

# The legal model of self-employment in Poland – the perspective of social insurance

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## 1. Initial remarks

A debate about the model of social security of self-employed persons has been ongoing among experts in legal and social sciences ever since the 1950s.<sup>1</sup> At its core are the issues of: compulsory or voluntary character of social insurance of the self-employed, the personal scope of social security, and the principles of financing contributions or taxes due on account of self-employed activity. It is worth mentioning that national legal systems enjoy autonomy in shaping social security regulations. Consequently, individual elements of social security, such as: the obligation to have social insurance, the social security contribution assessment basis, and the scope of the benefits to which the insured are entitled, vary to a great degree. At the same time, due to the economic change, the concept of a person who carries out business activity has been evolving. The objective of this chapter is to present the situation of the self-employed in Polish social insurance law against the background of selected social security systems. The subject of the analysis will be the reasons for and the consequences of the choice of self-employment as a form of gainful work activity. Moreover, the publication attempts to develop an optimal model of social security of the self-employed in Poland.

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1 B. Baumberg, N. Meager, *Job Quality and Self-Employment: Is it (Still) Better to Work for Yourself? The Handbook of Research on Freelancing and Self-Employment*, [in:] A. Felstead, D. Gallie, F. Green (eds.), *Unequal Britain at Work. The evolution and distribution of intrinsic job quality in Britain*, Oxford 2015; I. Tsuruga, Q.A. Nguyen, Ch. Behrendt, *Extending social security to self-employed workers Lessons from international experience*, International Labour Organization, 2019; J. Cieślík, *Samozatrudnienie w Polsce na tle tendencji ogólnoświatowych: wyzwania w sferze wspierania przedsiębiorczości i zabezpieczenia emerytalnego przedsiębiorców*, "Studia BAS" 2018, no. 2.

## 2. Social security of self-employed workers

Between the end of the 19<sup>th</sup> century and the 1940s, social security covered mainly employees and farm workers. The personal scope of social security expanded after World War II. Protection was gradually extended to cover successive professional groups: mandataries, individual farmers, as well as persons who carried out business activity (e.g. retirement pension insurance of the self-employed was introduced in Belgium in 1957; in turn, social insurance of craftspeople was introduced in Poland in 1965).<sup>2</sup> The expansion of social security's personal scope to cover the self-employed was a consequence of the demand for common social security that emerged in that time. One of the arguments in favour of covering the self-employed with social insurance was the swiftly rising number of sole proprietors. The low amount of savings accumulated by those persons in the period of their business activity paired with the liquidity risk frequently precluded them from ensuring real protection against the risk of old age or incapacity for work. At the same time, the available forms of individual prudence, including mainly business insurance, constituted excessive financial burden for many entrepreneurs. Analyses carried out by the International Labour Organization for 2019 reveal that self-employed workers were not covered by social security in many legal systems, which could essentially lower their level of protection in the event of old age or disablement.<sup>3</sup>

The increase in the number of sole proprietors noted since the 1970s is a consequence of the technological development, free movement of persons, corporate expansion, and recently also the development of digital platforms.<sup>4</sup> Keen competition between entities operating both in national markets and globally results in search for new, flexible forms of providing work based on minimised risk and costs borne by the businesses. In order to cap the costs of their activity, businesses lay off their employees and hire mandataries (contractors under mandate contracts) or the self-employed in their stead. Fairly often, the employer makes cooperation contingent on whether the other party starts their business and additionally provides their services in person. A common practice is to include in the contract stipulations that prevent the self-employed person from providing services to other entities or significantly limit their capacity to do so. Despite the formally equal status of the contracting party and the self-employed, the mode of providing services is often similar to work as an employee (the time and place of providing services are specified by the contracting party, and the provider's autonomy is restricted). That is why both EU bodies and the member states are looking for solutions that would be a compromise between freedom to choose the form of employment and the need to

2 Act of 29 March 1965 on the social insurance of craftspeople, *Dziennik Ustaw* of 1965, no. 13, item 90.

3 I. Tsuruga, Q.A. Nguyen, Ch. Behrendt, *Extending social security...*, p. 1.

4 C. D'Arcy, L. Gardiner, *Just the job – or a working compromise? The changing nature of self-employment in the UK*, London 2014.

grant wider protection to bogus, or false self-employed persons. I understand this concept to mean the establishment of a one-person business in order to provide services to one contracting party. An example could be the rights granted to economically dependent self-employed persons in Spain. An economically dependent self-employed person is defined in the Act of 11 July 2007 on self-employment. The characteristic feature of this form of gainful activity is that at least 75% of the self-employed person's global income comes from one source (one contracting party).<sup>5</sup>

In the face of numerous challenges, the legal status of the self-employed covered by social security continues to evolve. The free movement of persons and services results in the need to increase their competitiveness in both the internal and the external markets. For that purpose, individual countries bring changes to their legal provisions, usually with the aim to increase the flexibility of the rules for paying contributions (reduce the percentage rates of the contributions, introduce the possibility to declare the contribution assessment basis, replace the contribution calculated as percentage rate with lump sums), and if the contribution is a part of the tax system – to lower due taxes. This process results in reducing the real level of social protection of persons who carry out business activity, as is especially evident in the case of the economically dependent self-employed workers. These persons typically declare the lowest social contribution assessment basis.<sup>6</sup>

Carrying out business activity does not constitute a separate social insurance title under the Polish social insurance law. There are two reasons for this. The first is the fact that it was decided in 1990 to distinguish between agricultural and non-agricultural business activity.<sup>7</sup> In the case of social insurance of farmers, the provisions introduced separate rules for insurability,<sup>8</sup> a preferential lump-sum social insurance contribution, and the funding of benefits from a supplementary subsidy from the state budget (making up for 90% of the Pension Fund's income).<sup>9</sup> A separate social insurance of farmers made it possible to transform the Polish agricultural sector, but at the same time rendered minor farmers dependent from state budget subsidies.

