the idea was to reduce the costs of employment and to support employers facing financial difficulties. Thanks to this, employers may avoid collective redundancies. The Anti-Crisis Law (2013) applies to those employers undertaking commercial activities who experience a deterioration in their financial situation (according to a set of specific criteria). The application of both instruments is accompanied by a system of subsidies paid from a special public fund. These payments are intended to mitigate the consequences of the reduction in remuneration. The employees bear, however, a part of the risk connected with the worsening of the economic situation of the employer (the payments cover only a part of the lost remuneration). To introduce the above-mentioned measures, it is necessary

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<sup>28</sup> Employee representatives are only involved when there are trade unions in a given enterprise or establishment.

to conclude a collective agreement with trade unions or employee representatives chosen according to the procedure applied by the given employer (if there are no trade unions). Finally, the Anti-Crisis Law provides for the financing of various forms of training. The legislation enhances the development of human resources during the period of a reduction in working hours. Trainings are partially financed with public support.

One of the most important problems is the composition of the representation of employees who conclude collective agreements of the anti-crises type. The legislation gives priority to trade unions. When there are no trade unions, collective agreements may be concluded with an *ad hoc* representation. The enhanced role of non-trade union employee representatives serves as a remedy in the case of non-unionized enterprises in which employees are not represented. They are not, however, stable bodies with tasks and competences determined by the law. The solution is also criticized as there are no clear and democratic rules for the election of employee representatives, and no protection against dismissal is granted to them, which leads to doubts as to their ability to remain independent in their relations with the employer<sup>29</sup>. This may lead to abuses and the election of representatives who are not properly prepared to their role. The consequence of this situation is the lack of balance between social partners and the destruction of the traditional model of the social dialogue. One may also doubt if this solution is consistent with international and European standards, e.g. Section 18 of the directive 2003/88 which refers to collective agreements concluded at appropriate level.

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<sup>29</sup> See Z. Hajn, *Inne niż układ zbiorowy pracy nazwane umowy normatywne jako instrument zakładowego dialogu społecznego (Normative collective contracts other than collective labour agreement as an instrument of the workplace social dialogue)*, in *Zakładowy dialog społeczny (Workplace social dialogue)*, red. J. Stelina, Warsaw 2014, pp. 199-200, J. Stelina, *Prawo pracy a kryzys gospodarczy (Labour Law and the Economic Crisis)*, PiP 3/2010, pp. 11-12.

## **Fixed-Term Employment Contracts<sup>30</sup>**

Another aspect of anti-crisis activity of the Polish legislator is the acceptance of the common use of fixed-term contracts. According to the statistics, about 25% of Polish employees are hired on fixed-term basis. This reflects the weakness of the labour market and the tendency to abuse fixed-term employment which is used not only in cases justified by the nature of the work. An interesting role is played by the law which facilitates or even promotes the employment of workers on a part-time basis.

Firstly, the protection against abuses is regulated very lightly. In a number of cases, when it is justified by objective reasons, fixed-term contracts may be concluded without further restrictions. The justification for the conclusion and renewal exists in relation to contracts concluded to substitute an absent employee, seasonal works or works performed on a periodical basis (Art. 25<sup>1</sup> par. 3 L.C.) as well as employment contracts for the completion of a specific task. In the above-mentioned situation there are no limits concerning the total duration of fixed-term employment or the number of renewals. If there are no objective grounds for the conclusion or renewal of the contracts Art. 25<sup>1</sup> par. 1 L.C. allows only two successive part-time contracts. The employment contracts are considered to be successive if the period of time between the termination of the previous employment relationship and the conclusion of the subsequent employment contract is no longer than one month. The conclusion of the third successive employment contract for definite duration shall have the same legal consequences as the conclusion of an employment contract for an indefinite period. The problem is that in practice this rule may be quite easily avoided. The chain can be disrupted by the conclusion of a civil law contract or even by a fixed-term employment contract based on objective grounds irrespective of the duration of such a contract. In some circumstances the conclusion of such a contract may be, however, considered as an evasion of law.

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<sup>30</sup> The chapter is based on L. Pisarczyk, Fixed-term Employment Contracts in Poland: In Search of Equilibrium between Flexibility and Protection in: Labour Regulation in the 21st Century: In Search of Flexibility and Security, ed. T. Davulis, D. Petrylaite, Cambridge Scholars Publishing 2012.

