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Iwona Gredka-Ligarska
University of Silesia in Katowice
e-mail: iwona.gredka-ligarska@us.edu.pl
ORCID: 0000-0002-9243-3158

EMPLOYMENT STABILITY IN TIMES OF THE COVID CRISIS: A CASE OF LEGAL INSTRUMENTS INTRODUCED BY THE POLISH LEGISLATOR

Abstract

Protection of jobs has become one priority aim of the legislator during the crisis caused by the SARS-CoV-2 coronavirus pandemic. In the justification of the draft Act of 2 March 2020 on special solutions relating to the prevention, neutralisation, and combating of COVID-19 and other contagious diseases and the ensuing crisis situations (COVID Act), it was emphasized that the aid mechanisms introduced in the Act were supposed to prevent mass collective redundancies. And although the legislator tried to preserve sustainable employment during the COVID crisis, only a part of the introduced legal provisions offered a guarantee of work to employees. This article aims to provide an overview and assessment of the aid mechanisms implemented by the Polish legislator to protect jobs during the COVID crisis. The anti-crisis activities of the legislator, intended to preserve sustainable employment, can be divided into indirect and direct measures. An analysis was carried out taking into account the above division. Based on the analysis, reflections are formulated on the effectiveness of the implemented aid mechanisms. Finally, conclusions for the future are offered.

KEYWORDS

sustainable employment, protection of jobs, employment-based jobs, COVID crisis, anti-crisis legislation

SŁOWA KLUCZOWE

trwałość zatrudnienia, ochrona miejsc pracy, zatrudnienie pracownicze, kryzys covidowy, regulacje antykryzysowe

1. INTRODUCTION

The SARS-CoV-2 virus pandemic and the restrictions imposed as a result of that pandemic on the operation of many industries gave rise to serious threats to the economy and the labour market. This induced the Polish legislator to adopt numerous legislative acts intended to support the entrepreneurs, counteract their loss of financial liquidity, and protect jobs. Although the epidemic caused by COVID-19 is a new phenomenon on a global scale, the ensuing economic and social crisis, in certain respects, does not differ from the crises of the past. Times of crisis always involve uncertainty. It cannot be predicted in advance when a crisis will end and what its actual consequences will be. The deteriorating economic situation affects both the employers and the employees. It leads to the cancellation of jobs, bankruptcies open to composition arrangements and, in many cases, even to liquidation bankruptcy of employers. Such factors are not conducive to sustainable employment.

The Polish legislator tried to minimise the negative consequences caused by the SARS-CoV-2 pandemic in economic life, especially those concerning the financial status of employers. Specific legislative solutions were successively drafted and introduced under the Act of 2 March 2020 on special solutions relating to the prevention, neutralisation and combating of COVID-19 and other contagious diseases and the ensuing crisis situations[1]. A number of following Acts amended the COVID Act[2]. The main dangers identified were payment backlogs, limitations

[1] "Journal of Laws" 2020, item 374, hereinafter The COVID Act.

[2] Act of 31.03.2020 amending the Act on special solutions relating to the prevention, neutralisation and combating of COVID-19 and other contagious diseases and the ensuing crisis situations and certain other acts ("Journal of Laws" 2020, item 568, hereinafter Shield 1.0); Act of 16.04.2020 on special support instruments in relation to the spread of the SARS-CoV-2 virus ("Journal of Laws" 2020, item 695, hereinafter Shield 2.0); Act of 14.05.2020 amending certain acts on the protective measures in relation to the spread of the SARS-CoV-2 virus ("Journal of Laws" 2020,

to the scale of enterprise operations, plummeting demand for the products and services of enterprises, problems for firms with obtaining external financing and loss of contract partners, and limitation or suspension of investment. Firms were also exposed to delays in the performance of their obligations due to disruptions to the supply chain, lack of components necessary for production, and increased absence of employees caused by their isolation or quarantine[3]. On top of that, a factor especially acute and dangerous to the condition of many industries was the introduction in the Republic of Poland of temporary restrictions to the pursuance of certain types of economic activity, consisting of full or partial prohibition to conduct the specified kind of activity[4]. Those circumstances rapidly led to the entrepreneurs' financial difficulties. As a result, the priority aims of the crisis legislation were to preserve the financial liquidity of entrepreneurs and to ensure the protection of jobs. Also, in the longer run, much importance is attached to the curbing of growth in unemployment and minimising the size of the economic crisis and, in consequence, to the prevention of bankruptcy and liquidation of enterprises and mass group redundancies[5].

In times of crisis, the instruments of general and special protection of sustainable employment become insufficient to ensure the real protection of jobs. During the COVID crisis, also the aid mechanisms laid down in the Act of 11 October 2013 on special solutions relating to the protection of employment[6] have proven insufficient. The anti-crisis activities of the legislator intended to protect jobs can be divided into indirect and direct measures. This is a consequence of the fact that although maintaining sustainable employment in times of crisis has become

item 875, hereinafter Shield 3.0); Act of 19.06.2020 on bank loan interest subsidies granted to entrepreneurs affected by consequences of COVID-19 and on summary proceedings for the approval of an arrangement in connection with the COVID-19 virus pandemic ("Journal of Laws" 2020, item 1086, hereinafter Shield 4.0); Act of 17.09.2020 amending the Act on special solutions relating to the prevention, neutralisation and combating of COVID-19 and other contagious diseases and the ensuing crisis situations and certain other acts ("Journal of Laws" 2020, item 1639, hereinafter Shield 5.0); Act of 9.12.2020, amending the Act on special solutions relating to the prevention, neutralisation and combating of COVID-19 and other contagious diseases and the ensuing crisis situations and certain other acts ("Journal of Laws" 2020, item 2255, hereinafter Shield 6.0).

[3] Justification of shield 4.0, p. 1–3. Sejm paper No. 382, http://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=382 (accessed 16.05.2022).

[4] See e.g. Regulation of the Council of Ministers of 16.05.2020 establishing certain restrictions, requirements and prohibitions in relation to the state of the epidemic ("Journal of Laws" 2020, item 878); Regulation of the Council of Ministers of 21.05.2020 amending the Regulation establishing certain restrictions, requirements and prohibitions in relation to the state of the epidemic ("Journal of Laws" 2020, item 904); Regulation of the Council of Ministers of 29.05.2020 establishing certain restrictions, requirements and prohibitions in relation to the state of epidemic ("Journal of Laws" 2020, item 964).

[5] A. Boguska, Ł. Pisarczyk, *Zwolnienia z przyczyn niedotyczących pracowników wobec pandemii COVID-19*, "Z Problematyki Prawa Pracy i Polityki Socjalnej" 2021, No. 2 (19), p. 4.

[6] Consolidated text: "Journal of Laws" 2019, item 669, hereinafter ASSPJ.

one of the priorities of the anti-COVID legislation, only a part of the introduced intervention regulations ensured the stability of work for the employees.

The purpose of this article is to examine the legal instruments used by the Polish legislator for the protection of jobs during the COVID crisis, precisely from the perspective of their direct or indirect nature. This will already be a look from a certain distance because, at the time of preparing this study, two years have passed since the introduction in the Republic of Poland first the state of epidemic threat[7] and subsequently, the state of epidemic[8]. This allows reflection on the effectiveness of the applied aid mechanisms. Therefore, the author's task is to attempt to assess the analysed legal solutions and to draw conclusions that may prove helpful for drafting anti-crisis legislation in the future. This article is focused exclusively on the employment-based jobs since the employment relationship – by its very nature – is characterised by sustainability.

2. MECHANISMS OF DIRECT PROTECTION OF JOBS

At the time of the COVID crisis, the Polish legislator decided to implement – as is known from the Act on special solutions relating to the protection of jobs[9] – a mechanism of direct employment protection. This mechanism – in principle – consisted of a prohibition of dismissing employees in combination with financial aid and the legislator's authorisation of worsening the terms of employment. However, as laid down in the COVID Act, the system of subsidies was based on presumptions other than those laid down in ASSPJ. Under the COVID Act, grants from public funds are available to employers for the purpose, among others, of covering a part of an employee's reduced salary, provided that the employer has actually reduced such salary. On the other hand, under ASSPJ, subsidies were addressed not to the employer but to the employee and made a partial compensation for the income lost on account of the salary reduced by the employer. As a result, under the provisions of ASSPJ, the employer is only an intermediary in the payment of benefits to employees, which derive from the public funds. The employer pays the benefits together with the employer's own part of the salary[10].