Second, the legislature rightly decided to introduce the so called collective insurance title of “non-agricultural activity” into the Act on the Social Insurance System<sup>10</sup> that would cover several categories of self-employed persons. The adopted construction made it possible to cover with social insurance not only the self-employed, but also: partners or shareholders in some partnerships and companies

5 Art. 11 Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo, BOE (Boletín Oficial del Estado) no 166.

6 *Social protection rights of economically dependent self-employed workers*, Directorate General for Internal Policies, 2013, p. 9.

7 Act of 20 December 1990 on the social insurance of farmers, Dziennik Ustaw of 2024, item 90, as amended.

8 J. Jończyk, *Prawo zabezpieczenia społecznego*, Kraków 2006, pp. 240–241.

9 *KRUS w liczbach 2021–2023*, Kasa Rolniczego Ubezpieczenia Społecznego, Warszawa 2024.

10 Act of 13 October 1998 the act on the Social Insurance System, Dziennik Ustaw of 2024, item 497, as amended.

(sole-shareholder limited liability company, general partnership, limited liability partnership, limited partnership), liberal professionals, creators and artists, persons who run public or non-public schools, other forms of preschool education, education facilities or their complexes, since 2021<sup>11</sup> shareholders in the simplified joint stock company whose contribution to the company consists in providing work or services and since 2023 general partners in the limited joint-stock partnerships.<sup>12</sup> The common denominator of all the above persons is the right to declare the social insurance contribution assessment basis. The basic difference is that only persons who carry out non-agricultural business activity within the meaning of the Act on entrepreneurs<sup>13</sup> may benefit from the concessions and preferences with regard to paying contributions.

Most of the European social security systems are characterised by a dualistic division into employed and self-employed persons.<sup>14</sup> Some of them contain special regulations covering farmers or persons employed in the civil service. For instance, separate rules have been introduced in Belgium for those working in the civil service, called the system for civil servants of the Belgian federal government.<sup>15</sup> In Finland, farmers are covered by social security in MELA – Maatalousyrittäjien eläkelaitos.<sup>16</sup> The Polish social insurance system includes a third group of the insured, in between employees and the self-employed, namely persons who provide work under civil law contracts and are not self-employed. This category includes e.g. people who provide home-based work or work under a mandate contract (mandataries). Social insurance of persons who provide work under civil law contracts in Poland shares characteristics with both employee insurance and insurance of persons who carry out business activity. The element in common with employee insurance is the obligation to pay the contribution in full, i.e. based on the income earned under one of the contracts. The status of a mandatory whose only source of income is one contract is similar to that of the employee (an exception is the mandatory's voluntary sickness insurance). In turn, the obligation to cover with insurance only one of the contracts, provided that the income under such contract corresponds at least to the minimum wage (PLN 4300 in 2024) is something shared with the status of the self-employed.<sup>17</sup> A mandatory who provides services to several entities, similarly

11 Act of 19 July 2019 amending the Code of Commercial Partnerships and Companies and some other acts, Dziennik Ustaw of 2019, item 1655.

12 Act of 9 June 2022 amending the Law on Personal Income Tax and some other acts of 2022, item 1265.

13 Act of 6 March 2018 on entrepreneurs, Dziennik Ustaw of 2024 item 236, as amended.

14 *Social Security Programs Throughout the World: Europe*, Social Security Administration, Washington 2018.

15 *Social Security. Everything you have always wanted to know* (in Belgium), Federal Public Service, 2018, p. 7.

16 A. Huhtamäki, *Farmers' work-related social security in Finland, implemented by Mela*, "Ubezpieczenia w Rolnictwie – Materiały i Studia" 2020, no. 2(74), pp. 311–312.

17 Regulation of the Council of Ministers of 14 September 2023 on the amount of minimum wage and the amount of minimum hourly rate in 2024, Dziennik Ustaw of 2023, item 1893.

to a person carrying out business activity, may determine the level of protection by joining the social insurance scheme based on one, several, or all of the contracts they have concluded.

The Polish social insurance system is based on the disproportion of the burden imposed on the various insurance titles. The fact that the burden varies affects the employment structure in those sectors of the economy where keen competition forces businesses to cut the employment costs (e.g. construction, transportation, the hotel trade, and the catering trade). In the above lines of business, employment under civil law contracts is preferred. Similarly, civil law contracts prevail in the case of low-qualified personnel as well as short-term contracts. Self-employed activity, in turn, dominates among experts in the fields of IT, healthcare, and recently also construction. It is preferred mainly by young people as well as persons with high or unique qualifications. The young choose self-employment predominantly because it involves higher current income as a result of reduced contribution assessment basis, and because the risk of incapacity for work is relatively low and the perspective of old age – remote.

The dichotomous division into employment and self-employment present in a vast majority of social security systems<sup>18</sup> determines the purpose of social protection granted. In the case of social insurance of employees, this purpose is to ensure a level of benefits that can replace the lost income. This is why the social insurance obligation covers total income under the employment relationship (in Poland, it covers also income under civil law contracts concluded with the employer). As for the self-employed, the right to declare the contribution assessment basis gives them flexibility in determining the level of social protection, and the lump-sum amount of contribution assessment basis or the minimum declarable contribution assessment basis, present in many legal systems, are intended to ensure at least a minimum level of benefits. Thanks to these solutions, it is possible to individualise the contribution assessment basis, and thus to accomplish the economic goal – the optimum development of business activity.

Most social security systems provide the self-employed with preferences with regard to paying contributions. Tools used to reduce the level of social protection or to make it more flexible include: the possibility to declare the contribution assessment basis (Poland), lump-sum social security contribution (UK), and reduction of the percentage rate of the contribution assessment basis (Belgium, France).<sup>19</sup> A reduced contribution assessment basis results in reduced assessment basis of benefits granted to self-employed persons. It should be emphasised that optimisation of the contribution assessment basis is limited by the need to ensure a certain

18 It should be noted that there are also unified systems, witness Hungary (*Social protection for the self-employed. Hungary*, MISSOC – Mutual Information System on Social Protection, 2021, p. 3), or the Dutch system with retirement pensions funded from taxes (*Social protection for the self-employed. Netherlands*, MISSOC – Mutual Information System on Social Protection, 2021, p. 3).