Trying to assess the current solution one can say that fixed-term contracts are treated as an instrument to increase the rate of employment (the lack of the requirement for the justification indicating the maximum length of employment or the maximum number of renewals). Due to such regulations the employer gains an advantageous, flexible form of employment which makes their position towards the employee much stronger. From this perspective, a fixed-term contract becomes one of the elements of the active labour market policy aimed at combating unemployment. On the other hand, figures show that the actual role of the fixed-term employment in this area is rather limited. As a rule, it contributes to the creation of the jobs of a lower quality which cease to exist when the period of prosperity or public support ends. Very often deregulation did not lead directly to the increase in the number of jobs available changing rather the dynamics and structure of employment.<sup>31</sup>

Moreover, fixed-term contracts in Poland may be terminated in a very flexible way also before their expiration date<sup>32</sup>. According to Art. 33 L.C. if the employment contract is concluded for a period longer than six months, the parties may terminate it with a two weeks' notice.<sup>33</sup> The termination requires neither justification nor consultation with the trade union representing the employee. If the requirements determined in Art. 33 L.C. are fulfilled, the employer may terminate the employment contract at any moment (even if the employment relationship has lasted less than 6 months)<sup>34</sup>, simply by issuing a declaration of will concerning the termination of the employment relationship with a period of notice which amounts to 2 weeks. A clause allowing early termination may be introduced not only at the time of the conclusion of the contract but also at a later date<sup>35</sup>.

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<sup>31</sup> International Labour Organisation, 2000. Termination of Employment Digest. Geneva: ILO, 11-12.

<sup>32</sup> It is necessary to add that more than 25% of Polish employees are employed on fixed-term basis. Poland is nowadays in the first place in this respect in the European Union.

<sup>33</sup> The introduction of the clause provided for in Art. 33 L.C. depends theoretically on the will of both parties to the employment contract. Practically, it appears in nearly all fixed-term contracts concluded in Poland. Because of the difficult situation on the labour market the employer is able to dictate employment conditions, and the nature of employment contract becomes rather adhesive.

<sup>34</sup> The ruling of the Supreme Court of September 7, 1994, I PZP 35/94, Official Journal 1994, No. 11, item 173.

<sup>35</sup> The ruling of the Supreme Court of June 14, 1994, I PZP 26/94, Official Journal 1994, No. 8, item 126.

Last but not least, many fixed-term contracts are concluded for relatively long periods (even 10 or 15 years). It guarantees the stability of the workforce (employees exercise the right to dissolve their contracts rather rarely) while the employer is still entitled to terminate the contract at any time, without justification and with a period of notice which amounts to 2 weeks only. In numerous cases this leads, in fact, to the evasion of the laws on permanent employment which provide for a much higher level of protection. The employees are forced, by the economic situation, to consent to such conditions without any guarantee of future employment. They are protected only to a limited extent by the judiciary when fixed-term contracts are concluded for a relatively long time (5, 7, 9 or 10 years) without objective justification and with the possibility of early termination with a period of notice. In such situations the Supreme Court has declared fixed-term contracts null and void as they intended to evade the regulations on general protection against dismissal which is provided for in employment contracts of indefinite duration<sup>36</sup>. As a consequence, the contractual clause which determines the termination date is deemed not to exist and the contract is considered to have been concluded for an indefinite period.<sup>37</sup> Long-lasting fixed-term contracts are allowed when they are objectively justified or concluded without the termination clause. This type of protection is not, however, efficient enough. In the case of executive staff (because of the special nature of employment) the Supreme Court has accepted recently the contract concluded for 5 years<sup>38</sup>. In the cases when the employment contract is concluded in order to replace an absent employee the period of notice is short, amounting just to three working days. In this situation as well the termination requires neither justification nor consultation with the trade union which represents the employee.

To summarise, the phenomenon of the enormous use of fixed-term employment has changed the Polish labour market, creating two different standards of protection: relatively high in the case of permanent workers and much lower in the case of fixed-

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<sup>36</sup> The ruling of the Supreme Court of September 7, 2005, II PK 294/04, Official Journal 2006, No. 13-14, item 207.

<sup>37</sup> The ruling of the Supreme Court of October 25, 2007, II PK 49/07, Official Journal 2008 No. 21-22, item 317.

<sup>38</sup> The ruling of the Supreme Court of October 5, 2012, I PK 79/12.

term employees. This part of the Polish labour market has dangerously approached the hire and fire model. In the past, the promotion of fixed-term contracts was treated as a factor encouraging the creation of new jobs. Moreover, the Constitutional Court has stated that the special rules concerning the termination of fixed-term contracts reflect the unique nature of these contracts and, as a consequence, do not contradict the constitutional principle of equal treatment<sup>39</sup>. This has opened the way towards the preservation of the particularly high level of fixed-term employment<sup>40</sup>.

Nowadays this situation is assessed more critically also from the perspective of the requirements determined by the European law. In 2012 NSZZ Solidarność lodged a complaint with the European Commission against Poland for the non-fulfillment of EU duties consisting in the wrongful implementation of Article 2 of the Council Directive 99/70/EC with respect to measures aimed at eliminating the abuse of fixed-term employment contracts. In its reply of 11 December 2013, the European Commission shared the view of NSZZ Solidarność and pointed to several inconsistencies between the EU law and its Polish implementation, namely the unjustified differences between the notice period for fixed-term contracts and indefinite contracts, the fact that a gap of one-month, which prevents two fixed-term contracts from being deemed successive, is not long enough, the wrongful exclusion of apprenticeships and public or publicly supported training, integration or re-skilling programs from the protection against an excessive number of sequential fixed-term contracts provided for by the Labour Code, as well as the ambiguity of the notion of ‘periodically performed tasks’ which allows an unlimited number of successive fixed-term contracts to be concluded<sup>41</sup>.