[7] Regulation of the Minister of Health of 13.03.2020 declaring a state of epidemic threat in the Republic of Poland (”Journal of Laws” 2020, item 433).

[8] Regulation of the Minister of Health of 20.03.2020 declaring a state of epidemic in the Republic of Poland (”Journal of Laws” 2020, item 491). The state of the epidemic was in force in the Republic of Poland since 20.03.2020 and was cancelled on 16.05.2022.

[9] Art. 13 in conjunction with Art. 5 ASSPJ.

[10] A. Boguska, Ł. Pisarczyk, *Sfera zatrudnienia w działaniach antykryzysowych. Wybrane zagadnienia*, “Monitor Prawa Pracy” 2020, No. 5, p. 9.

Bearing in mind the wide range of the intervention mechanisms implemented during the COVID crisis, it should be highlighted that the legislator used a prohibition to dismiss employees only to a limited degree. On the other hand, it is the direct protection mechanism that offers a real guarantee of employment to employees.

As introduced in the COVID Act, the prohibition of dismissing employees has a narrower and a wider form. The narrower approach involves prohibition of terminating an employee's contract for reasons independent of the employee[11], whereas under the wider approach, there is an obligation to "maintain employment" of the employees covered by the subsidies. As far as the narrower form of protection is concerned, the underlying provisions can be found in Articles 15g; 15gg; 15gga of the COVID Act.

Article 15g of the COVID Act is an example of imposing a prohibition to terminate an employee's contract for reasons independent of the employee in combination with the deterioration of the terms of employment and provision of financial support to the employer. This provision includes an institution of reducing employees' working time or coverage of employees with an economic stoppage, in combination with a reduction of the employee's salary and partial compensation for the costs of salaries[12]. Employers could apply for the payment of benefits from the Guaranteed Employee Benefits Fund[13]. The subsidy for the employee salaries, as provided for by the legislator for a period of economic stoppage caused by the COVID-19 pandemic, amounted to 50 per cent of the minimum salary for work, as established under the provisions on minimum remuneration for work, considering the working times (Art. 15g(7) of the COVID Act). To obtain the subsidy, in the period of economic stoppage, an employee's salary had to be reduced, however, by no more than 50 per cent and down to an amount no less than the minimum salary for work, considering the employee's working

[11] For more on reasons independent of the employee, see Judgment of the Supreme Court of 10.10.2019, I PK 196/18, Legalis; Judgment of the Supreme Court of 10.03.2016, III PK 81/15, OSNP 2017 No. 10, item 124; Judgment of the Supreme Court of 24.03.2011, I PK 185/10, LEX No. 1119478; Judgment of the Supreme Court of 29.03.2001, I PKN 325/00, OSNP 2003 No. 1, item 8.

[12] Moreover, employers could obtain funds to cover the contributions to an employee's social insurance, as payable on the granted benefits for cofinancing the salaries of the employees covered by economic stoppage or reduction of working times in consequence of the COVID-19 pandemic (Art. 15g(2) of the COVID Act, as amended under Art. 77, item 13, letter c of Shield 4.0).

[13] When defining the material scope of the provision of Art. 15g of the COVID Act, the legislator did not use the term "employer", but made clear that benefits may be granted for the cofinancing of salaries of employees covered by economic stoppage or reduction of working hours as a consequence of the COVID-19 pandemic. This means that the aid mechanisms laid down in Art. 15g of the Covid Act were addressed by the legislator to employers, however, not to all employers. For extensive comments on the subjective scope of Art. 15g of the COVID Act, see M. Raczkowski, M. Ducki, *Porozumienia zawieszające w ustawie antykryzysowej*, "Praca i Zabezpieczenie Społeczne" 2020, No. 5, pp. 19–20.

time[14]. On the other hand, the employees' working time could be reduced maximally by 20 per cent, however, no more than to 0.5 of ful-ltime employment[15].

The subsidies for the employees' salaries covered by a reduction of working time were defined by the legislator differently from the subsidies for salaries of employees covered by economic stoppage. Namely, the salaries of employees covered by a reduction of working time could be subsidised up to one-half of such employees' remuneration. In case of reduction of working time, the subsidies for remunerating employees had a more individualised nature and were defined in relation to the salary of particular employees and not as a lump sum[16]. However, for the purpose of controlling the costs of the subsidy, the legislator introduced its quota limit. A monthly amount of subsidies per one employee covered by a reduction of working time could not exceed 40 per cent of an average monthly salary for the preceding quarter, as announced by the President of the Central Statistical Office and applicable on the date of submitting the request for subsidy[17].

The right to take advantage of the subsidies for employees' salaries covered by economic stoppage or a reduction of working time was made dependent by the legislator on the fulfilment of several positive and negative preconditions[18]. Among the positive preconditions, one should note the requirement of a decrease

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[14] In consequence, if a fulltime employee received minimum salary, in the period of economic stoppage an employer could obtain a subsidy for the salary of such an employee, covering as much as one half of the employee's remuneration. However, if the employee's salary before the economic stoppage period was significantly higher than the minimum salary, the subsidy amount – although nominally the same – actually constituted a lesser financial aid for the employer. If the employer reduced the previous remuneration of such employee by the highest admissible amount, that is by half, the subsidy obtained (50 per cent of minimum salary for work) could cover only a part of the employee's salary. Moreover, the legislator entirely precluded the possibility to obtain subsidies for the salaries of employees engaged at highly paid job positions (Art. 15g(7), second sentence, of the COVID Act). As a result, the parties that benefited most from the cofunding mechanism laid down in rt.. 15g of the COVID Act were employers operating in such industries where employee salaries were still at a relatively low level (e.g., catering industry, hotel industry).

[15] Provided, however, that an employee's salary may not be lower than the minimum salary for work, as established under the provisions on minimum remuneration for work, considering the employee's working time (Art. 15g(8) of the COVID Act).

[16] A. Przybyłowicz, (in:) K.W. Baran (ed.), *Tarcza antykryzysowa 1.0−4.0: Ustawa o dodatku solidarnościowym i inne regulacje. Szczególne rozwiązania w prawie pracy, prawie urzędniczym i prawie ubezpieczeń społecznych związane z COVID-19. Komentarz*, Warszawa 2020, p. 191.

[17] As in the case of an economic stoppage, also in the case of reduction of working times, subsidies were not payable for the remuneration of such employees whose salaries – as received in the month preceding the month of submitting the application for the subsidy – were higher than 300 per cent of an average monthly salary for the preceding quarter, as announced by the President of the Central Statistical Office under the provisions on pensions and disability pensions from the Social Insurance Fund (Art. 15g(10a) of the COVID Act).

[18] For more, see K. Księżyk, (in:) K.W. Baran (ed.), *Tarcza antykryzysowa 1.0−4.0: Ustawa o dodatku solidarnościowym i inne regulacje. Szczególne rozwiązania w prawie pracy, prawie urzędniczym i prawie ubezpieczeń społecznych związane z COVID-19: Komentarz*, Warszawa 2020, pp. 155–156.

in turnover as a consequence of the COVID-19 pandemic (Art. 15g (9) of the COVID Act). At the same time – when specifying the negative preconditions – the legislator found it inadmissible, among others, to fulfil the prerequisites for declaring the employer's bankruptcy[19]. In consequence, the subsidies laid down in Art. 15g of the COVID Act were addressed to such employers whose financial condition deteriorated as a result of the SARS-CoV-2 virus pandemic (decrease in turnover) but who, at the same time, have not lost their ability to meet their monetary obligations.