19 *Social Security Programs Throughout the World. Europe*, Washington 2018.

minimum living standard; hence, national schemes generally provide for a minimum declarable contribution. Thus, for example in Belgium, it is a quota contribution for low-income earners, and in Poland, it is the minimum declarable contribution assessment basis corresponding to 60% of the expected average remuneration.<sup>20</sup>

The increase in self-employed activity has resulted in the emergence of a specific professional group – economically dependent self-employed workers, which can be placed between the employed and the self-employed. Economically dependent self-employment is defined as a work relationship where the worker is formally self-employed, but they fulfil their duties in conditions similar to those of employees.<sup>21</sup> A legal definition of an economically dependent self-employed person has been introduced in Spain (Los trabajadores autónomos económicamente dependientes). The concept refers to a person who carries out regular business or professional, profit-oriented activity for a natural or legal person (i.e. client) on whom they are economically dependent in that they derive 75% of their income from this relationship.<sup>22</sup> No legal definition of an economically dependent self-employed worker exists in the Polish system, yet the draft individual labour code from 2018 (which did not come into force) developed by the Labour Law Codification Commission included a demand for the adoption of such definition in the labour code. According to Article 177 of the Draft,<sup>23</sup> the concept was construed to refer to a person who personally provides services directly to a specific business, organisational unit other than a business, or an agricultural holding (contracting party), on average for at least 21 hours per week, for a period of at least 182 days. Although the definition proposed by the Codification Commission referred directly to labour law regulations, it could in the future well determine the scope of social protection of the dependent self-employed under Polish social insurance law.

The legal and financial status of economically dependent self-employed persons raises numerous doubts in the light of both labour law and social insurance. The reason for this is that economically dependent self-employed persons who work for and are remunerated by one entity, similarly to other persons who carry out business activity, profit from preferential treatment granted to the latter. This preferential treatment consists in first and foremost reduced assessment basis of social

20 Pursuant to Article 18(8) of the Act on the social insurance system, the assessment basis for retirement and disability pension contributions is the amount declared, but not lower than 60% of the expected average monthly remuneration adopted to determine the limit of the annual contribution assessment basis, announced pursuant to Article 19(10) for a given calendar year. The contribution in the new amount applies from 1 January to 31 December of a given year.

21 *Social protection rights of economically...*, p. 7.

22 *Social protection for the self-employed. Spain*, MISSOC – Mutual Information System on Social Protection, 2021, p. 7.

23 *Teksty projektu Kodeksu pracy i projektu Kodeksu zbiorowego prawa pracy opracowane przez Komisję Kodyfikacyjną Prawa Pracy*, <https://www.gov.pl/web/rodzina/bip-teksty-projektu-kodeksu-pracy-i-projektu-kodeksu-zbiorowego-prawa-pracy-opracowane-przez-komisje-kodyfikacyjna-prawa-pracy> (accessed: 1.02.2022).

insurance and health insurance contributions, as well as preferential rules for paying the income tax. An entity who contracts services from an economically dependent self-employed person reduces their own business activity costs by financing the other party's contribution (formally speaking, the contribution payer is the economically dependent self-employed worker), thus gaining economic advantage over entities that employ workers. By way of example, the nominal social contribution assessment basis for persons who carry out non-agricultural business activity in Poland amounted to 60% of the expected average remuneration, which was equal to 109% of the minimum wage (July 2024).<sup>24</sup> An income barely exceeding the amount of minimum wage sets the level from which a contracting entity (e.g. a hospital), by terminating the employment contracts with its medical staff and then offering the redundant employees to co-operate as self-employed persons, can significantly reduce the costs of running business. The same mechanism is used with regard to drivers, IT specialists, or aviation staff. The higher the self-employed person's income, the greater the contracting entity's savings. Unable to withstand the competition resulting from the optimisation of social security contributions, successive employers in many sectors in Poland are forced to change the basis of employment of their employees and impose on them self-employment.

It is emphasised in subject literature that economically dependent self-employment is characterised by curbing the autonomy that a person carrying out business activity should enjoy<sup>25</sup> and replacing it with stronger subordination, bond, supervision, and economic dependence on the contracting party.<sup>26</sup> The contracting party is in this case the recipient of the self-employed person's services. From this perspective, the risk typical of carrying out autonomous business activity is greatly reduced. Due to the lump-sum social insurance contribution assessment basis, the shifting of their payment to the self-employed, and the lack of protection available to employees under the labour code, economically dependent self-employment is becoming an increasingly popular form of carrying out gainful activity and, in many sectors, the dominant and only legal basis offered to jobseekers. A prime example are the creative industries, where a significant proportion of those working there either provide services under a contract of mandate or are self-employed.<sup>27</sup>

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24 Persons who have only just established their business activity may for two years reduce the contribution assessment basis to 30% of the minimum wage, which corresponds to 15,9 % of average remuneration in enterprise sector (July 2024, author's own calculations).

25 L. Rodgers, *The Uberization of work case developments in the UK*, "Revue de Droit Comparé du Travail et de la Sécurité Sociale" (English edition) 2019, no. 4, p. 74.

26 A. Musiała, *Prawna problematyka świadczenia pracy przez samozatrudnionego ekonomicznie zależnego*, "Monitor Prawa Pracy" 2014, no. 2.

27 K. Zawadzki, *Praca i wynagrodzenia w gospodarce kreatywnej. Uwarunkowania – specyfika – ewolucja*, Toruń 2016, pp. 106–111.