Doubts concerning the termination of fixed-term contracts have been partially confirmed by the Court of Justice of the European Union. According to the Court,

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<sup>39</sup> The ruling of the Constitutional Court of December 2, 2008, P 48/07, Journal of Laws 2008, No. 219, item 1409.

<sup>40</sup> See more L. Pisarczyk, Fixed-term Employment Contracts in Poland: In Search of Equilibrium between Flexibility and Protection in: Labour Regulation in the 21st Century: In Search of Flexibility and Security, ed. T. Davulis, D. Petrylaite, Cambridge Scholars Publishing 2012.

<sup>41</sup> See B. Surdykowska, Fixed-term contract regulation under EU scrutiny, EIROnline, <http://www.eurofound.europa.eu/eiro/2014/01/articles/pl1401029i.htm>, access on 21.07.2014.

clause 4(1) of the Framework Agreement on fixed-term work must be interpreted as precluding a national rule which provides that, for the termination of fixed-term contracts of more than six months, a fixed notice period of two weeks may be applied regardless of the length of service of the worker concerned, whereas the length of the notice period for contracts of indefinite duration is fixed in accordance with the length of service of the worker concerned and may vary from two weeks to three months, where those two categories of workers are in comparable situations<sup>42</sup>. As a consequence, an amendment to the Labour Code is being prepared. The legislation must, at least, equalize periods of notice in various types of employment contracts. Trying to avoid further doubts, the legislator should cover fixed-term contracts with the requirements concerning justification of the termination and the consultation with trade unions.

Moreover, in the year 2010 the legislator decided to liberalize the law on temporary workers exceeding the period of employment between the same temporary worker and user enterprise from 12 to 18 months. Although there was no direct reference to the requirements of the European Law, the amendment may be assessed as an element of the elimination of the obstacles which limit the development of temporary work.

### **Employment on a Civil Law Basis**

Even more dangerous is the development of civil law contracts replacing employment relationships. Last years, as a consequence of the economic slowdown, an increase of number of people working on the basis of the civil law contracts was observed. In the years 2011-2012 it reached 5-6 % of the workforce<sup>43</sup>. The employment on the basis of civil law contracts is less costly for the employers and is often an alternative to joblessness or dismissals, but it is also a precarious form of work. For this reason,

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<sup>42</sup> The ruling of the Court of Justice of the European Union of March 13, 2014 in case C-38/13 Małgorzata Nierodzik v Samodzielny Publiczny Psychiatryczny Zakład Opieki Zdrowotnej im. dr. Stanisława Deresza w Choroszczy.

<sup>43</sup> See S. Cichoński, P. Strzelecki, J. Tyrowicz, R. Wyszynski, NBP. Kwartalny raport o rynku pracy w I kwartale 2014 (*National Polish Bank, Quarterly report on the labour market in the first trimester of 2014*), no. 01/2014, Warsaw 2014.

these contracts are often called ‘junk’ contracts<sup>44</sup>. According to the Polish law, there is no legal presumption of the existence of the employment relationship. In theory, potential employees may ask the court to establish of the existence of the employment contract, but legal proceedings concerning these matters are not very common. This leads to the abusive use of civil law employment and the exclusion of numerous workers from the protection granted by the labour law. The most important problem is the lack of effective measures of labour law enforcement. In practice, civil law contracts constitute one of the most popular form of the flexibilization of the labour market. Unfortunately, this way of flexibilization cannot be accepted from the perspective of the principles constituting the fundament of the socio-economic system. It leads to a significant worsening of the position of numerous workers.

Moreover, workers engaged on a civil law basis are not entitled to form and join trade unions. On 28 July 2011, the National Commission of NSZZ Solidarność lodged a complaint against Poland to the ILO Committee of the Freedom of Association. Solidarność stated that the Polish Act on Trade Unions is in conflict with Article 2 of the ILO Convention no. 87 in so far as it does not guarantee workers employed on the basis of civil law contracts the right to associate and to join organizations of workers. As a consequence, the Committee delivered a statement in which it shared the opinion of Solidarność that the exclusion of workers employed on the basis of civil law contracts from the group of workers who may associate and join trade unions is in conflict with ILO Convention No. 87. The Committee also stated that the consequence of attributing to the persons employed on the basis of civil law contracts the right to associate and join organizations of workers should be that such organizations will be entitled to engage in collective negotiations in the interest of these persons (see ILO Report no 363, March 2012, case no. 2888 (Poland), point 1084). The Committee requested in its recommendations that the Polish Government take the necessary measures in order to ensure that all workers, including self-employed workers and

