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ECONOMICALLY DEPENDENT SELF-EMPLOYMENT – IS IT TIME TO SINGLE OUT A NEW TITLE TO SOCIAL SECURITY?¹

Abstract. The foregoing study is an element of research conducted by the author as a part of the research project “In search of a legal model of self-employment in Poland. Comparative legal analysis.” In the article, the author analyses the legal position of the economically dependent self-employed people in Polish social security law. The main part of the considerations is the analysis of preferences granted to people conducting non-agricultural economic activity. The regulation in force in Spain is the author’s starting point for developing the concept of separating the economically dependent self-employed as an intermediate entity between those having a status of an employee and self-employed. In conclusion, the author presents the concept of introducing a separate title into the Act on the Social Insurance System – economically dependent self-employed.

Keywords: title to social security, non-agricultural economic activity, self-employment, social security

SAMOZATRUDNIENIE ZALEŻNE EKONOMICZNIE – CZY NADSZEDŁ CZAS NA WYODRĘBNIENIE NOWEGO TYTUŁU DO UBEZPIECZENIA SPOŁECZNEGO?

Streszczenie. Opracowanie stanowi element badań prowadzonych przez autora w ramach projektu badawczego „W poszukiwaniu prawnego modelu pracy na własny rachunek w Polsce. Analiza prawno-porównawcza”. W artykule analizowana jest pozycja prawna samozatrudnionego zależnego ekonomicznie w polskim prawie ubezpieczeń społecznym. Zasadniczą część rozważań stanowi analiza preferencji przyznanych osobom prowadzącym pozarolniczą działalność gospodarczą. Regulacja obowiązująca w Hiszpanii stanowi dla autora punkt wyjścia do opracowania koncepcji wyodrębnienia samozatrudnionego zależnego ekonomicznie jako bytu pośredniego między zatrudnieniem pracowniczym a samozatrudnieniem. W konkluzji autor prezentuje koncepcję wprowadzenia do ustawy o systemie ubezpieczeń społecznych odrębnego tytułu – samozatrudnionego ekonomicznie zależnego.

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Słowa kluczowe: tytuł do ubezpieczenia społecznego, pozarolnicza działalność gospodarcza, samozatrudnienie, ubezpieczenie społeczne

1. INTRODUCTORY NOTES

The self-employed² are a growing group of people covered by social security. Under the Act on the Social Insurance System,³ the self-employed are subject to insurance for non-agricultural activity. The Act introduces numerous preferences for persons covered by this insurance title, including the possibility of declaring the basis for calculating social security contributions, exemption from paying contributions during the period of suspension of activity or the possibility of paying a contribution from a base lower than nominal. Flexible shaping of the rights of a person running a business makes it possible to adjust the level of burdens to the individual needs of the entrepreneur.

Due to the preferences granted by the legislator, as well as due to the flat-rate basis for calculating the premium, the problem of joining the insurance for non-agricultural activity of economically dependent self-employed, i.e. persons conducting business activity who do not employ other people and predominantly (at least half of the income generated or provision of services in the amount exceeding half of the nominal working time of a worker) perform activities for a single contracting entity. The status of economically dependent self-employed persons has been regulated in selected legal systems, e.g. in Spain, Italy or Germany (Tyc 2021, 136; Barwaśny 2019, 106). The adopted solutions were aimed at improving the broadly understood social situation of the self-employed, including primarily counteracting the precarization of self-employment.

The aim of the foregoing publication is to assess the legitimacy of introducing a new social insurance title into the Polish social security system – economically dependent self-employed. The legal position of an economically dependent self-employed person is part of the research conducted by the author as part of the research project “In search of a legal model of self-employment in Poland. Comparative legal analysis.”

² Accepting Prof. T. Duraj’s views, by self-employment I understand the provision of services (work), to one or more (many) contracting entities, by natural persons conducting, at their own risk and responsibility, economic activity of an entrepreneurial nature, without the possibility of hiring employees or using someone else’s work on the basis of civil law contracts (Duraj 2009, 25).

³ Act of 13 October 1998 on the Social Insurance System, Journal of Acts of 2021, item 423, as amended.