### 3. Autonomy of social security systems in the EU

The shape and level of social protection of the self-employed in Poland is undoubtedly influenced by EU regulations. Social security is a vital element of the economic system of each EU member state. It ought to be noted that the individual social security systems evolved over the course of the 20<sup>th</sup> century. The personal scope of security became more diversified, the retirement age was gradually increased, the pillars of the pension scheme were introduced, and the systems of social security of public officers, civil servants, or farmers emerged from the general scheme. As a result, the individual national systems differ so essentially<sup>28</sup> that no harmonisation is possible at this juncture. The autonomy of social security systems is strongly emphasised in EU legislation. The need for coordination of social security schemes to the extent necessary to implement the principle of free movement of persons was indicated already in the EEC Treaty<sup>29</sup> and later also in regulations.<sup>30</sup> As indicated in subject literature, the principle of preserving the distinctiveness of national social security systems and the self-determination of each member state's public authority to shape its own system has been inherent in the supranational coordination process from the outset and as such set indefinitely.<sup>31</sup>

Detailed regulations covering the personal scope of the insurance or the amount of contributions are determined by national legislatures. This solution makes it possible to adopt national rules that respond to the changing employment structure, unemployment rate, or economic processes. It needs to be remembered, however, that the autonomy of social security systems stimulates competition between countries. Temporary transfer of business under provisions on the coordination of social security systems in the EU allows the self-employed who pay lower contributions to expand to neighbouring labour markets. An intense competition hampers the development of social security, which is inextricably linked to the need to increase contributions or taxes. The consequence is the erosion of the social protection of the insured, particularly the self-employed. By way of example, solutions adopted in Czechia or Lithuania that make it possible to pay lower social insurance contributions than in Poland motivate Polish authorities to reduce the social insurance

28 R.C.A. White, *Workers, Establishment, and Services in the European Union*, Oxford European Union Law Library, 2005, pp. 164–165.

29 Treaty establishing the European Economic Community signed in Rome on 25.03.1957, <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:11957E/TXT&from=EN> (accessed: 7.02.2022).

30 Regulation (EC) no. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, p. 1; Regulation (EC) no. 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) no. 883/2004 on the coordination of social security systems, OJ L 284, p. 1.

31 T. Majewska-Bińczycka, *Koordinacja systemów zabezpieczenia społecznego w UE na progu XXI w.*, [in:] M. Rycak, J. Wratny (eds.), *Prawo pracy w świetle procesów integracji europejskiej. Księga jubileuszowa Profesor Marii Matej-Tyrowicz*, Warszawa 2011, p. 159.

contribution assessment basis or to increase its flexibility. Lower social insurance contributions of self-employed workers paired with lack of corresponding solutions for employees stimulates a rise in self-employment. In turn, a correlation between the contribution and the benefits results in the situation when self-employed people who pay low contributions in the course of their working life acquire lower, often minimum retirement or disability pensions in the future.

Supranational entities focused on cooperation with the self-employed, such as global corporations and those employing on so-called digital platforms, strive to maximise their profits and therefore are not interested in an adequate level of social protection for the self-employed they cooperate with. By optimising the type of employment, these actors gain a significant economic advantage in the relevant national market. One of the forms of gainful activity of which digital platforms take advantage is bogus (false) self-employment. This phenomenon has been the subject of several national court judgments, including in Spain and the post-Brexit UK (judgment *Uber vs. Aslam*).<sup>32</sup> Directive 2014/67/EU,<sup>33</sup> which is part of the mobility package, explicitly states that it is intended to be a useful tool helping to effectively combat false self-employment and ensure that posted workers are not falsely declared as self-employed. The solutions introduced in the directive are intended to contribute to preventing, avoiding, and combating circumvention of the legislation in force. In my opinion, the phenomenon of bogus self-employment could be effectively countered by introducing a legal definition of economically dependent self-employed persons at the European level and granting them rights comparable to those of workers in an employment relationship.

#### **4. Preferences for persons who carry out business activity in Poland**

Business activity constitutes a special title to social insurance. First, a person who carries out such activity acts as both the payer and the insured. This means that they are obliged to pay their insurance contributions, with the source of financing being their income. In addition, the contribution payer is liable with their assets for the correct calculation and payment of the contribution.

Second, the legislation which determines the form of social security of entrepreneurs (i.e. the Act on the social insurance system and the Act on entrepreneurs),

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32 Judgment. *Uber BV and others (Appellants) v Aslam and others (Respondents)*, <https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf> (accessed: 19.07.2024).

33 Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) no. 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159/11.

similarly to most western regulations<sup>34</sup> provide for preferences with regard to the rules of paying social insurance contributions. The provisions in force in Poland essentially introduce two types of preferences: exemption from the obligation to have social insurance, and possibility to pay contributions based on a lower assessment basis.

The first category (exemption from the insurance obligation) includes the so called unregistered activity provided for in the Act on entrepreneurs, as well as exemption from the payment of contributions for the first six months of carrying out business activity. Pursuant to Article 5(1) of the Act on entrepreneurs, when a natural person who carries out business activity does not generate in any month income from it in the amount of at least 75% of the minimum wage, such activity does not constitute business activity within the meaning of the Act (so-called unregistered activity), and thus a title to social insurance.<sup>35</sup> This means that activity performed sporadically or on a minor scale is exempt from the obligation of registering for social insurance. Before the Act on entrepreneurs entered into force (i.e. until 2018), a self-employed person could declare a lower contribution assessment basis for 24 months calculated from the establishment of business activity. If the activity run by the self-employed failed to develop sufficiently for them to be able to pay their social insurance contributions, then usually, after 24 months, they were forced to suspend or close the business. Based on the low income criterion, the concept of unregistered business activity is addressed primarily to two categories of people: persons who begin self-employed activity – during the period of looking for contracting partners – and persons who have another main source of income (e.g. under employment) and provide specific services only occasionally.

Furthermore, a person who begins their business activity can exercise their right to exemption from paying contributions for the first six months. This right does not depend on the amount of income the self-employed earns. Importantly, Article 18(1) of the Act on entrepreneurs provides for two situations in which the right to use this preference is excluded. The purpose of the first one is to limit the possibility of exercising the right on a cyclical basis. Namely, the exemption from paying contributions cannot be used by a person who once again starts a business before at least 60 months have elapsed from the date of its last suspension or termination. The second condition covers situations where the self-employed person performs activities for a former employer to whom, prior to the date of commencement of business activity in the current or previous calendar year, they performed activities falling within the scope of the business activity under an employment or cooperative employment relationship.<sup>36</sup> This condition is significant because the law does not prohibit the possibility of converting an employment relationship into

34 OECD Tax Database Explanatory Annex. Part III. Social Security Contributions, OECD, May 2021, <https://www.oecd.org/tax/tax-policy/tax-database/social-security-contributions-explanatory-annex.pdf> (accessed: 1.08.2022).