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<sup>44</sup> For details about this negative phenomenon see M. Seweryński, *Kryzys gospodarczy i prawo pracy (Crisis and the Labour Law)* in *Prawo pracy. Refleksje i poszukiwania (Labour Law. Reflections and explorations)*. Księga Jubileuszowa Profesora Jerzego Wratnego (*Liber Amicorum in Honour of Prof. Wratny*), ed. G. Uścińska, Studia i Monografie IPiSS, Warsaw 2013 pp. 27-28.

persons employed under civil law contracts, enjoy the right to establish and join organizations of their own choosing within the meaning of the Convention No. 87. The recommendation of the ILO Committee was followed by the constitutional complaint lodged by the OPZZ concerning the unconstitutional character of the above-mentioned exclusion of the workers employed on the basis of civil law contracts from the freedom of association (K 1/13).

### **Employee Rights Related to Parenthood**

The time of financial crisis coincided with a debate about the dramatically negative demographic trends in Poland. The country has been struggling with a falling birth rate since 1984. Despite the alarms, demographic problems were pushed aside by various cabinets for various reasons (mainly of budgetary and financial nature). Even before the financial crisis, the core element of governmental policy was to broaden parental rights and facilitate childcare. The first major changes in parental rights of workers in the period under consideration were introduced on the basis of projects submitted before the crisis and included the parental rights of men. Parental rights in Poland, as in other countries, were traditionally the domain of women. A tendency to broaden parental rights of men was observed quite late in comparison with other European countries – practically in the 2000's.

Limiting further reasoning to the period of the crisis, the first change was establishment of 'the paternity leave'. The right was introduced gradually by the act of 2008<sup>45</sup>. The entitlement to 1-week 'paternity leave' was in force since 1 January 2010 and was projected to broaden to 2 weeks since 1 January 2012. Fathers might apply for 'the paternity leave' until a child is 1 year old. This period of time is covered by pre-existing entitlement to 'the maternity benefit' in the amount of 100% worker's average income, paid from the social security system resources.

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<sup>45</sup> The act of 6 December 2008 on change of Labour Code and other acts, Journal of Laws 2008, No 237, item 1654.

It has to be remarked that in Polish system fathers were earlier entitled to exercise a part of ‘maternity leave’ (6 weeks, exercising the right to above mentioned), on the condition that mother resigned from partial exercise of this right. They had also autonomous right to ‘the childcare leave’. The right to this leave for mother and father amounted up to 36 months but until the child is 4-years-old. Mother and father could use it jointly only up to 3 months. It is not supported by any decent benefit from the social security system. Only if parents are under the certain threshold of poverty, the ‘childcare allowance’ – in considerably low amount (app. 100 EUR per month) could be paid as a supplement to ‘the family benefit’ from social assistance.

The act of 2008 created also the second new entitlement – ‘the additional maternity leave’. The length of traditional ‘maternity leave’ in Poland is 20 weeks<sup>46</sup>. The leave is socially covered by ‘the maternity benefit’ in the amount of 100% worker’s average income, paid from the social security system resources. It is an obligatory right as a rule (with exceptions, like above mentioned case of resignation to the father). Mothers became entitled to apply for 2-week ‘additional maternity leave’ to follow directly ‘the maternity leave’ since 1 January 2010. The application must be received 14 days before the beginning of the leave at the latest. The right to ‘additional maternity leave’ was gradually increased to up to 4 weeks since 2012 and up to 6 weeks since 2014<sup>47</sup>.

The new in Polish legal system was a right to combine ‘the additional maternity leave’ with part-time employment (maximum half-time). This entitlement is a strong measure in a sense that employer who was handed an application for ‘the additional maternity leave’ has an obligation to give it. Moreover, between handing an application and the end of ‘the additional maternity leave’ dismissal of an employee is prohibited. Dismissed employee is entitled to reinstatement.

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<sup>46</sup> 31 weeks in the case of delivery of twins, 33 weeks – 3 children at one delivery, 35 weeks – 4 children, 37 – 5 children and more.

<sup>47</sup> Employees having twins or other multiple births were entitled to up to 3 weeks' additional maternity leave since 2010, risen to 6 weeks since 2012 and 8 weeks since 2014.