In Art. 15g(17) of the COVID Act, the legislator instructs to apply as appropriate[20], among others, Art. 13 ASSPJ, which provides for a prohibition to terminate an employee's contract for reasons independent of the employee. This prohibition applies both in the period or periods of receiving the benefits and in the period or periods directly following the period or periods of receiving the benefits – however, for no longer than a total of 3 months. However, it should be noted that the prohibition of terminating the employee's contract for reasons independent of the employee – within the full scope provided in Art. 13 ASSPJ – applied only for a very short time in pursuance of Art. 15g of the COVID Act (only from 31 March 2020 to 18 April 2020). Very soon, already in the Shield 2.0, the legislator decided to restrict the discussed prohibition exclusively to a period of the employer's receipt of the benefits referred to in 15g(1) and of the means referred to in Art. 15g(2) of the COVID Act. Such a decision of the legislator should be assessed critically. The guarantee of employment granted to employees under Art. 15g of the COVID Act should definitely be subject to a longer protective period. Preferably, it should be subject to at least a 3-month period directly following the receipt of the benefits. In literature, it was noted that the shortening of the protective period was probably a response to the concerns reported by employers and was to provide an incentive for the employers to take advantage of the aid mechanisms offered by the state[21].

In Art. 15gg of the COVID Act, the legislator decided to correlate the prohibition of terminating an employee's contract with the employer's right to obtain the subsidies for salaries and social insurance contributions payable on such salaries in relation to those employees who are not covered either by a stoppage in the understanding of Art. 81 of the Labour Code or an economic stoppage or reduction of working time, as referred to in Art. 15g(5) of the COVID Act. As a result, employers who have noted a reduction in turnover, as defined in Art. 15g(9) of the COVID Act, could obtain – from the funds of the Guaranteed Employee Benefits Fund – subsidies amounting to one-half of an employee's salary, however, no

[19] This refers to the prerequisites specified in Art. 11 or Art. 13(3) of the Act of 28.02.2003 – Bankruptcy Law ("Journal of Laws" 2003, No. 60, item 535, as amended).

[20] This means appropriate application to the payment and settlement of the benefits referred to in Art. 15g(1) and of the means referred to in Art. 15g(2) of the COVID Act.

[21] See A. Boguska, Ł. Pisarczyk, *Zwolnienia z przyczyn…*, pp. 7–8.

more than 40 per cent of an average monthly salary for the preceding quarter as announced by the President of the Central Statistical Office (Art. 15gg(4) of the COVID Act)[22]. Employers could receive subsidies for a total period of 3 months, starting from the month when the application was submitted. At the same time, the grant of subsidy was correlated by the legislator with a prohibition on terminating an employee's contract for reasons independent of the employee. The prohibition applied for a period of receipt of the benefit co-financing the salary (Art. 15gg(8) of the COVID Act). In literature, it was highlighted that the term "shall not terminate employment contract", in fact, meant a prohibition imposed on the employer to terminate an employment contract[23]. Under Art. 15gg(8) of the COVID Act, in the period of receiving subsidies for the salary of a specific employee, the employer could not terminate that employee's contract for reasons independent of the employee. However, the employer could terminate the contract for reasons attributable to the employee[24]. Moreover, an employment contract could be terminated upon the expiry of the period for which it was concluded. An employer could also terminate an employee's contract with immediate effect, i.e. without notice, if the prerequisites under Art. 51 of the Labour Code were fulfilled. It seems that by using the term "shall not terminate the employment contract", the legislator meant the procedure of terminating an employment contract as specified in Art. 30, para 1, item 2 of the Labour Code, that is, termination of an employment contract under a notice made by the employer. This means that this concept covers both making such an act and its consequence[25]. Under the analysed Art. 15gg(8) of the COVID Act, it is inadmissible that, in a period of the employer's receipt of the subsidy for a salary of a specific employee, the employment contract is terminated by the employer's notice for reasons independent of that employee[26].

[22] On the other hand, the subsidy was not payable for the remuneration of employees whose salary received in the month preceding the month of submitting the application was higher than 300 per cent of an average monthly salary for the preceding quarter, announced by the President of the Central Statistical Office under the provisions on pensions and disability pensions from the Social Insurance Fund, as applicable on the date of submitting the application (Art. 15gg(5) of the COVID Act).

[23] A. Boguska, Ł. Pisarczyk, *Zwolnienia z przyczyn…*, p. 6.

[24] For more on reasons attributable to the employee, see L. Mitrus, *Wypowiedzenie umowy o pracę z przyczyn dotyczących pracownika*, Warszawa 2018, p. 139 *et seq.*

[25] See A. Boguska, Ł. Pisarczyk, *Zwolnienia z przyczyn…*, p. 7.

[26] Since not only the mere legal act is of the essence but, first of all, its consequence, that is cessation of the employment relationship for reasons independent of an employee, a question arises if, under Art. 15gg(8) of the COVID Act, it was admissible to terminate an employment contract by mutual agreement of the parties for reasons independent of the employee. The answer will be affirmative if the initiator of the agreement was the employee. In practice, however, such situations would definitely be rare since the reasons for terminating the employment relationship must be independent of the employee. For a contract to terminate by mutual agreement of the parties – on the employer's initiative – the employee obviously has to express his consent. Nonetheless, due

In conclusion, the narrow approach to the prohibition of dismissing employees under Art. 15gg(8) of the COVID Act is manifested in the limitation of that prohibition to dismissals for reasons independent of the employees and to the procedure referred to in Art. 30, para 1, item 2 of the Labour Code. Violation of the prohibition under Art. 15gg(8) of the COVID Act is sanctioned by the requirement to return in full the subsidy obtained for the employee's salary, together with interest at the rate corresponding to tax arrears (Art. 15gg(23b) of the COVID Act).

Also, in Art. 15gga of the COVID Act we have to do with a narrow approach to the prohibition of dismissing employees. However, the subjective scope of that provision differs from the scope of Art. 15gg of the same Act. The provisions of Art. 15gga of the COVID Act are dedicated only to entrepreneurs who operate in specific industries and who, as of the date specified by the legislator, have conducted – as their principal activity – the activities referred to by specific codes as per the Polish Classification of Activities (PKD) 2007[27]. Under the provision of Art. 15gga(15) item (1) of the COVID Act, the employers who were granted subsidies for the employee salaries were covered with a prohibition to terminate such employees' contracts for reasons independent of the employee throughout the period of the subsidy's receipt. As in the case of Art. 15gg of the COVID Act, also under Art. 15gga of that Act, a prohibition was imposed on the employer to terminate employee contracts under the procedure specified in Art. 30, para 1, item 2 of the Labour Code for reasons independent of the employee. Violation of that prohibition by the employer gave rise to an obligation to return the entire subsidy received for the salary of the employee whose contract was terminated for reasons independent of the employee (Art. 15gga(16) of the COVID Act).

A wider prohibition of dismissing employees was provided for by the legislator in: Art. 15zzb(8), Art. 15zze(7), and in Art. 15zze^2(7) of the COVID Act. This prohibition was correlated with the subsidies for the employee salaries and social insurance contributions payable on such salaries. Employers could be granted

to the procedure of terminating employment contracts by mutual agreement, the employer could achieve the same result as was precluded by the legislator under Art. 15gg(8) of the COVID Act. The employer's use of the procedure of the parties' mutual agreement was not prohibited under Art. 15gg(8) of the COVID Act, which means that it was entirely admissible.