35 A. Pietrzak (ed.), *Prawo przedsiębiorców. Komentarz*, Warszawa 2019, p. 86.

36 M. Wierzbowski (ed.), *Konstytucja biznesu. Komentarz*, Warszawa 2019, p. 112.

self-employment, but only excludes the right to exemption from paying contributions in the case of performing services for a former employer. Persons co-operating with their own employer will be obliged to pay social security contributions under general provisions, i.e. they must declare a contribution assessment basis not lower than 60% of the average expected remuneration (the nominal contribution assessment basis for a person who carries out non-agricultural activity).

The second group of preferences is the possibility to pay contributions on a lower than nominal assessment basis. The Act on the social insurance system provides for such a privilege in two cases. The first one covers the period of the first 24 months of business activity.<sup>37</sup> This preference can be exercised from the moment of starting business, which entails either waiving the six-month exemption from paying social security contributions or shortening this period (e.g. after two months of non-payment of contributions). An entrepreneur may also use the entire period of exemption from the payment of social security contributions to which they are entitled and then declare a lower than nominal contribution assessment basis for the next 24 months. Article 18a of the Act on the social insurance system provides for the possibility to reduce the assessment basis for insurance contributions to a maximum amount corresponding to 30% of the minimum wage. In the period covered by the preference, a person who carries out business activity may declare a contribution assessment basis that is higher or lower than the income they earn. Similarly as in the case of the exemption from paying social insurance contributions, under Article 18a of the Act on the social insurance system, this right is not granted to persons who carry out non-agricultural activity or carried it out in the last 60 calendar months before the day of commencement of business activity, and to persons who carry out business activity for a former employer to whom, prior to the date of commencement of business activity in the current or previous calendar year, they performed activities falling within the scope of the business activity under an employment or cooperative employment relationship. The total period in which a self-employed worker may benefit from the exemption from paying contributions and declare a contribution assessment basis lower than the nominal one is 30 months (i.e. 2.5 years). The duration of the preference granted to persons starting a non-agricultural business is comparable to other social security systems. For example, self-employed persons in Belgium pay a contribution on a lower than nominal assessment basis for the first three years. In Greece, on the other hand, there is a preferential contribution for a period of five years from the date of first establishment of business activity.<sup>38</sup>

Article 18c of the Act on the social insurance system provides for the possibility of a cyclical reduction of the contribution assessment basis in the event that the income earned in the previous calendar year was lower than the amount specified in the Act. In 2021, the right to pay contributions at a preferential rate was available to persons

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37 P. Kostrzewa, *Ustawa o systemie ubezpieczeń społecznych. Komentarz*, System informacji prawnej LEX-el, 2014.

38 *OECD Tax Database Explanatory Annex...*, p. 43.

whose income before taxes in the previous calendar year was less than PLN 120,000, which gives an average income of PLN 10,000 per month. The relatively low level of income entitling to the preference means that, in practice, this relief will cover only a small percentage of self-employed persons who, as a rule, are sole proprietors. The solution is aimed at lowering the contribution assessment basis in the event of an economic slowdown or other unforeseeable circumstances reducing the dimensions of business activity. A person who earned less than PLN 120,000 in the previous calendar year pays in the next calendar year a contribution whose assessment basis is half of the income earned from the activity in the previous calendar year, but the basis may not be lower than 30% of the minimum wage. As I have already mentioned, it is possible under provisions in force to benefit from this relief on a cyclical basis. The right to pay a preferential contribution is granted for 36 calendar months during the last 60 calendar months of non-agricultural business activity. Apart from its evident pros, such as increasing the flexibility of the rules for paying contributions, the solution favours economically dependent self-employed persons, in particular those who work via digital platforms or in construction, whose monthly income is lower than PLN 10,000. Additionally, the question arises as to whether preferences shaped in this way do not unduly stimulate the growth of false self-employment. A person starting a business is exempt from paying contributions for a period of six months, and then has the possibility to pay contributions on a preferential basis for the next 24 months and, with an appropriate level of income, to pay lower contributions for the next 36 months. In practice, the first social security contribution of a nominal amount (60% of the average remuneration) will be paid only after 66 months, i.e. after more than five years of non-agricultural business activity. It seems that the possibility of combining the available preferences will influence the growth of self-employment in successive branches of the economy.

The most important privilege offered to persons engaged in non-agricultural activities is the possibility to declare the assessment basis for social security contributions. Between 1965 and 1990, initially craftspeople, and later others covered by self-employment insurance, paid a lump-sum contribution whose amount depended on the number of inhabitants of the locality where the business activity was carried out, as well as on the type of activity undertaken by the person. This way of determining the contribution was introduced mainly out of the legislature's concern that self-employed workers would deliberately under-record their income and thus underestimate their contribution assessment basis. The lump-sum contribution imposed a substantial burden on some persons who carry out business activity; hence, the possibility to apply to the Social Insurance Institution (Zakład Ubezpieczeń Społecznych, ZUS) for a reduction of the contribution assessment basis was introduced in 1974.<sup>39</sup> ZUS's decision was discretionary. The disability pension

39 Regulation of the Minister of Labour, Wages and Social Affairs of 24/11/1983 to amend the Regulation on the implementation of the Act on the social insurance of craftspeople and some other self-employed persons and their families, *Dziennik Ustaw* of 1983, no. 66, item 300.

authority could reduce the contribution, but by no more than half of the contribution due. In the 1990 regulation,<sup>40</sup> the lowest possible social insurance contribution that could be declared was linked to the average remuneration. According to Section 30 of this act, the contribution assessment basis was the declared income. The amount indicated by a self-employed person could not be lower than 60% of the average remuneration. The Act on the social insurance system reproduced the solutions in force in earlier years. The contribution assessment basis was the amount declared, but not lower than 60% of the average monthly remuneration in the previous quarter. Scholars expressed the view that the contribution assessment basis was defined “in a conventional manner” and that moreover, “there are no clear reasons for it to be exactly 60% of the average remuneration”.<sup>41</sup> The adoption of the quarter as the period determining the lowest declarable contribution assessment basis was mainly due to the high inflation during the period of political transformation. It was not until 2008, after the economy had stabilised, that Article 18(8) of the Act on the social insurance system was amended. As from 1 January 2009, the contribution assessment basis has been the amount declared, but not lower than 60% of the expected average monthly remuneration adopted to determine the limit of the annual contribution assessment basis. The contribution in the new amount applies from 1 January to 31 December of a given year.