Revolutionary changes in parental rights were launched by the act of 2013<sup>48</sup>. In general terms the total amount of parental rights with a decent social coverage was doubled. The above mentioned act came into force on 17 June 2013. ‘The maternity leave’ with a standard duration of 20 weeks and ‘the additional maternity leave’ with a standard duration of 6 weeks were supplemented by the new ‘parental leave’ with a duration of 26 weeks. Aggregated leaves amount up to 52 weeks nowadays. ‘The parental leave’ is addressed both to mothers and fathers. The right can be exercised jointly, but if that is the case – the total duration for both parents cannot exceed 26 weeks (e.g. if both parents exercise it jointly from the beginning, it will end in 13 weeks). Whole period of 52 weeks is covered by social benefits at a decent level. ‘The maternity benefit’ of 100% worker’s average income covers 26 weeks of ‘the maternity leave’ and 6 weeks of ‘the additional maternity leave’. ‘The parental leave’ (the last 26 weeks) is covered by ‘the maternity benefit of 60% worker’s average income, but at the request of worker whole period of 52 weeks might be covered by ‘the maternity benefit’ at a constant amount of 80% worker’s average income.

At the same time the above mentioned the act of 2013 has addressed ‘the additional maternity leave’ also to fathers (originally the entitlement as a rule was addressed to mothers). It can be also shared by mother and father. Worker is entitled to resign from ‘the additional maternity leave’ and ‘the parental leave’ at any time. In that case the employer is obliged to engage him or her after 14 days from application. It has also be remarked that the right to ‘the childcare leave’ was broadened until a child is 5 years old (it was originally until 3 years old). In that field the act of 2013 took one austerity measure. Unconditional right to join parental rights with part-time work was weakened. Employer might refuse exercising this right, if this is not possible due to the organization of work or type of work performed by the employee. The axiology of the above mentioned change is to enable employers to refuse part-time work, if it is not suitable to work organization.

### **Old Age Pension Schemes Reform**

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<sup>48</sup> The act of 28 May 2013 on change of Labour Code and other acts, Journal of Laws item 675.

The most significant changes that Polish social security law has undergone since the start of the global economic crisis cannot be presented without at least brief description of the social security system reform of 1998<sup>49</sup>. The reform sets out the background for changes in Polish social security law during the global economic crisis. The reform affected mainly the retirement system, which has been facing serious financial difficulties since the early 1980's. The problems arising from demographic changes – the ageing of the population that Europe is facing – were exacerbated in Poland by factors specific to Central and East European countries. The first factor are turbulences related to the transition from a centrally planned to a market economy. The second factor are widespread retirement privileges, which settled the effective retirement age at the level of app. 55 years for women and app. 60 years for men in 1998, in comparison with the standard statutory retirement age to 60 years for women and 65 years for men.

There are three ways of dealing with pension system problems: subsidization, rationalization and/or reforming. The government of Jerzy Buzek (1997-2001, center-right cabinet based on the political federation called 'Electoral Campaign of the Solidarity', closely connected with the historical Polish trade union) chose the way of system reform combined with subsidization. The reform of 1998 partly cancelled retirement privileges and introduced the entirely new old-age pension system. The traditional continental European pay-as-you-go retirement system was combined with a found method, highly recommended in this period of time by the World Bank and international financial institutions. Reformers aimed to achieve the '*security through diversity*', which was the catchword of the reform. The new system was based on defined contribution principle and covered vast group of insured born after 31 December 1948 (without miners)<sup>50</sup>. Older insured people were still covered by the

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<sup>49</sup> The reform was introduced on 1 January 1999 mainly by the act of 13 October 1998 on social insurance system, consolid. text OJ 2013, item 1442 as amended and the act of 17 December 1998 on pensions and annuities from Social Insurance Fund, consolid. text OJ 2013, item 1440 as amended.

<sup>50</sup> It has to be remarked that the common system of social insurance in Poland does not cover also farmers – who are covered by a specific insurance system which is characterized by much lower contribution, considerably lower benefits and a state budget subsidization as well as uniformed services (army, police, border guards, prison

previous system. The new retirement system was divided into three pillars and the new old-age pension was projected to consist of two or even three diverse parts. Nevertheless, the amount of future old-age pension depended strictly on the amount of contributions paid. That created incentives to work longer and declare income but had very little in common with the principle of solidarity – the cornerstone of the social security law.

The retirement system pillars were financed from different sources. The first and the second pillar were mandatory, the third pillar was voluntary. The mandatory retirement insurance contribution (19,52% of the contribution basis) was envisaged to finance first two pillars. However, it did not mean identical financing method. The first pillar (12,22% of the contribution basis) was realized in the traditional pay-as-you-go system. This part of mandatory contribution was registered at the individual pension insurance account and distributed to cover current system expenses practically in the same month. Registered contributions were valorized annually respect mainly to inflation rate. Destination of those accountant records was calculation of the first part of the old-age pension.

The second pillar (7,3% of the contribution basis) was founded. Polish National Insurance Institution (pol. ZUS) transferred this part of contribution to private funds named open pension funds (pol. OFE). Directly after deduction of the OFE's commission, contribution was invested in capital values under statutory framework guaranteeing security of allocated resources. It has to be remarked that in the early years of the reform the commission was not legally limited and open pension funds set it at very high levels. The average open pension found commission in 2000 was app. 9,1%<sup>51</sup>. The commission was legally limited to 7% (since April 2004 and that maximum level of commission was sustained until the crisis). Resources invested by open pension funds were targeted to create 'the capital old-age pension' – the old-age

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service and other), judges and prosecutors – who are covered by noncontributory social security system financed from the state budget.