[27] Under Art. 15gga of the COVID Act, entrepreneurs who met the industry criterion could obtain benefits – from the Guaranteed Employee Benefits Fund – for the protection of jobs. This referred to entrepreneurs whose income from economic activity, in the understanding of tax legislation, received in one of the three months preceding the month of submitting the application was lower, as a result of the COVID-19 pandemic, at least by 40 per cent than the incomes earned in the preceding month or analogous month of the preceding year. Subsidy co-financing the salary of one employee was 2,000.00 PLN per month – considering the employee's working time – and was payable for a total period of 3 calendar months from the month of submitting the application An exception related to highly paid job positions and employees engaged in a period shorter than 3 months prior to submitting the application. In such cases the subsidy was not payable (Art. 15gga(5) of the COVID Act).

a subsidy under an agreement concluded with the starost. The beneficiaries of that subsidy were obligated to maintain employment of the employees covered by the subsidy throughout the period for which the subsidy was granted[28]. This means that employers were obliged to refrain from terminating such employees' contracts on notice, both for reasons independent of the employee and for reasons attributable to the employee. The prohibition against terminating an employment relationship also extended to the termination of an employment contract by mutual agreement of the parties but on the employer's initiative. On the other hand, the obligation to maintain employment did not relate to termination of an employee's contract without notice through the employee's fault, in case of fulfilment of a prerequisite under Art. 52 of the Labour Code. However, there could be some interpretive doubts regarding the admissibility to cease employment – that is not to maintain in employment – in case of dissolution of an employment contract upon expiry of the period for which it was concluded or in case of terminating an employment contract by the employer without notice and without the employee's fault, under Art. 53 of the Labour Code. Within the framework of Art. 15zzb of the COVID Act, the legislator dispersed a part of such doubts by adding para (9a). The admissibility was confirmed of terminating the employment contract by the employee themselves, which, however, seems quite obvious, bearing in mind that the labour relationship is a voluntary legal relationship. More importantly, however, the legislator confirmed that the obligation, expressed in Art. 15zzb(8) of the COVID Act, to maintain in employment, did not cover the expiry of the employment relationship or terminating an employee's contract under Art. 52 of the Labour Code. Notably, Art. 15zzb(9a) of the COVID Act does not relate at all to the termination of an employment contract under Art. 53 of the Labour Code, i.e. without notice and without employee's fault. Following the assumption of the reasonable legislator, it should be concluded that such omission was not accidental but intended by the lawmaker. It must be concluded that immediate termination of an employment contract, as provided for in Art. 53 of the Labour Code, is inadmissible within the framework of Art. 15zzb(8) of the COVID Act[29].

In summary, the scope of direct protection of jobs in times of the COVID crisis should be considered too narrow. This concerns both too short a period of the prohibition to dismiss employees and too few aid rules in which the Polish

[28] Under the original version of Art. 15zzb(8) of the COVID Act, the employer was obliged to maintain in employment the employees covered by the agreement concluded with the starost throughout the period of the subsidy and, upon expiry of the subsidy, for a period equal to that period. Very quickly – already in consequence of amending the COVID Act by the Shield 2.0 – the legislator withdrew from that solution and shortened the protection to a period of receipt of the subsidy.

[29] The same conclusions relate also to the provisions of Art. 15zze(7) in conjunction with Art. 15zze(8a) and of Art. 15zze^2(7) in conjunction with Art. 15zze^2(9) of the COVID Act. This is the case as we have to do with provisions analogous to those set out in Art. 15zzb(8) and (9a) of the COVID Act. However, the subjective scope of those rules is different.

legislator decided to use that prohibition. For the sake of comparison, the Italian legislator introduced a prohibition to launch the procedure of collective redundancies or to effect individual dismissals for economic reasons, initially for a period of 60 days (from March to May 2020). Then, this prohibition was prolonged until August 2020[30]. On its part, the Spanish legislator, with a view to protecting jobs, provided, among others, for an exemption of entrepreneurs from the obligation to pay social insurance contributions. The exemption covered 75 per cent of the contribution payable by an entrepreneur (which is referred to large enterprises) or 100 per cent of the contribution in respect of entrepreneurs employing less than 50 employees. However, a precondition to the grant of the exemption was that the entrepreneur had to maintain the previous headcount for a minimum 6-month period. Moreover, in the second stage of introducing anti-crisis legislation, the Spanish legislator decided to introduce a prohibition to dismiss employees for economic, technical, organisational or manufacturing reasons or on account of *force majeure*. On the other hand, dismissal for reasons attributable to the employee was still admissible[31].

3. MECHANISMS OF INDIRECT PROTECTION OF JOBS

During the COVID crisis, the Polish legislator focused its actions on mechanisms of indirect protection of jobs. As opposed to the legal instruments of direct protection of sustainable employment – introduced for a very short, 3-month period – instruments of indirect protection were used by the legislator more extensively and in a long-term perspective. Among the most essential mechanisms of indirect protection of jobs, one can list authorisation of the employers' right to worsen the terms of employees' service and financial support for employers. As far as indirect protection of jobs is concerned, the legislator does not introduce a prohibition to dismiss employees but strives to improve the financial standing of employers[32]. This is done in different ways, i.e. through legal provi-

[30] M. Biasi, *Covid-19 and labour law in Italy*, "European Labour Law Journal" 2020, Vol. 11, issue 3, pp. 309–310.

[31] M.A. García-Muñoz Alhambra, *Covid-19 and labour law in Spain*, "European Labour Law Journal" 2020, Vol. 11, item 3, p. 321.

[32] It is noteworthy that at an initial phase of the pandemic, aid legislation was addressed to a wide range of entrepreneurs (employers), and as the following waves of the pandemic proceeded, support from the state was addressed only to entrepreneurs operating in specific industries. This was the case as the legislator looked after those industries that suffered the most as a consequence of the coronavirus pandemic and which, in turn, suffered most acutely the negative consequences of the restrictions imposed for the purpose of combating the pandemic. As examples of aid provisions dedicated to specific industries, one can list the right to be granted exemption from the

sions reducing labour costs (authorisation of worsening the terms of employment, increasing flexibility of the labour process), or by exemptions from the obligation to pay social insurance contributions, or, finally, through direct financial support granted to employers. And although financial support to employers is not a classical instrument in the area of labour law intended to protect employment stability, in times of a crisis – and the COVID is no exception – it is qualified as one of the mechanisms of indirect protection of jobs. By using the instruments of indirect protection of jobs, the legislator does not provide employees with a guarantee of employment, but by improving their employers' financial position, the legislator strives to create conditions conducive to maintaining the existing headcount and avoiding collective redundancies[33].

An example of legislation authorising employers to worsen the terms of employee's service was the provision of Art. 15gb of the COVID Act. In the discussed norm, the legislator did not provide for any subsidy for employers but allowed for a reduction of employees' working times or coverage of employees with an economic stoppage and a reduction of salary. This was admissible in case of a decrease in the incomes from sales of goods or services – as a consequence of the COVID-19 pandemic – and an ensuing essentially increased burden on the salary fund[34]. Taking advantage of the legal instruments provided for in 15gb of the COVID Act, employers could, at the same time, submit an application for a subsidy granted under Art. 15g(1) of the COVID Act if, concurrently, the preconditions prescribed in that provisions were fulfilled[35]. The employer could reduce the working time of an employee maximally by 20 per cent, however, no less than 0.5 of full-time employment, provided that the employee's salary could not be lower than the minimum salary for work, as established under the provisions on minimum remuneration for work, considering the employee's working time (Art. gb(1) point 1 of the COVID Act).

Additionally, in case of covering an employee with the economic stoppage, such an employee's salary could be maximally reduced by 50 per cent, however, to an amount no less than the minimum salary for work, as established under the provisions on the minimum remuneration for work, considering the employee's working time. In the analysed provision, the legislator authorised long-term dete-

obligation to pay social insurance contributions, health insurance contributions, contributions to the Labour Fund, the Solidarity Fund, the Guaranteed Employee Benefits Fund or the Temporary Retirement Fund. This right was provided for in the Shields: 5.0; 6.0; 7.0; 8.0; 9.0, with a proviso that the exemption from payment of contributions may be granted only to such entrepreneurs who, on the date specified by the legislator, conducted – as their principal activity – the activities under specific codes as per the Polish Classification of Activities (PKD) 2007.

[33] Ł. Pisarczyk, *Prawo pracy wobec kryzysu*, "Państwo i Prawo" 2020, No. 12, source: LEX.

[34] The phrase "essentially increased burden on the salary fund" was defined in Art. 15gb(2) of the COVID Act.

[35] It was necessary, among others, to note a decrease in the turnover in the understanding of Art. 15g(9) of the COVID Act.

rioration of the terms of employees' service. Reduction of the working time or coverage of an employee with economic stoppage could be introduced for a period of 6 months starting from the month when the quotient of employee salary costs decreased to a level lower than 105 per cent of the quotient from the base month, however, no longer than for a period of 12 months from the date of cancelling the state of epidemic threat or the state of the epidemic[36].