As I have already indicated, the assessment basis for social insurance contributions is declared by the person carrying out non-agricultural activity.<sup>42</sup> The Supreme Court in its resolution of 21 April 2010<sup>43</sup> found that the Social Insurance Institution is not entitled to question the amount declared by a person who carries out non-agricultural activity as the social insurance contribution assessment basis, if it is within the limits set out in the Act of 13 October 1998 on the social insurance system (except when, during the initial period of this activity, the insured person declares a basis for social security contributions the amount of which is not reflected in income<sup>44</sup>). As a result, an entrepreneur may, in periods of their choice, declare a contribution higher than the income earned in that period, which will enable them to acquire a higher sickness or maternity allowance. In an extreme case, i.e. when a self-employed person with low income pays a sickness contribution based on the maximum

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40 Regulation of the Council of Ministers of 29/01/1990 on the amount of and the assessment basis for social insurance contributions, registering for social insurance, and settling social insurance contributions and benefits, *Dziennik Ustaw* of 1990, no. 7, item 41.

41 J. Wantoch-Rekowski, *Składki na ubezpieczenia emerytalne. Konstrukcja i charakter prawny*, Toruń 2005, p. 156.

42 D. Karkowska, A. Nerka, *Pozycja płatnika składek w ubezpieczeniu społecznym i zdrowotnym*, Warszawa 2007, p. 127.

43 Resolution of the Supreme Court of 21 April 2010, ref. no. II UZP 1/10, OSNP 2010, no. 21–22, item 267.

44 Resolution of the Supreme Court of 29 November 2023, ref. no. II UZP 3/23, OSNP 2024, no. 5, item 51.

monthly assessment basis (250% of the average remuneration) for a year, they may receive a benefit higher than the income obtained from running the business.

It should be emphasised that the Act on the social insurance system provides for two restrictions with regard to the possibility to declare the maximum social contribution assessment basis. First, pursuant to Article 19(1) of the Act on the social insurance system, the annual pension contribution assessment basis in a given calendar year may not exceed the amount equal to thirty times the expected average monthly remuneration in the national economy in that calendar year set forth in the interim budget law or its draft, if the relevant law has not been passed yet. Second, pursuant to Article 20(3) of the Act on the social insurance system, the sickness insurance contribution assessment basis for persons who carry out non-agricultural activity may not exceed 250% of the expected average remuneration per month. If then the insured had pension insurance for a part of the year and due to high income reached the contribution assessment basis equal to thirty times the expected average remuneration, they will not be able to pay pension insurance contributions until the end of the calendar year. In this situation, the period when the social security contributions are not paid should be treated equally with the period when they are paid. In the case of sickness insurance, the amount declared in a given month may not exceed 250% of the expected average remuneration. This means that the law introduces a minimum and a maximum declarable rate for persons who carry out business activity. The upper limit is a consequence of the principle that social insurance is supposed to protect against social risk only up to a certain (average) degree. Persons who earn highest income and wish to receive benefits to compensate for lost income have to seek protection outside of the social insurance scheme. In addition, the upper limit of the contribution protects against the possibility of a short-term increase of the contribution assessment basis in order to obtain undue sickness or maternity allowances. The cap on the contribution assessment basis guarantees higher stability and predictability of social insurance finances.

Then, the minimum declarable contribution (nominally: 60% of the average remuneration) is intended to enable the insured to obtain benefits that guarantee a minimum standard of living and at the same time ensure a sufficient amount of income to the Social Insurance Fund. As I have mentioned, the lowest contribution assessment basis in 2024 was equal to 109% of the minimum wage. It follows that if a self-employed person earns more, they may pay a lower contribution than an employer pays for their employee. At the same time, due to the correlation between the contribution and the benefit existing in the Polish social insurance system, a lower contribution assessment basis results in a lower sickness allowance, or lower retirement pension or disability pension based on incapacity for work. Persons who run a major business and declare the lowest possible contribution assessment basis may in the future receive benefits whose replacement rate will amount to merely a few per cent of the lost income. Similarly to Poland, selected other legal systems include restrictions on the minimum amount of social insurance contributions. For instance, persons whose income is below a set amount (EUR 14,042.57 in 2021)

in Belgium pay a lump-sum contribution, while those whose income exceeds this amount pay a contribution determined as a percentage rate based on the income. The scheme introduced a maximum annual basis amount above which no contribution is paid (EUR 89,361.89 in 2021).

## 5. Social security model for persons who carry out business activity

As I have indicated in the introduction, the objective of this study is to try and assess the effectiveness of the current system of social insurance of persons who carry out non-agricultural business activity in Poland, and to develop a proposition of an optimum model of such social insurance. This is a complicated task due to the considerable variation in the legal status of persons who carry out non-agricultural activity. Such persons can be divided into three groups. The first group are persons who carry out business activity, employ others, and are open to cooperation with an unlimited number of business partners. The second category consists of people who do not employ others, and are open to cooperation with an unlimited number of business partners. Finally, the third group are the economically dependent self-employed, who do not employ others, and who intend to cooperate mainly with one entity. This division is vital in order to ascertain the potential sources of financing social protection (determine the contribution payer). As for the first two categories of persons who carry out non-agricultural business activity, the contribution payer is undoubtedly this specific self-employed worker. Since they cooperate with numerous partners, it is not possible to specify another person or entity that could be burdened with the contribution in their stead. When we consider the economically dependent self-employed, two approaches are possible. In the first approach, the self-employed person themselves is the contribution payer. It is possible to adopt another approach, where the contribution payer will be the contracting party, especially when the self-employed worker provides services to that party personally and employs no other persons, and the income earned from one source amounts to at least 67–75%<sup>45</sup> of the total income earned in the previous calendar year.