2. SELF-EMPLOYED IN THE POLISH SOCIAL SECURITY SYSTEM

Self-employment is one of the fastest growing forms of employment⁴ (Cieślak 2019, 11). The growing popularity of this form of gainful activity is, on the one hand, a consequence of the freedom of a self-employed person to choose the contractors and the freedom to determine the rules of cooperation with such contractors, and on the other hand, lower, compared to an employment relationship, costs related to running a business, including, preferential rules for taxing income from business activity, and low basis for calculating insurance premiums for running a non-agricultural business (Krajewski 2021, 286–290). Thirdly, the Labour Code does not apply to contracts concluded with the self-employed.⁵

The self-employed are covered by social security for non-agricultural activities (Art. 8(6) Act on the Social Insurance System). This title covers diverse categories of persons, ranging from creators and artists, through individuals involved in sole proprietorship to shareholders of selected commercial enterprises. As noted by D. Dzienisiuk (Dzienisiuk, Supera-Markowska 2020, 71–72), the title to insurance indicates a group of people usually distinguished by the way of obtaining sources of income. The introduction of a collective title to insurance made it possible to unify the rules of insurance coverage by different categories of self-employed persons (Antonów 2015, 712). The adopted structure does not limit the legislator in modifying the scope and rules of protection for each of the groups covered by this insurance title. The legislator has the possibility to distinguish a specific category of persons and differentiate their legal situation (e.g. exclusion of the insurance obligation or increase or decrease of the premium calculation base). Such a modification of the rules for being subject to social insurance was made by the legislator in the case of persons conducting non-agricultural economic activity (Art. 8(6)(1) Act on the Social Insurance System). The aim of the legislator was: to introduce several start-up motivations or preferences for people starting a non-agricultural business, to reduce the base for calculating the premium during downtime or payment backlogs, and also the possibility of disconnection and accumulation of individual insurance titles in the event of the coincidence of several insurance titles. Other categories of persons covered by non-agricultural activity insurance (Art. 8(6) of the Act on the Social Insurance System) have in principle been excluded from the possibility of benefiting from discounts and preferences. As a result, an insured person conducting non-agricultural economic activity may

⁴ Between 2010–2020, the number of people running a business increased by about 34.7%. In comparison, the number of people in an employment relationship increased by 13.8%. At the same time, the number of home workers decreased by 73.3%. The Author's own research based on GUS, Statistical Yearbook of the Republic of Poland (2021, 241).

⁵ Act of 26 June 1974, Labour Code, Journal of Laws of 2020, item 1320, as amended.

adjust the scope of coverage and the insurance-related expenses to their needs and the current budget.

The construction of the premium calculation base, independent of the income achieved by the entrepreneur, compensates for the risk associated with running a business. Therefore, a self-employed person may declare a basis higher, as well as lower, than the financial result achieved by him (see the decision of the Polish Supreme Court of 21 April 2010, II UZP 1/10, OSNP 2010, No. 21–22, item 267). Of course, the entrepreneur can declare the basis for calculating the contribution in the amount of income achieved, but the declared basis cannot be higher than the amount corresponding to 250% of the forecast average salary (in 2022 – PLN 14,805.00).⁶ The self-employed gets the opportunity to reduce the basis for calculating the contribution, and thus increase income from their business, at the expense of reducing social protection. However, the Act on the Social Insurance System introduces the lowest declarable contribution. According to the provisions in force, it corresponds to 60% of the forecast average monthly salary announced for a given calendar year. In 2022, the lowest contribution basis is PLN 3553.20.⁷ This basis should be compared with the amount of the minimum wage, which in turn is the lowest basis for the amount of the contribution paid for a full-time employee. In 2022, the minimum wage is PLN 3,010.⁸ Comparing both of these amounts, we will come to the conclusion that a person conducting non-agricultural activity will pay a contribution from a base of 118% of the minimum wage. This means that the lowest declarable basis for calculating the contribution of a person running a business is an amount slightly higher than the lowest basis applicable to the employer hiring an employee. Secondly, comparing this amount to the average salary in the enterprise sector, which in March 2022 amounted to PLN 6665.64,⁹ zlećit is worth pointing out that the basis for calculating the social

⁶ Announcement of the President of the Social Insurance Institution of 22 November 2021 on the amount of 250% of the forecast average salary, applied in the period from 1 January 2022 to 31 December 2022 when determining the basis for calculating contributions to sickness insurance of persons who are subject to sickness insurance voluntarily (M.P. of 2021, item 1083).

⁷ Announcement of the Minister of Family and Social Policy of 4 November 2021 on the amount of limitation of the annual basis for calculating contributions to the pension and disability insurance in 2022 and the amount of the forecast average salary adopted to determine it (M.P. of 2021, item 1056).

⁸ Ordinance of the Council of Ministers of 14 September 2021 on the amount of the minimum wage for work and the amount of the minimum hourly rate in 2022 (Journal of Laws of 2021, item 1690).