In addition, as a part of worsening the terms of employees' service, the legislator authorised: 1. reduction of uninterrupted daily rest of an employee from 11 hours to 8 hours and reduction of uninterrupted weekly rest of an employee from 35 hours to 32 hours, 2. introduction of a system of equivalence where it was admissible to prolong the daily working time, however, to no longer than 12 hours, in a settlement period not exceeding 12 months[37], 3. introduction of less favourable terms of employees' service than those under the employment contracts concluded with the employees (Art. 15zf(1) item (1)–(3) of the COVID Act)[38]. This rule provided for extensive use of collective agreements, in which social partners would decide about: the conditions and procedures of performing work in the period of economic stoppage or reduction of working times (Art. 15g(11) of the COVID Act), about the introduction of a system of equivalence (Art. 15zf(1) item (2) of the COVID Act), about the application of less favourable terms of employees' service than those under employment contracts concluded with the employees, and about the scope and period of application of such less favourable terms (Art. 15zf(1) item (3) of the COVID Act).

Deterioration of the employees' situation is also related to the restriction of social activities of employers who noted a decrease in the turnover[39] or an essentially increased burden on the salary fund[40]. This was the case since the legislator permitted employers to suspend their obligations in respect of: 1. creating and operating a company employee social benefits fund, 2. making a basic deduction, 3) payment of leave benefits (Art. 15ge(1) of the COVID Act), and 4. reducing the amount of the basic deduction to a statutory level (Art. 15ge(3) of the COVID Act).

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[36] Unless the employer restores at an earlier time the working times applicable before their reduction or ends the economic stoppage in relation to an employee (Art. 15gb(5) of the COVID Act).

[37] Prolonged daily working times were to be compensated by a shorter daily working time on certain days or by days off (Art. 15 zf(1) item (2) of the COVID Act).

[38] Introduction of flexible terms of determining employees' working times, introduction of a system of equivalence, and application of less favourable terms of employees' service was made available by the legislator to such employers who noted a decrease in the turnover as a consequence of the COVID-19 pandemic and who – within the third quarter of 2019 – were not in arrears with paying tax liabilities, contributions to social insurance, health insurance, the Guaranteed Employee Benefits Fund, the Labour Fund or the Solidarity Fund. Decrease in the turnover was defined in Art. 15zf(2) and (2a) of the COVID Act.

[39] Decrease in turnover – in the understanding of Art. 15g(9) of the COVID Act.

[40] Essentially increased burden on the salary fund – in the understanding of Art. 15gb(2) of the COVID Act.

The legislator introduced a long time frame, allowing entrepreneurs to restrict their social activities throughout the period of the state of epidemic threat or the state of epidemic declared in relation to the COVID-19 pandemic[41].

Upon examining the legal mechanisms compromising the terms of employees' service, a conclusion arises that the legislator's interventions are too far-reaching. The legislator authorised the deterioration of the employees' situation within too long a time frame. The manifestation of the foregoing is, among others, the authorisation of: 1. restricting social activities throughout the entire period of the state of epidemic threat or the state of epidemic announced in relation to the COVID-19 pandemic (Art. 15ge(1) of the COVID Act), 2. reducing working time or covering an employee with an economic stoppage for a period up to 6 months[42] and, maximally, for a period up to 12 months from the cancelling of the state of epidemic threat or the state of the epidemic (Art. 15gb(5) of the COVID Act). Moreover, the legislator did not define the time frame for the application of less favourable terms of employees' service, leaving that question to be decided in a collective agreement[43] (Art. 15zf(1) item (3) of the COVID Act). The same is true in respect of economic stoppages and reductions of working times, as laid down in Art. 15g of the COVID Act. The period of the employer's use of

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[41] In literature, attention was drawn to the fact that the purpose of the discussed provisions – namely reduction of employers' operating costs – may justify the authorisation given to employers for the suspension of the obligation to make a deduction for the company employee social benefits fund, pay leave benefits or the obligation to create the fund (obviously, this relates exclusively to such employers whose financial condition deteriorated as a result of the SARS-CoV-2 coronavirus epidemic.). However, there is no justification for endowing employers with the right to suspend the operation of the fund, that is to suspend payment of social benefits from the means already accumulated in that fund. Since such means cannot be allocated to any other purposes – and especially to the financing of the employer's current operations – the suspension of operation of the company employee social benefits fund, in no way whatsoever, improved the financial standing of the employer, and only deprived employees of the access to social benefits in the difficult time of the COVID crisis. See M. Latos-Miłkowska, *Działalność socjalna pracodawcy w tarczy antykryzysowej*, "Praca i Zabezpieczenie Społeczne" 2021, Vol. LXII, No. 1, p. 10. Moreover, this author emphasised that most serious controversies were aroused by the solution adopted under Art. 15ge(3) of the COVID Act, consisting in the suspension, by operation of law, of the provisions of collective labour agreements and remuneration regulations setting out a deduction to the company employee social benefits fund or for other social activities in an amount higher than statutory deduction, as provided in the Act of 4.03.1994 on the company employee social benefits fund ("Journal of Laws" 1994, No. 43, item 163, as amended). In the opinion of M. Latos-Miłkowska, the provisions of Art. 15ge(3) of the COVID Act violate the constitutional principle of dialogue between social partners and infringe on the right of trade unions to conduct collective bargaining for the purpose of concluding collective labour agreements or other collective agreements. M. Latos-Miłkowska, *Działalność socjalna pracodawcy*...., p. 11.

[42] Starting with the month when the quotient of employee salary costs decreased to a level lower than 105 per cent of the quotient in the base month.

[43] See M. Latos-Miłkowska, *Porozumienia zbiorowe w tarczy antykryzysowej*, "Praca i Zabezpieczenie Społeczne" 2020, Vol. LXI, No. 10, p. 29.

those institutions was also left to be decided in a collective agreement concluded between social partners (Art. 15g(14) item (3) of the COVID Act).

As a result, the legal provisions adopted by the Polish legislator with regard to worsening the terms of employees' service should be regarded as too intrusive in the situation of the employees. Undoubtedly, we have to do with a disproportion between protecting the interests of employers and protecting the interests of employees[44]. On the one hand, the mechanism of direct protection of jobs (prohibition of dismissing employees) is only rarely introduced by the legislator, and if so, only for a short period – as short as 3 months[45]. On the other hand, during the COVID crisis, the legislator permitted the possibility to worsen the terms of employees' service – in case of a deteriorated financial condition of the employer – for a, principally, indefinite term. This is the case as no one could predict when the SARS-CoV-2 coronavirus pandemic would end and when, in turn, the state of pandemic – declared in Poland on 20 March 2020 – would be cancelled. By permitting the possibility to worsen the situation of employees throughout the entire duration of the state of epidemic or the state of epidemic threat, the legislator upset the balance between protecting the interests of employers and protecting the interests of employees.

4. UNDERMINING STABILITY OF EMPLOYMENT IN THE TIMES OF THE COVID CRISIS

By introducing legal mechanisms intended to protect jobs, the Polish legislator, paradoxically, introduced also solutions undermining the stability of employment. As examples of such solutions, one can point to the limitation of the amount of severance allowances or provisions on the restructuring of the workforce in public administration. In the first case, the legislator decided that the amount of a severance allowance, compensation or other monetary benefit paid by an employer to an employee in connection with terminating their employment contract – where the applicable legislation sets out an obligation to pay the benefit – may not be higher than ten times the minimum salary for work, as established

[44] See M. Mędrala, *Ograniczenia praw zatrudnionych w tarczy 4.0 – niektóre refleksje w kontekście zasad konstytucyjnych*, "Monitor Prawa Pracy" 2020, No. 9; A. Rytel-Warzocha, *Wypowiadanie umów o zakazie konkurencji w ustawie "Tarcza 4.0" – kilka uwag z punktu widzenia zgodności z Konstytucją RP*, "Monitor Konstytucyjny", http://monitorkonstytucyjny.eu/archiwa/14207 (accessed 3.04.2023); I. Gredka-Ligarska, *Uprawnienie do wypowiadania umów o zakazie konkurencji w okresie obowiązywania stanu zagrożenia epidemicznego albo stanu epidemii, ogłoszonego z powodu Covid-19. Uwagi* de lege lata *i* de lege ferenda, "Roczniki Administracji i Prawa" 2021, special edition.