According to an OECD report,<sup>46</sup> a numerous group among the self-employed are persons who treat this type of work as a source of extra earnings.<sup>47</sup> If several insurance titles coincide, it is necessary to find out whether the insured person earns income from other sources. Therefore, if persons who work under an employment

<sup>45</sup> It amounts to alternatively 2/3 or 3/4 of the annual income.

<sup>46</sup> *Pensions at a Glance 2021: OECD and G20 Indicators*, OECD Publishing, Paris, p. 72, <https://doi.org/10.1787/ca401ebd-en>

<sup>47</sup> Up to 27% in OECD countries are people for whom self-employment is an additional (side) source of income.

relationship earn income from business activity and provide services as self-employed for entities other than their employer, they can be covered by voluntary social insurance on account of business activity. It should be emphasised that Article 9 of the Act on the social insurance system does not stipulate an obligation to register for insurance under the type of activity that yields the highest income.

A secondary and less significant division of the self-employed is based on the criterion of the amount of income earned from business activity. The amount of income is important from the perspective of legislation, e.g. for the purpose of determining the minimum declarable contribution, or the percentage rate of the social security contribution. It should be noted at this point that the minimum declarable contribution assessment basis should be such that a straight majority of the self-employed earn enough to afford its payment. As I have mentioned, social insurance is intended to provide social protection up to a certain level, above which the insured seeks protection against social risks themselves. This level in Poland is equivalent to: in retirement and disability insurance – thirty times the expected average monthly remuneration in the national economy for a given calendar year (Article 19(1) of the Act on the social insurance system), while in sickness insurance for self-employed persons – 250% of the expected average remuneration (Article 20(3) of the Act on the social insurance system).

The least problematic issue is to establish whether the social insurance of the self-employed should be compulsory or voluntary. The obligation to be covered by social security for the self-employed is a corollary of the possibility of a social risk. Moreover, it should be noted that the social risks of employees and the self-employed are similar, and that therefore the scope and level of protection of both groups should be comparable. In some legal systems, insurance for the self-employed is voluntary. However, it is worth pointing out that social insurance is based on a non-profit method of protecting against social risks. This means that the contribution is calculated in such a way as to cover (secure) the consequences of random events that occur during a given period in the population of the insured persons. The non-profit nature of social insurance means that its cost is lower than in the case of private insurance, where the primary purpose of conducting insurance business will be the insurer's profit. In addition, social insurance is guaranteed solvency by the state budget and is the only one that realistically ensures that the benefits it provides are paid out for life. When insurance is voluntary, some self-employed workers deliberately do not register for it. Those not covered by social insurance are generally entitled to benefit from social assistance schemes. The cost of protecting those entitled to social assistance benefits is passed on to taxpayers, including those who have secured social protection by regularly paying social insurance contributions. The obligation for the self-employed to have insurance furthermore reduces self-selection of risk, and reduces and averages the insurance costs in that the contribution is paid both at times when the exposure to a random event is low and in situations when it is high. Voluntary character of social insurance would certainly cause an increase in the number of self-employed workers. It seems that the pressure to choose this form

of gainful activity would be much higher than at present and, as a consequence of the so-called push out to self-employment, some of the gainfully active would be left with no social protection at all. The arguments presented above support the recognition of compulsory insurance as the optimal solution for the self-employed.

Another issue is to determine the optimal contribution assessment basis. The assessment basis can be determined by three methods. The first is to introduce a uniform amount of social security contribution into the system (lump-sum contribution). The second method consists in correlating the contribution with the income earned or the income reduced by certain costs of its acquisition (income-based contribution). The third method involves giving the insured the right to declare the social security contribution assessment basis (declared contribution assessment basis). Each of the options outlined above involves significant advantages as well as disadvantages. The advantage of the lump-sum contribution is the independence of the income earned by the entrepreneur and the social security burden. However, the lump-sum contribution has the fundamental disadvantage that the amount of benefits does not correspond to the income lost through social risk activation. The rate of replacement of income earned from business activity with a sickness allowance or retirement pension will correspond not with the income actually lost, but with the contribution rate that applies at the date of activation of the social risk. This may also mean that the benefit will provide the insured person with only the bare minimum living standard. Thus, in the case of a lump-sum contribution, there is a problem of determining the contribution–benefit ratio. Certainly, it is possible to imagine a system in which the person who carries out business activity pays a lump-sum contribution for a certain period (e.g. 25 years) and then receives a benefit depending on the capacity of the system, or a minimum benefit.

In my opinion, the model of contribution paid on income is the optimal solution. First, it is transparent, i.e. the self-employed person is able to calculate the social security contribution at the end of the month, quarter, or year. Second, the method of correlating income with the amount of social security contribution prevails in OECD countries.<sup>48</sup> Due to the wide disparity when it comes to the income of the self-employed, individual legislations introduce certain modifications to give them certain preferences. The most common modifications to the contribution assessment basis include: cap amounts above which no contribution is collected, a preferential contribution rate for employees, or a gradual progressive or degressive social security contribution rate. This model appears to be the most effective in terms of insurance fund revenues. The preferences applied (e.g. a lower contribution rate) compensate for the economic risk borne by the self-employed. In the case of a contribution calculated on income, the contribution–benefit relationship is maintained. Although there may be differences in the benefits of employees and the self-employed in this model since the contribution rate is preferential to the latter, the level of their

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48 *Tax Database. Table III. 3 Self-employed social security contribution rates*, OECD, [https://stats.oecd.org/Index.aspx?DataSetCode=TABLE\\_III3](https://stats.oecd.org/Index.aspx?DataSetCode=TABLE_III3) (accessed: 1.02.2022).

protection will correspond to that of the other occupational groups covered by social insurance. Importantly, the contribution rate paid on income reduces competition between individual insurance titles. Given a choice of comparable contribution rates, employees will not be as motivated to choose self-employment as the basis for their co-operation with a contracting entity.<sup>49</sup> A disadvantage of this contribution calculation method may be the relatively high burden on the self-employed who earn the highest income. This method should take into account the fact that a sole trader's earnings do not equal income – hence the importance of taking into consideration a certain level of expenses involved in running a business that should not be included in the social security contribution assessment basis.