<sup>51</sup> Ile OFE kosztują przyszłych emerytów? (*How much does OFE cost future pensioners?*), ulotka MinisterstwaPracy i Polityki Społecznej (leaflet of The Ministry of Labour and Social Policy).

pension from the second pillar. The matter of institutions responsible for payment of the capital old-age pensions was not regulated and left for unidentified future. It has to be remarked that strict regulation resulted in accumulating app. 50% of OFE's resources in government bonds.

The voluntary third pillar was based on framework regulations on employee pension funds and pension insurance open accounts including various incentives to retirement saving. The coverage of the third pillar is rather low nowadays. To give an example – less than 1,5% of working population is contributing to the third pillar<sup>52</sup>.

Combining the traditional pay-as-you-go method with the founded second pillar remarkably reduced current retirement system resources. Since 1999 only the part of retirement insurance contribution (12,22% of the contribution basis) could cover current pension system expenditure, while one-third (7,3% of the contribution basis) was invested by open pension funds. Polish Supreme Court ruled yet in 2008 that the part of social insurance contribution transferred to open pension funds remained public character, despite having at least a few elements originating from private law<sup>53</sup> (private entities that operate funds, assets come into marital joint property, there is a right to *quasi*-heritage of assets). Those public resources were invested by private entities, thus the reform significantly increased the deficit of the public – pay-as-you-go part of the retirement system. The aim of the reform was to cover the additional deficit created by the reform with income from privatization of national wealth. However, it turned out that this aim would never be achieved yet in early 2000's.

Transferring billions zlotys to private open pension funds, broadening public expenditure and delaying privatization of the biggest Polish national companies led to a growing deficit of the state budget yet before the global economic crisis. The crisis has slowed down the EU economic growth, but Poland has avoided deep recession, maintaining positive GDP indicator. It has to be remarked that accumulated GDP

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<sup>52</sup> J. Hagemeyer, K. Makarski, J. Tyrowicz, Unprivatizing the Pension System: The Case of Poland, „Univeristy of Warsaw Faculty of Economic Sciences Working Papers” 2013, nr 26 (111), p. 1.

<sup>53</sup> Supreme Court judgment of 4 June 2008, II UK 12/04.

indicator for Poland between 2008 and 2012 was app. 20%, while the EU average GDP in the same 6-years period was app. 0%<sup>54</sup>. Nevertheless, crisis negatively affected Polish economy, which resulted also in enhanced financial difficulties of social security system. Above mentioned state budget deficit problem deepened since the beginning of the crisis.

The increasing national budget deficit provoked a debate on changes in the pension system. The first government of Donald Tusk (2007-2011, center-right cabinet based on the Civic Platform and the Polish Peasant Party) insisted on the partial withdrawal of essential elements of the new pension system – the second pillar and a return to the pay as you go system. In a very heated debate, a number of economists, lawyers and the public opinion argued strongly the government was aiming to rescue public finances from the present problems resulting from excessively high expenditure during the period of crisis at the costs of future old-age pensioners. Nevertheless, the first major change was introduced by the act of 2011<sup>55</sup> and came into force in May 2011. The contribution transferred to open pension funds was reduced – from the initial 7.3% of the contribution basis to 2.3% (May 2011-2012), 2.8% (2013), 3.1% (2014), 3.3% (2015-2016) and target 3.5% (starting in 2017).

Answering to immense social opposition, the difference between previous 7,3% of the contribution basis and the proposed rate was given a special legal status. Taking under consideration Polish society treated ‘the OFE contribution’ as a private ownership, it was decided to be booked at special ‘sub-account’ by the Polish National Insurance Institution. Similarly to the OFE contribution resources registered at the ‘sub-account’ would create ‘the old-age pension from the second pillar’, come into marital joint property and there is a right to *quasi*-heritage of registered values. On the other hand, the part of the contribution registered at the ‘sub-account’ was spent that same month

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<sup>54</sup> Gospodarka Polski. Prognozy i Opinie (The economy of Poland. Prognosis and opinions), Instytut Nauk Ekonomicznych Polskiej Akademii Nauk (Polish Academy of Sciences, The Institute of Economy), Raport nr 22 (Report no 22), Warszawa 2013, p. 6.

<sup>55</sup> The act of 25 March 2011 on the change of acts connected with functioning of old-age pension system, Journal of Laws 2011, No 75, item 398.

within the pay-as-you-go system and was represented by no real value but only the state guarantee of future old-age pension payment.