[45] See Ł. Pisarczyk, *Prawo pracy…* .

under the provisions on minimum remuneration for work (Art. 15gd(1) of the COVID Act). This regime is applicable in the period of the state of epidemic threat, or the state of epidemic declared in relation to the COVID-19 pandemic if the employer notes a decrease in the turnover[46] or essential burden on the salary fund[47]. The limitation introduced by the legislator relates to any type of severance allowance or benefit paid in connection with terminating an employment contract[48], which means that the regime also covers severance allowances for terminating the employment relationship for reasons independent of the employee, paid within the framework of collective or individual dismissals[49].

From the exclusive perspective of employers, the legislator's intervention consisting in the reduction of the amounts of severance allowances paid to dismissed employees can be considered legitimate. The legislator realised that, despite the aid instruments addressed to employers, in certain situations, redundancies are still unavoidable. The legislator did not want to impose an additional burden on employers, who would face the necessity to dismiss employees. However, it would be difficult to resist the impression that, by introducing such legislative solutions, the legislator even encouraged employers to reduce the workforce. This is especially vital in situations where redundancies have not yet been decided. Moreover,

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[46] Decrease in turnover in the understanding of Art. 15g(9) of the COVID Act.

[47] Essential burden on the salary fund as referred to in Art. 15gb(2) of the COVID Act.

[48] In literature, attention was drawn to serious problems with interpretation of Art. 15gd of the COVID Act. It was not clear if by the term "provisions" setting out an obligation to pay a benefit one should understand generally applicable legislation or if the concept includes also provisions of autonomous sources of labour law under Art. 9 of the Labour Code. E. Zając-Tobiasz and M. Zając-Rzosińska, emphasise that since the norm of Art. 15gd of the COVID Act generally refers to provisions, without mentioning labour regulations, this means that internal company labour regulations should not be covered by the scope of its application. E. Zając-Tobiasz, M. Zając-Rzosińska, *Zwolnienia z przyczyn niedotyczących pracowników w dobie pandemii COVID-19*, "Temidium" 2021, No. 2, p. 46. Moreover, the legislator did not define, for the purposes of Art. 15gd of the COVID Act, the terms "severance allowance", "compensation" or "other monetary benefit paid in connection with terminating an employment contract". In consequence, it is difficult to establish beyond any doubt the objective scope of those terms. M. Mędrala draws attention to the fact that, in relation to Art. 15gd of the COVID Act, textual interpretation proves insufficient since it can often lead to even absurd conclusions, which, at the same time, are very unfavourable to employees. Therefore, in this context, it becomes necessary to apply purposive interpretation. See M. Mędrala, *Aksjologia ograniczenia wysokości świadczeń pieniężnych wypłacanych w związku z rozwiązaniem umowy o pracę w ustawodawstwie pandemicznym*, "Przegląd Prawa Publicznego" 2021, No. 7–8, pp. 62–72.

[49] Therefore, the regime under Art. 15gd(1) of the COVID Act constitutes *lex specialis* in relation to the provision of Art. 8(4) of the Act of 13.03.2003 on special terms of terminating labour relationships with employees for reasons independent of employees ("Journal of Laws" 2003, No. 90, item 844, as amended, hereinafter Act on collective redundancies). Under Art. 8(4) of that Act "The amount of severance pay may not be higher than 15 times the minimum salary for work, established under separate provisions, as applicable on the date of terminating the employment relationship".

one should critically assess the fact that the legislator authoritatively imposed limits on severance allowances[50]. The possibility to pay severance allowances to employees in an amount following from the existing regulations could, in fact, be preserved even despite a decrease in the turnover or an essential burden on the salary fund[51]. This way, the legislator decided that the financial situation of dismissed employees should be obligatorily worsened. It was emphasised in the doctrine that the legislator's endeavours to provide support to entrepreneurs should be accompanied by the preservation of social sustainability. As a result, the state should assume the economic burden of the benefits taken away from employees[52].

The second example of legal mechanisms introduced by the legislator which undermined the stability of employment during the COVID crisis refers to the restructuring of the workforce in governmental administration. In Art. 15zzzzzo of the COVID Act, it was decided that if negative economic consequences of the COVID-19 pandemic lead to threatening the state's public finances, the Council of Ministers may – by a regulation – in specific public administration entities: 1. impose an obligation to reduce manpower or 2. introduce, for a definite term – no longer than within the end of the given financial year – less favourable terms of employees' service than under the basis of their employment relationship. Deterioration of employment terms may consist in the suspension of the right to additional salary components, rewards, bonuses or other benefits of such type, or suspension of rights under other legal provisions, including the right to additional

[50] In literature, attention was paid to the fact that payment of a benefit in an amount higher than under the restriction laid down in Art. 15gd(1) of the COVID Act will constitute a kind of breach of the employer's financial discipline. Benefits in an amount higher than provided for in statutory provisions may, however, be paid as optional benefits – on other grounds. M. Mędrala, *Ograniczenia praw zatrudnionych…* . Other opinion in this regard was expressed by K. Naumowicz. According to that author, the provision of Art. 15gd of the COVID Act is semiimperative and does not preclude the possibility to determine a higher benefit for an employee since the legislator did not clearly resolve in respect of nullity of other arrangements in that regard. K. Naumowicz, (in:) K.W. Baran (ed.), *Tarcza antykryzysowa 1.0−4.0: Ustawa o dodatku solidarnościowym i inne regulacje. Szczególne rozwiązania w prawie pracy, prawie urzędniczym i prawie ubezpieczeń społecznych związane z COVID-19. Komentarz*, Warszawa 2020, p. 233. The Supreme Court in the Judgment of 13.10.2020 (II PK 12/19, source: Legalis), pointed out that: "Provisions of autonomous labour regulations or agreements allowing for severance allowances in an amount higher than 15 times the minimum salary for work must be compatible with the principle of equal treatment of employees (Art. 11^2 of the Labour Code) and of their nondiscrimination (Art. 11^3 of the Labour Code). The duty of equal treatment of employees relates to the members of staff in a similar factual and legal situation. As a result, an employer may, under Art. 18 para 1 of the Labour Code, grant to an employee a benefit more favourable than under the provisions of labour law (including arrangements or collective labour agreements), but such arrangements should be provided for in the contract or in the provisions applicable in the employer's company setting out the rights and obligations of the parties to the employment relationship and comply with the principle of equal treatment in employment".

[51] See M. Mędrala, *Aksjologia ograniczenia*..., p. 65 *et seq.*

[52] A. Boguska, Ł. Pisarczyk, *Zwolnienia z przyczyn…*, p. 22.

leave (Art. 15zzzzzu(1))[53]. The introduction of less favourable employment terms may relate to all employees in a given entity or to a group of employees according to the basis of their employment relationship (Art. 15zzzzzu(3) of the COVID Act)[54].

In a situation of workforce reduction – understood either as termination of employment relationships or reduction of working times[55] – the legislator excluded the application of the provisions of the Act on collective redundancies (Art. 15zzzzzq(1) of the COVID Act). This way, the legislator deprived employees of the protection laid down in the cited Act. Although alternative protective mechanisms have been provided for – as justly highlighted in the academic literature – these alternative mechanisms offer a much lower level of protection[56]. Moreover, the legislator excluded the application of the procedure of consultations with trade unions under Art. 38 of the Labour Code (Art. 15zzzzzr(8) of the COVID Act). However, most serious doubts are aroused by the fact that dismissed employees were deprived of the priority right in re-employment if the employer conducts new recruitment in the future. At the same time, one should not lose sight of the provision of Art. 15zzzzzq(1) item (1) of the COVID Act, under which the obligation to reduce workforce may be complied with, among others, through terminating an employer's labour relations, including with regard to employers with an established right to an old-age or disability pension or employers fulfilling the criteria for granting an old-age pension. With the above in mind, one should agree with the opinion presented in the academic literature that the purpose of the cited restructuring legislation was not the only pursuit of savings in governmental administration but also a planned replacement of the existing human resources[57]. This raises serious doubts both in the context of the principle of equal treatment in a situation of terminating employment relationships and in the context of the state's task to ensure a continuity of proper operation of governmental administration.