⁹ Announcement of the President of the Central Statistical Office of 21 April 2022 on the average monthly salary in the enterprise sector in March 2022, <https://stat.gov.pl/sygnalne/komunikaty-i-obwieszczenia/lista-komunikatow-i-obwieszczen/obwieszczenie-w-sprawie-przecietnego-miesiecznego-wynagrodzenia-w-sektorze-przedsiębiorstw-w-marcu-2022-roku,56,101.html> (accessed: 15.05.2022).

security contribution of a person conducting non-agricultural activity is 53.3% of the basis for calculating the contribution paid for an employee achieving an average salary. At the same time, a person starting a non-agricultural activity for a period of 6 months is exempt from paying social security contributions (Art. 18(1) of the Entrepreneurs' Law Act¹⁰), and then for the next 24 months may pay a contribution from the base corresponding to 30% of the minimum wage for work (Art. 18a of the Act on the Social Insurance System). The basis for calculating the contribution, at the request of a person conducting non-agricultural activity, is reduced from PLN 3553.20 to a maximum of PLN 903. By the way, it is worth adding that the amount of the reduced contribution base corresponds to 13.5% of the average salary.

The Act on the Social Insurance System excludes the right to reduce the basis for calculating the contribution in cases of performing business activity for a former employer for whom, before the date of commencement of business activity in the current or previous calendar year, the entrepreneur performed activities falling within the scope of the business activity performed as part of the employment relationship or cooperative employment relationship, as well as in the case of restarting the activity by persons who conduct or have conducted business activity in the last 60 calendar months (Art. 18a of the Act on the Social Insurance System). However, the solutions introduced should be considered insufficient. On the one hand, they limit the possibility of applying a reduced basis for calculating contributions in the event that the employer, seeking to reduce employment costs, forces the employee to become self-employed. On the other hand, the flat-rate lowest contribution base for non-agricultural activities, amounting to 60% of the average forecast salary, will still be lower than the income on which the contribution is based in the case of an employee. Thirdly, the restriction applied does not solve the problem of contracting entities whose business model includes cooperation only with persons conducting business activity.

Contracting entities, seeing measurable benefits resulting from lower employment costs, often with the consent of the interested parties themselves, transform existing employment contracts into self-employment. In some countries, e.g. Spain, the development of self-employment is due to the inability to find an alternative form of gainful activity (Rubert, Pereiro 2021, 128). The expansion of self-employment can be observed in those branches of the economy that have so far been the domain of the standard form of employment. I am thinking here primarily of construction, health care or the broadly understood services sector.

¹⁰ Act of 6 March 2018, Entrepreneurs' Law, Journal of Laws of 2021, item 162, as amended.

3. CONSEQUENCES OF THE INCLUSION OF THE ECONOMICALLY DEPENDENT SELF-EMPLOYED AS A NON-AGRICULTURAL ACTIVITY – IN THE SPHERE OF SOCIAL SECURITY

The category of persons conducting business activity includes various entities, ranging from persons who, while conducting business, employ other persons, through persons who do not employ anyone and cooperate with many contractors, to self-employed persons who have set up their business in order to cooperate only with one contracting entity, often a former employer. The last of these categories raises numerous controversies when it comes to labour law and social security law.

By paying lower premiums, economically dependent self-employed, are able to reduce the costs of conducting their business, as well as the costs of the contracting entity's activity. In the case of large entities (transport companies), these savings are counted in hundreds of thousands of zlotys per month, which may correspond to, for example, the possibility of offering lower rates for the services they provide. In many sectors (e.g. healthcare or transport), self-employment distorts the competitive balance. Entities focused on cooperation with the self-employed, through the low costs of their own operations, become more competitive. These entities, being able to reduce the rates for the services they offer, displace from the market entities hiring employees or force them to change their employment strategy. On the other hand, in the healthcare sector, hospitals, in an attempt to reduce the costs of their operations, replace employees with self-employed people. There is also a group of high-income earners who, on their own initiative, do not want to remain in an employment relationship and choose self-employment. Such a phenomenon can be observed, for example, in the IT sector.

Persons conducting business activity may declare the lowest basis for calculating the premium provided for by law throughout the insurance period. The consequence of the adopted strategy will be that in the future the benefits of such people will oscillate around the minimum pension or disability pension. In practice, this means the need to insure the risk of old age in, for example, the so-called third pillar of the pension system. As statistics show, the number of people saving in individual forms of the third pillar (IKE and IKZE) is small. In 2022, at least one payment was made by 446.5 thousand savers in IKE¹¹, and in the case of IKZE, the number of savers who made up to at least one payment to IKZE amounted to 318.8 thousand¹². These data apply to all savers, and therefore not only to people running their business activity.