The method where the social security contribution assessment basis is declared, adopted in Poland, is also strongly justified. The flexible way in which the contribution is determined is intended to take into account, first and foremost, the economic needs of the self-employed person, to guarantee the possibility of their development, and to allow them to reduce the contribution during periods of economic downturn. The self-employed person can adjust the amount of the contribution to their individually defined economic needs in periods of their choice. Moreover, ZUS is not entitled to verify whether a need actually exists. A sole trader can also pay a contribution at the lowest rate and additionally save in various forms of the so-called third pillar (IKE, IKZE), which enables them to diversify the sources of security for old age.

Yet when granting a certain level of preferences, the interest of the other insured must be taken into account, as well. This means that the common contributory fund for the insured should be financed in such a way that each occupational group contributes enough to finance their future benefits. This is because it can hardly be considered fair that an employee earning the minimum wage should self-finance their retirement pension, while at the same time a self-employed person earning several times the former's income should have their pension financed from taxes or contributions paid by the other insured. In view of the disproportion in contributions paid, the law should clearly define the criteria that will distinguish the self-employed and prevent the bogus self-employed workers from accessing the preferences. The optimum solution should be to introduce solutions into the social insurance system that approximate the legal position of the economically dependent self-employed person, the employee, and the mandatary. If the income of a self-employed worker comes from a single source (at least 67% or 75% of the income earned in the previous calendar year) or in a situation where a self-employed worker performs activities for a single contracting entity for at least 21 hours a week, it should be assumed that such income is subject to taxation under the rules applicable to employees. The global income criterion has been introduced in Spain, while the hourly criterion was proposed by the Labour Law

49 However, it should not be forgotten that the pressure from employers to choose self-employment as a basis for co-operation is also caused by the obligations imposed on them by labour legislation in the context of employment.

Codification Committee in the draft individual labour law code. It is worth noting that ZUS has adequate instruments to verify both criteria.

An important issue is the possibility to benefit from preferences at the stage of setting up sole proprietorship. Self-employment is a way of entering the labour market.<sup>50</sup> During the first two years counted from the date of starting the business, self-employed persons, as long as they do not perform activities for a former employer, should benefit from preferential rules for the payment of contributions and taxes. This solution would, on the one hand, allow for the unhindered pursuit of sole proprietorship and, on the other hand, even if the business were set up solely for the purpose of cooperating with a contracting entity, the self-employed would have the necessary time to diversify their sources of income. After every 24 months of activity, the sole trader would have to demonstrate that the economic activity they were carrying out did not meet the criteria for recognition as bogus self-employment. As I have already mentioned, these criteria are the percentage of income from one source, and the employment of other persons. Businesses that are geared to cooperating with the self-employed would lose the incentive to impose this form of gainful activity because of the possibility of changing the way contributions are paid if the self-employed person meets the criteria for an economically dependent self-employed worker. In my view, the proposed solution would not violate the constitutional freedom of economic activity, or the freedom to choose one's occupation. Indeed, a self-employed person would be able to continue their business activity, but at the same time they would have to pay a contribution on the income earned from their activity for the contracting entity.

## 6. Conclusion

Globalisation has a significant impact on the shape of social security. A phenomenon that co-shapes the level of social protection is the accompanying optimisation of employment processes and costs. In practice, this entails looking for solutions that maximise the profit of the contracting entity and minimise its risk. For this reason, the labour law and social security law regulations focused on employee protection are, from the point of view of a global employer, ineffective and increase the costs of such an entity's activities.

Social security for the self-employed is gaining in importance. The growing interest in this form of gainful activity is the result of pressure to reduce the costs of running a business. The decades-old bond between the employer and the employee, manifested on the part of the employer as concern for the employee's welfare and on the part of the employee as loyalty to the employer, is gradually being loosened. The place of both ties is being replaced by loose cooperation, often only on a single task or project. As a result, the contracting parties do not see the need to provide

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50 *Social protection rights of economically...*, p. 9.

their partners with adequate social protection, understood not only as classic social insurance, but also as company-based forms of supplementary old-age risk insurance, even when they have been co-operating for several years.

The Polish model of social insurance for the self-employed can be considered flexible and susceptible to optimisation. The Act on the social insurance system allows for changes in the title of insurance, differentiates the levels of charges depending on the basis of social insurance coverage and, above all, enables the self-employed person to declare the assessment basis for social insurance contributions. The preferences granted to the self-employed enable them to pay contributions on a reduced basis for 30 months, which corresponds to solutions implemented in other European countries. The regulations do not limit cooperation with the former employer. However, the consequence of performing activities for a former employer is that it is not possible to benefit from the preferential rules for declaring social security contributions.

Polish law does not define the concept of an economically dependent self-employed person. Recognising dependent self-employment as a normal form of business activity means that such a person will be entitled to the preferences enjoyed by persons running a non-agricultural business activity. The choice of this form of gainful activity is motivated by a desire to reduce the employment costs borne by the contracting entity. Hence, such entities show no interest in providing opportunities to make additional savings for old age.

The expansion of economically dependent self-employment, due to the limited number of contractors and relatively low income, will necessitate further optimisation of the social security contribution assessment basis. In order to meet the expectations of the self-employed, states are increasing the flexibility of the rules for the payment of social security contributions. The contracting entity, taking into account the successive changes in the current legislation, often consumes all or part of the preference granted by the state, rarely offering more favourable conditions of cooperation to the economically dependent person. Of course, there are also sectors, such as IT, where due to the high demand for specialised services, it is the self-employed who decide on the terms and conditions under which they provide their services. It is important to emphasise that individuals operating in the IT sector perform exactly the same activities under employment relationships as under civil law contracts, as self-employed, or also as economically dependent self-employed workers.

Therefore, I believe that a step in the right direction would be to introduce into the Act on the social insurance system a separate title for insurance – the economically dependent self-employed, whose status should be similar to that of the employee. This would reduce the need for optimising the type of employment. With this solution, it would be possible to preserve preferences in the case of sole proprietorships geared towards cooperation with multiple contracting parties and, on the other hand, reduce the pressure to choose economically dependent self-employment as the basis for gainful activity.

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