By providing for a possibility of such far-reaching restructuring of the workforce in public administration – that is, in an area in which the state has the great-

[53] In the period of application of such restrictions, application was excluded of the provisions forming a basis for granting the suspended salary components, benefits or rights (Art. 15zzzzzu(1) of the COVID Act).

[54] If the worsened terms of employment are unacceptable for an employee, within 14 days of the receipt of a respective notice, the employee may declare not to consent to the application to the employee of the worsened terms of employment. Such declaration is tantamount to the submission by the employee of a notice of terminating the employment relationship (Art. 15zzzzzu(5) of the COVID Act).

[55] K. Walczak, *"Optymalizacja" kosztów zatrudnienia w administracji rządowej*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2020, No. 27 (4), p. 295.

[56] For more, see A. Boguska, Ł. Pisarczyk, *Zwolnienia z przyczyn...,* p. 16 *et seq*.; K. Walczak, *"Optymalizacja" kosztów…*, pp. 299–300; K. Walczak, *Kilka uwag na temat zatrudnienia w dobie pandemii i po jej zakończeniu*, "Monitor Prawa Pracy" 2020, No. 6, p. 10.

[57] K. Walczak, *"Optymalizacja" kosztów...,* p. 299; K. Walczak, *Kilka uwag...*, p. 9.

est influence – the legislator gave a very inconsequent message to employers in the private sector. It would be difficult to expect employers in the private sector to make significant efforts to maintain the existing headcount if the state does not intend to protect jobs in the public sector. The scenario of workforce restructuring in governmental administration has not been realised. However, this does not change the fact that, in the period of the COVID crisis, the legislator showed far-reaching inconsistency in the drafting of legal mechanisms intended to protect jobs. Despite the legislator's strenuous efforts, the legislator did not create a coherent system of protecting jobs and did not avoid legal solutions undermining sustainable employment in time of crisis.

5. SUMMARY

Summarising the anti-crisis regulations from the perspective of protecting jobs – on the second anniversary of declaring a state of the epidemic in the Republic of Poland – it is worth emphasising that large-scale collective redundancies did not take place. According to the Central Statistical Office, the unemployment rate was 5.5 per cent in February 2022[58]. As a result, the rate returned to a level observed in February 2020, that is before the beginning of the SARS-CoV-2 coronavirus pandemic in Poland. The number of unemployed registered in February 2022 was 865.6 thousand, whereas in February 2020, the same number was 860.2[59]. In comparison, according to the data published by Eurostat, the rate of unemployment in January 2022 was 6.2 per cent in the European Union and 6.8 per cent in the eurozone. A decrease was noted as compared to December 2021, when the rate of unemployment for the European Union was 6.3 per cent and for the eurozone – 7 per cent[60]. According to the data published by Eurostat, the unemployment rate in Poland was at the level 2.8 per cent – in January 2022, 2.9 per cent – in December 2021, and 3.6 per cent – in January 2021[61].

[58] Statistical data from the website of the Central Statistical Office (GUS), https://stat.gov.pl/obszary-tematyczne/rynek-pracy/bezrobocie-rejestrowane/stopa-bezrobocia-rejestrowanego-w-latach-1990-2022,4,1.html (accessed 16.05.2022).

[59] Statistical data from the website of the Central Statistical Office (GUS), https://stat.gov.pl/obszary-tematyczne/rynek-pracy/bezrobocie-rejestrowane/wyrownania-sezonowe-bezrobotni-zarejestrowani-i-stopa-bezrobocia-w-latach-2011-2022,5,1.html (accessed 16.05.2022).

[60] Statistical data from Eurostat's website, https://ec.europa.eu/eurostat/documents/2995521/14317274/3-03032022-BP-EN.pdf/e9f04fd8-a9d7-0fd6-2341-e9194274dfcd?t=1646235822280 (accessed 16.05.2022). A decrease in unemployment was also observed in relation to January 2021, when the unemployment rate in the entire EU was 7.5 per cent, and in the euro zone – 8.3 per cent.

[61] It must be explained that the data of the Central Statistical Office (GUS) and Eurostat differ because of a dissimilarity of the applied methodologies. In the case of Eurostat, the unemployment rate is based on the definition recommended by the International Labour Organisation (ILO).

In this context, judging exclusively by the unemployment indicators in Poland for the first quarter of 2022, it can be concluded that the legal instruments introduced by the Polish legislator for the purpose of preserving sustainable employment during the time of the COVID crisis proved adequate and effective. However, the formulation of such a conclusion would be a major simplification, disregarding a broader social and economic context. It should be borne in mind that in the initial period of the coronavirus pandemic – when aid mechanisms were addressed to a wide range of employers – the unemployment rate in Poland rose from the level of 5.4 per cent in March 2020 to the level of 6.3 per cent in December 2020[62]. A short, only 3-month period of protecting jobs – if introduced by the legislator at all – gave rise to a situation in which, upon its expiry and upon the use of subsidies from the state, employers could freely reduce the workforce. The highest – throughout the entire pandemic period – level of unemployment was observed in Poland in February 2021 (6.6 per cent). The unemployment rate above 6 per cent subsisted until June 2021 and then started to fall. In October 2021, the rate came back to the level from before the pandemic (5.5 per cent)[63]. The above may show that employers benefited from the change of the previous method of counteracting the pandemic, i.e. withdrawal from shutting down the economy and from the prohibition of operation of many industries. In autumn 2021 – that is during the IV wave of the coronavirus pandemic in Poland – the unemployment rate did not

The measurement is based on a harmonised data source, the European Union Labour Force Survey (LFS). Based on the ILO definition, Eurostat defines unemployed persons as persons aged 15 to 74 who: - are without work; - are available to start work within the next two weeks; – and have actively sought employment at some time during the previous four weeks. The unemployment rate is the number of people unemployed as a percentage of the labour force. The labour force is the total number of people employed plus unemployed, https://ec.europa.eu/eurostat/documents/2995521/14317274/3-03032022-BP-EN.pdf/e9f04fd8-a9d7-0fd6-2341-e9194274dfcd?t=1646235822280 (accessed 16.05.2022). According to the Polish Central Statistical Office, the registered unemployment rate is a percentage share of the registered unemployed to the number of the professionally active civilian population, i.e. excluding employees of budgetary units conducting activities in the area of national defence and public security. Unemployment rate is calculated including persons working in agriculture, in private farms. On the other hand, the term unemployed must be understood as a person over 18 who has not attained the retirement age, is not employed and does not perform any other salaried work, able and ready to take on full-time employment (or, in respect of persons with disabilities – able and ready to take on at least half-time employment), who does not attend a school – except for schools for adults or higher schools offering education on part-time basis – registered in the appropriate, that is having jurisdiction over their place of residence (either permanent or temporary), district employment office, and searches for employment or other salaried job. https://stat.gov.pl/obszary-tematyczne/rynek-pracy/bezrobocie-rejestrowane/wyrownania-sezonowe-bezrobotni-zarejestrowani-i-stopa-bezrobocia-w-latach-2011-2022,5,1.html (accessed 16.05.2022).

[62] https://stat.gov.pl/obszary-tematyczne/rynek-pracy/bezrobocie-rejestrowane/stopa-bezrobocia-rejestrowanego-w-latach-1990-2022,4,1.html (accessed 16.05.2022).

[63] https://stat.gov.pl/obszary-tematyczne/rynek-pracy/bezrobocie-rejestrowane/stopa-bezrobocia-rejestrowanego-w-latach-1990-2022,4,1.html (accessed 16.05.2022).

rise even though the aid instruments at that time were already addressed only to selected industries[64]. Moreover, it must be remembered that the situation at the time of the COVID crisis was much diversified in different industries. For example, the fitness, event, artistic, catering, or hotel industries were strongly affected by the prohibitions introduced by the state and faced the need to dismiss employees. At the same time, entrepreneurs in the IT sector or courier companies developed without any disturbance, noted growth, and recruited new employees.