¹¹ Polish Financial Supervision Authority, Information about IKE as of December 31, 2021, https://www.knf.gov.pl/?articleId=77283&p_id=18 (accessed: 15.05.2022).

¹² Polish Financial Supervision Authority, Information about IKZE as of December 31, 2021, https://www.knf.gov.pl/?articleId=77281&p_id=18 (accessed: 15.05.2022).

Declaring the basis for calculating the contribution not much higher than the minimum wage means that in periods of short-term incapacity for work, e.g. illness, pregnancy or childcare – the amount of benefits granted may significantly differ from the level of income earned during the period of running a business. This is particularly important in the case of self-employed persons cooperating with only one entity. In the case of concluding an employment contract, the basis for calculating the contribution is income from work. The amount of short-term benefits is correlated with lost wages. In the case of economic activity, the basis for calculating sickness or maternity allowance is, as a rule, the average amount declared as the basis for calculating sickness insurance contributions in the last 12 months, reduced by an indicator of 13.71%. The short-term benefits of self-employed persons correspond to the level of protection declared by them. As a result, the rate of replacement of lost income may amount to only a few or a dozen percent.

In Social Security, replacing standard employment with economically dependent self-employment reduces the income of insurance funds. Cooperation with the self-employed also contributes to the lack of employee rights, e.g. sick pay, paid leave. During periods of stagnation, the self-employed may suspend business activity, which means that he bears the risk associated with running a business. Due to the reduction in the revenues of Social Insurance Fund and National Health Fund, the legislator is forced to modify the legal situation of all persons conducting non-agricultural economic activity. As an example, we can use the change in the rules for determining the basis for calculating the health insurance premium. A further and uncontrolled increase in the phenomenon of economically dependent self-employment may lead to further adverse changes. I am referring here to a further increase in the burden on those conducting non-agricultural economic activity.

4. THE CONCEPT OF SINGLING OUT THE ECONOMICALLY DEPENDENT SELF-EMPLOYED

Legal regulations do not stipulate the rules for singling out new insurance titles. Article 67 of the Constitution only indicates that a citizen has the right to social security. This means that it is the duty of the legislator to create a social security system and to provide the economically active person with the opportunity to join social security. The aforementioned provision indicates that the scope and forms of security are left to the ordinary legislator. In the Act on the Social Insurance System the legislator differentiates the situation of insured persons, providing diverse groups of insured persons with a level of protection tailored to their needs, while taking into account the economic capabilities of the payer of contributions. The level of burdens assigned to persons conducting

non-agricultural activities additionally takes into account the economic risks associated with running a business. When shaping the title to insurance, the legislator also takes into account the interest of Social Insurance Fund, i.e. ensuring a sufficiently high level of premiums due.

Economically dependent self-employment is a consequence of the contracting entities' search for a reduction in employment costs. The situation of an economically dependent self-employed person is to some extent similar to that of a cooperating person. Considering such people as belonging to a separate category is aimed at e.g. providing them with an adequate level of protection (increasing the revenues of the Social Insurance Fund should be considered a secondary objective). The growing number of people providing services in the conditions of economically dependent self-employment reduces the revenues of insurance funds and thus can lead to a global increase in premiums and taxes. It is worth emphasizing that the real "beneficiary" of the reduction in the premium calculation base is inter alia the ordering entity, which, when issuing an invoice for the commissioned services, takes into account the cost of paying social security contributions by the self-employed. The above considerations lead, in my view, to the conclusion that it is possible to introduce into the Act on the Social Security System a separate title of insurance – an economically dependent self-employed.

The status of economically dependent self-employed persons can be shaped in three ways:

- it is possible to assume that economically dependent self-employed persons constitute one of the categories of persons conducting non-agricultural activity – and thus the legislator should not single out this professional group from persons conducting non-agricultural economic activity;
- it is possible to unify the legal situation of all employed persons and introduce a uniform level of burdens, e.g. the introduction of one levy;
- it is possible to introduce a separate notion of the economically dependent self-employed for the needs of the social security system and health insurance.

The first of the solutions is used currently. Economically dependent self-employed persons are treated in social insurance as persons conducting non-agricultural economic activity. What distinguishes them is the exclusion of the possibility of reducing the basis for calculating the contribution if the self-employed performs work for the benefit of a former employer for whom, before the date of commencement of business activity in the current or previous calendar year, he performed activities falling within the scope of the business activity within the framework of an employment relationship or a cooperative employment relationship. Maintaining the current solutions is conducive to increasing the number of sole proprietorships. As noted by J. Cieřlik, in Poland in quantitative terms, the entrepreneurial rate is close to optimal, and increasing the number of people engaged in business activity in Poland has no rational justification, because the quantity does not necessarily mean the quality and scale of entrepreneurs'

activities (Cieślak 2019, 15). Too many entrepreneurs operating on a given market may lead to the precarisation of self-employment and the need to constantly support some of them with public funds.