The public opinion in Poland was convinced neither by creating sub-accounts, nor by simultaneous increase in the allowed percentage of the OFE's stock market investment. Above mentioned change was also introduced gradually from initial permitted 40% in stock market values, throughout 42,5% (2012), 47,5% (2013), 50% (2014), and followed by a further 2% every year to 62% in 2020. This change aimed to increase the rate of return of open pension funds, which would receive fewer resources.

The partial withdrawal from the fund method turned out not sufficient recourse after parliamentary elections in 2011. The prime minister Donald Tusk straight after elections and forming his second cabinet (2011-, backed by the same center-right coalition the Civic Platform and the Polish People Party) yet in his expose announced the necessity of raising and equalization the retirement age. The demographic crisis was seriously threatening future finances of retirement system. The retirement age rise was justified by a lowering birth rate and extended life expectancy. It aimed to prolong the period of contribution payment and shorten the period of receiving a benefit, which would result in improvement of financial situation of Social Insurance Institution and prevent disadvantageous demographic trend.

Despite the immense social opposition, effectively supported by trade unions, the change was introduced by the act of 2012<sup>56</sup>. The statutory retirement age – 60 years for women and 65 years for men was started to be gradually raised since 1 January 2013. According to the act of 2012, it would be raised every quarter by a month since 1 January 2013, and was expected reaching 67 years for women in 2040 and for men in 2020.

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<sup>56</sup> Act of 11 May 2012 on change of the act on pensions and annuities from Social Insurance Fund and some other acts, Journal of Laws 2012, item 637.

The debate in Poland did not focus on the possible and realistic means to promote employment of people 60+ to enable them to really work longer until the raised retirement age. One of the coalition parties, the Polish People Party made a strong demand, which became the bone of contention during the ensuing heated debate, that an extra social benefit be introduced to soften the social consequences of the change. The ruling coalition agreed to that condition and introduced ‘the partial old-age pension’ – a new social benefit, which was called contrary to its legal character.

Entitlement to ‘the partial old-age pension’ was conditioned by: reaching age of 62 for women and 65 for men and legitimating minimum insurance period of 35 years for women and 40 years for men. Amount of this benefit was set at a very low level of 50% of old-age pension from the first pillar. Provisions allowed simultaneous collection of ‘the partial old-age pension’ and employment without income limits. Those conditions prove that legal character of this new instrument was much more of social benefit partly supporting people whose retirement age was raised, rather than a new type of the old-age pension. It has to be remarked that in the new Polish very individualistic and liberal retirement system, collection of ‘the partial old-age pension’ reduces resources gathered in the first pillar – at the ‘individual pension account’.

‘Solidarity’ trade union, federation of post-socialistic trade unions and a group of opposition deputies claimed raising the retirement age and ‘the partial old-age pension’ before the Constitutional Tribunal. The Tribunal judged<sup>57</sup> that Polish legislator had the right to increase the retirement age. The constitution guarantees the right to social security connected with retirement but in the case of bad condition of the retirement system it also leaves broad competences to legislator to take necessary corrective action. Thus, raising and equalization of retirement age does not infringe constitutional principles of acquired rights and principle of citizens' trust in the state and its laws. On the other hand the Tribunal judged that ‘the partial old-age pension’ infringes the constitution when it comes to the diversity of rights for women and men. According to the amended law women are entitled to ‘the partial old-age pension’ at

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<sup>57</sup> The Constitutional Tribunal judgment of 7 May 2014, K 43/12.

the age of 62, whereas men at the age of 65. Judges emphasized that the long period of raising and equalizing the retirement age for men and women (men reach it in 2020 and women in 2040) is a kind of transitional period. ‘The partial old-age pension’ conditions with different age for men and women is not in its actual shape temporary. Thus, it is unconstitutional and must be corrected by the legislator.

During the crisis a progress was also made in the politically hard field of raising the retirement age for uniformed services. After the changes, the old-age pension for this group will be available for persons over 55 years of age with at least 25 years of service. To compare within the old rules, it was accessible after 15 years of service, without any age limit. This change is a slight restriction to the retirement privileges of those groups, but shall be remarked.

The last major change in social security law during the crisis was introduced by the act of 2013 on change of some acts due to prescribing principles of old-age pension payment from resources aggregated in open pension funds<sup>58</sup>. The above mentioned act describes a complicated financial operation, which in simple words might be summarized as the further withdrawal from the fund method of financing retirement system and the second pillar. Chronic financial problems of retirement system caused also by additional costs of open pension funds functioning brought about hard and decisive legislation action.