With the above in mind, the assessment of the analysed legislation intended to protect jobs must be ambiguous. It cannot be concluded that mass redundancies were avoided only due to the aid mechanisms introduced by the Polish legislator during the COVID crisis. On the other hand, it would be illegitimate to conclude that the legislator's aid activities were irrelevant to the protection of jobs. The support mechanisms introduced by the state definitely helped amortise employers' clash with the very difficult reality that became their share because of the coronavirus pandemic and the lockdown. At the same time, it should be noted that the avoidance of mass collective redundancies was also a merit of employers themselves, who tried not to treat redundancies as an easy tool in the search for savings. As already noted in the literature, the COVID crisis differed from previous crises, among others, in that employers – wherever possible – avoided dismissing their personnel[65]. Bearing in mind the experiences of the recent years, which demonstrate that it is a difficult, time-consuming and costly procedure to find a valuable employee, employers strived to preserve the existing staffing. To achieve that end, they were trying to cut down expenses, for example, by sending employees on overdue leaves, using the institutions of stoppage, suspension of company regulations, and amending the terms of employment contracts[66].

A valuable instrument for the protection of jobs was also the institution of remote work, as introduced by the Polish legislator in the COVID Act. Performance by employees of remote work – wherever this was possible – allowed to reduce the costs relating to lease and maintenance of office space. It also allowed to maintain social distance and, as a consequence, to prevent the spread of the coronavirus. Due to the above, employers were, to a much lesser extent, exposed to disorganisation of the labour process or even to its complete paralysis in the event of mass absence of employees because of their isolation or quarantine.

Entrepreneurs themselves, when assessing the aid mechanisms implemented by the Polish legislator in the time of the COVID crisis, pointed to their numerous shortcomings. A reproach was made about the delayed implementation of the specific support instruments and insufficient consultation of those instruments with entrepreneurs. Attention was also drawn to excessive bureaucracy, regulatory

[64] According to the legislator's assumptions, to such industries that suffered the most as a result of the restrictions in the pursuance of economic activities.

[65] K. Walczak, *Kilka uwag...*, p. 10.

[66] *Ibidem*, p. 11.

chaos and a high degree of complication of the introduced legal provisions. It was underlined that preventive aid instruments were missing dedicated to those entrepreneurs who were not yet in a difficult financial situation but whose development was important for a sector or for the entire economy[67]. Particular attention should also be paid to the legitimate criticism – addressed to the legislator – regarding much uncertainty of the law[68]. During a crisis, the situation changes dramatically and calls for an urgent reaction from the state. Nevertheless, citizens and employers should not be surprised by legal provisions, which were often amended during the crisis and frequently became the applicable law without any opportunity to prepare for their entry into force.

The research carried out by the Polish Economic Institute indicates that in the time of the COVID crisis, the aid mechanisms most highly appreciated by entrepreneurs and, at the same time, the most frequently used were: exemptions from contributions to the Social Security Institution (ZUS), the financial shield, subsidies for employees' salaries and contributions to social insurance, reduction of working times and remote work[69]. Therefore, arriving at general conclusions which step beyond the framework of the COVID crisis, it can be indicated that such institutions as: exemptions from contributions to the Social Security Institution (ZUS), subsidies for employees' salaries and social insurance contributions, reduction of working times – are necessary and work out during a crisis, regardless of its cause. It is also important to adjust the type and intensity of aid to the actual needs of employers. In this context, it seems legitimate to address aid tools to particular industries. This is not easy since the establishment of the condition and needs of particular sectors of the economy requires an in-depth analysis, and a crisis situation necessitates rapid decision-making. Nevertheless, the activities of the legislator should not be chaotic or imprudent. In the light of the above, there is a need to hold more consultations with employer representatives.

Moreover, it was underlined in the literature that, in the future, one should avoid excessive fragmentation of different types of aid mechanisms and stretching their launch over time, as this renders difficult perception by employers of the

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[67] K. Dębkowska, U. Kłosiewicz-Górecka, A. Szymańska, P. Ważniewski, K. Zybertowicz, *Tarcza Antykryzysowa. Koło ratunkowe dla firm i gospodarki?*, Warszawa 2021, p. 60, https://pie.net.pl/tarcza-antykryzysowa-kolo-ratunkowe-dla-firm-i-gospodarki/ (accessed 16.05.2022).

[68] *Raport Związku Przedsiębiorców i Pracodawców "Podsumowanie* lockdown-u *w Polsce"*, Warszawa 2021, p. 14, https://zpp.net.pl/wp-content/uploads/2021/01/25.01.2021-Business-Paper-Podsumowanie-lockdownu-w-Polsce.pdf (accessed 16.05.2022).

[69] K. Dębkowska, U. Kłosiewicz-Górecka, A. Szymańska, P. Ważniewski, K. Zybertowicz, *op. cit.*, pp. 41, 61. It follows from the Report of the Polish Economic Institute that industrial processing companies and service companies were especially advantaged by the financial shield. Trade companies benefited the most from the subsidies for salaries and social insurance contributions. Enterprises in the area of construction were supported mostly by the reduction of working times, and transport companies often took advantage of stoppage benefits.

offered aid or analysis of consequences of such aid[70]. During the COVID crisis, aid instruments were introduced through multiple amendments to the COVID Act and characterised by a high degree of complexity. In this context, their understanding posed a serious challenge to employers. Therefore, in the future, an aid system should be consistent and transparent and – as far as possible – prepared in advance, based on the experiences gained during the 2 years of the COVID crisis and previous crises. However, it must also be remembered that every crisis is different, caused by different factors and may call for legislation allowing for its specificity.

When analysing the aid mechanisms implemented during the COVID crisis to protect jobs, it would be impossible to ignore employees themselves and their interests. In times of crisis, a special task of the state is to weigh the interests of employers and employees, so that provision of support to employers does not correlate with excessive burdens on employees and the other way round. From this perspective, it becomes apparent that the Polish legislator did not strike balance between protecting the interests of employers and those of employees. The legislator concentrated on aid mechanisms dedicated to employers, hoping that the improvement of their financial position would allow to preserve jobs. As a result, the legislator attempted to ensure sustainable employment during the COVID crisis, predominantly through the mechanisms of indirect protection of jobs. Financial risk, which is generally associated with employers, was shifted, to an excessive degree, to employees[71]. The legislator managed to avoid mass collective redundancies, however, at the expense of excessive deterioration of terms of employment. In particular, financial aid instruments were missing – addressed to employees themselves and compensating for their loss of income in consequence of the worsening of their terms of employment. Subsidies for salaries, as envisaged by the legislator, did not serve to compensate for employees' loss of income but made a part of salaries paid by the employer in an already decreased amount. Additionally, the legislator did not provide for any compensation to employees in connection with the reduction of the amounts of severance allowance paid in case of dismissal for reasons independent of an employee. In the context of the aid mechanisms dedicated to employers, the lack of support for employees may therefore be only approached with criticism. In those cases where salaries or severance allowances were reduced, the state should compensate for the loss of income to employees. If this is not fully possible – because of missing funds – such compensation should take place at least in part. Striking a balance between the parties of employment relationships requires that financial support be addressed both to employers and to employees. Yet, these are employers that, as it were, benefited twice. First, they had an opportunity to reduce their employ-

[70] *Ibidem*, p. 61.

[71] For more on the transfer of risk, see Ł. Pisarczyk, *Ryzyko pracodawcy*, Warszawa 2008, pp. 82–90.

ees' salaries and second, they received subsidies from the state to cover a part of those salaries in an already reduced amount. Employers saved financial means also by paying to employees severance allowances in a reduced amount. On the other hand, employees themselves did not benefit much from the aid mechanisms implemented by the legislator. This means that they did not obtain any guarantees of employment – apart from certain scant and short-term exceptions – and the terms of their employment could be worsened by employers for a longer period of time. Accordingly, employees could hope, in the first place, that due to the aid mechanisms implemented by the legislator, the financial condition of their employers would improve so that the employees could keep their existing jobs.

In future, the legislator should show more care for the interests of employees and recognise that the treatment of employment as a stand-alone value is not enough. Although this seems obvious, it is worth reminding that employment should give an employee the possibility to maintain themselves and the employee's families at a decent level. Taking care of the interests of employers and, at the same time, striving to preserve jobs in times of a crisis, the legislator should not enable excessive deterioration of the terms of employment-based jobs.

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