The second solution, i.e. the unification of the level of burdens, was the subject of a lively discussion thanks to the concept of one levy developed by an inter-ministerial team in the Chancellery of the Prime Minister.¹³ In principle, simplifying and unifying the rules for paying contributions and taxes is an interesting alternative to the current solutions. First of all, it reduces the occurrence of optimization of the costs of doing business. A person covered by one levy, regardless of the form of gainful activity adopted (employment contract, civil law contracts, running a business), pays part of the income generated, thus financing the social and health insurance system. In practice, however, it is difficult to imagine the functioning of uniform rules in the case of employees and entrepreneurs who bear a significant risk. The single levy model equalizes the burden on the economically active, which means an increase in the share of the highest earners, including entrepreneurs, in the creation of social and health insurance funds. The adopted solution could have a negative impact on the financial condition of persons conducting non-agricultural activities.

The third solution is to single out economically dependent self-employment as a title to social and health insurance. This status would be granted to natural persons engaged in business activity who do not employ other persons, providing services to one or more contractors,¹⁴ if in the previous year the revenue from contracts performed for one entity represented at least 50% of the global revenue from economic activity. It is also possible to introduce a second criterion for the provision of services in the previous year on an hourly basis corresponding to 1/2 of a full-time job. The proposed level of revenue from a single source is lower than the one in Spain. As J. Cabeza pointed out, due to the fact that 75% of income must come from one source, only about 7.5 thousand people obtained the status of economically dependent self-employed (*trabajadores autónomos económicamente dependientes* – TRADE).¹⁵

Too high a coefficient may significantly limit the use of the postulated insurance title.

For a period of 12 months from the date of commencement of business activity, the self-employed would benefit from reliefs and preferences, e.g. would have the right not to pay social security contributions for a period of 6 months (Art. 18(1) of the Entrepreneurs' Law Act), and then for the next 6 months the

¹³ Szalamacha: „Zmiany w podatkach nie zlikwidują ulg np. na dzieci” [Changes in taxes will not eliminate reliefs for children], June 1, 2016. <https://podatki.gazetaprawna.pl/artykuly/948303,szalamacha-zmiany-w-podatkach-ulgi> (accessed: 15 March 2018).

¹⁴ Construction similar to that of an employee performing activities for the employer.

¹⁵ Lecture of J. Cabeza „Boundaries between subordinate work and self-employment taking into account the case law of the CJEU” presented on 11 March 2022 in Lodz.

insured person would have the right to declare the basis for calculating the contribution in the amount of not less than 30% of the minimum wage. After one year, following the example of the regulations in force in Spain, the insured would fill out the appropriate form – showing the sources of income in the previous year. If the self-employed did not exceed the limit of 50% of income from a single source in a tax period of 12 months, he would be insured for non-agricultural activities. The postulated solution would encourage to diversify the sources of income. The scope of protection of a self-employed person cooperating with a single contracting entity would be similar to the social protection granted to an employee. The proposed solution would limit the possibility of optimizing employment costs used by contracting entities, providing protection not only for economically dependent self-employed, but also for the people employed in those sectors of the economy where economically dependent self-employment predominates.

5. SUMMARY

Economically dependent self-employment is one of the challenges in social security law. On the one hand, the flexible nature of the rights and obligations of the self-employed has a positive impact on running a business, on the other hand, the growing number of self-employed people able to pay only the lowest contribution exerts pressure on further flexibility of the rules of social insurance by entrepreneurs.

Making the rules for paying premiums more flexible means that people with lower incomes are covered by insurance for non-agricultural activities. The expansion of this form of gainful activity can be observed in sectors of the economy dominated by employment within the framework of an employment relationship. Self-employment is treated as a form of reducing employment costs and increasing the competitiveness of business entities. Gradually, the boundaries between standard employment and self-employment are blurring. The ubiquitous optimisation of employment costs requires, in my opinion, the intervention of the legislator.

The introduction of a separate title of “economically dependent self-employed” would make it possible, to increase the level of social protection of these people, increase the revenues of the Social Insurance Fund, and at the same time would make it possible to modify the legal situation of economically dependent self-employed without the need to interfere with the rights and obligations of other persons covered by insurance for non-agricultural activity.

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