On the basis of the act of 2013 open pension funds were obliged to liquidate 51,5% of gathered assets at the accounts of each insured. Assets which were obligatorily liquidated are mainly: Polish treasury bonds and debentures issued by the State Economy Bank to finance development of highways. If above mentioned values were less than 51,5% of assets, liquidation shall include also resources invested by open pension funds in banks or in other values (as stock market shares). After liquidation, which took place on 3 February 2014, open pension funds had obligation to transfer to

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<sup>58</sup> The act of 6 December 2013 on change of some acts due to prescribing principles of old-age pension payment from resources aggregated in open pension funds, OJ 2013, item 1717.

the Polish Social Insurance Institution gigantic amount of 153,15 billion zlotys. Those financial resources were registered at 'sub-accounts' mentioned above and then transferred to accounts of state treasury in exchange for an obligation to cover expenditure for future old-age pensions in part that was registered at 'sub-accounts' during the operation. The act also forbidden investing open pension funds assets in treasury bonds.

Moreover, the act of 2013 stopped transferring of further parts of retirement insurance contribution to open pension funds since 1 July 2014. Insured who are still interested in locating part of their retirement insurance contribution by open pension funds could apply for it. The act set the new contribution rate that might be transferred to open pension fund at the level of 2,92%. The right to application for transfers is timely limited. Insured might apply only between 1 April and 31 July 2014 and then every 4 years since 2016 within the same period (1 April – 31 July). Contributions of insured who applied for further transfers to open pension funds will be divided in following manner: 'individual accounts' – 12,22% of the contribution basis, 'sub-account' – 4,38% of the contribution basis and 'open pension found' – 2,92% of the contribution basis; in the case of insured who did not apply for transfers will be divided into 2 parts: 'individual accounts' – 12,22% of the contribution basis, 'sub-account' – 7,3% of the contribution basis. The change does not mean voluntary membership in open pension funds. It has to be remarked that the act of 2013 did not liquidate 48,5% of open pension assets that are invested in market values.

The act of 2013 also liquidates 'the capital old-age pensions' (in other words the old-age pension from the second pillar). After reaching the retirement age an insured will be entitled to one old-age pension paid by Social Insurance Institution. The membership in open pension funds and voluntary transfers to those funds would come to an end 10 years before reaching the retirement age. Since that day assets will be gradually transferred from open pension funds to Social Insurance Institution, registered at 'sub-accounts' and right after spent for present expenditure of retirement system (pay-as-you-go). This solution was called by the legislator: 'safety zip'. Rules

of valorization of ‘sub-account’ registries was also changed. The resources booked at the subaccount would be indexed on the basis of average nominal growth of the gross domestic product (GDP) from the previous five years (with the provision that the indexation rate may not be of negative value).

## **Conclusions**

Over the recent years the Polish Labour and Social Security Law has undergone a number of significant reforms. There were two main driving forces of the changes: the global crisis and the need to resolve demographic problems. Apart from this, one should not forget the specific context of the functioning of industrial relations in Poland: the shift from a centrally-planned to a free market economy, a lower level of economic development and the decline of the social dialogue. Consequently, the Polish legislator has had to take into account both the global tendencies and some specific features of the Polish socio-economic system.

When it comes to the scope of the reforms, there are similarities between Poland and other European countries. To support the employers, the legislation moved towards greater flexibility. The employers gained some new instruments in the field of the organization of the process of work. One of the most important examples are longer reference periods. Moreover, the legislation accepts a temporary deterioration in the working conditions or even the stoppage of work if it is justified by the employer’s situation. At the same time, the Polish legislator also decided to enlarge the entitlements related to parenthood, in response to the dramatic demographic situation.

One thing that is characteristic of the Polish labour law is the way in which the changes were introduced. Initially, at the beginning of the economic slowdown in Poland in 2008, it seemed that the social partners will have a say in the formulation of anti-crisis measures and the bipartite social dialogue on the national level will gain momentum. Despite the first success of the talks on ‘anti-crisis package’, which was

partially implemented by a legally binding act, the social dialogue broke down. This was mainly due to the dissatisfaction of trade unions with the results of the “anti-crisis package’ which, according to trade unions, was much more favourable to the employers than to the workforce. The most regrettable fact is the suspension of the work of the Tripartite Commission, which has led to a situation where the social dialogue is not well developed on the national level at present.

Due to the steadily diminishing rate of trade union membership and the weakness of trade unions in times of crisis, not many collective labour agreements are being concluded in Poland. Instead, the conditions of work are regulated in internal regulations established by employers, unilaterally or through negotiations with trade unions in the unionized enterprises. The Labour Code, after the amendments of 2013, also provides for an increased role in negotiations with the employer of employee representatives who are elected according to unclear rules established in accordance with the practice of the given undertaking and are not afforded protection against dismissal. This leads, however, to the destruction of the traditional social dialogue and constitutes a real threat to the equilibrium between management and labour.

Without a doubt Poland must solve the problem of the abusive use of civil law contracts and fixed-term employment.

A separate problem is the shape of old age pensions system, which has been determined not only by demographic problems but also by the financial situation of the state. The Polish legislator is still searching for an appropriate model of social insurance. This may, however, negatively influence the situation of working people.