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# The scope of risk community solidarity

The author of the paper regards the solidarity of a risk community as a principle of social insurance law that is expressed by an unequal (both in relation to period and amount) bearing of social insurance costs (contribution payments) in relation to expected (yet only potential) profit, *i.e.*, a benefit obtained only in the event of social risk materialisation and meeting legal conditions for the granting of a benefit. While determining the scope of the use of solidarity mechanisms, no behaviour should be tolerated, nor a mechanism introduced that are aimed at the abuse of insurance cover (*e.g.*, by using a particular personal situation to obtain high benefits while employment is fictitious), disloyalty to the risk community (*i.e.*, avoiding social insurance obligation or the concealment of income that is subject to deductions for contribution purposes) or encumbering the risk community with payment of benefits in favour of persons who are not members of the community (*e.g.*, in the event of not taking up employment or any other paid occupation due to the need for the personal care of an ill family member). Acceptance for such activities leads to violation of both the integrity of the risk community and the financial balance of the social security system.

**Key words:** financial balance of the social insurance system, insurance cover abuse, social insurance law, solidarity of risk community

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# The concept of risk community solidarity[1]

Jan Jończyk has introduced the concept of "risk community solidarity" into the legal language, indicating that it is connected with the financing of social security and is a derivative of the "obligation of solidarity with others" expressed in the preamble to Basic Law. Its essence consists in spreading the risk burden, *i.e.*, the cost of insurance financing, to the widest possible group, but without symmetry between the input (contribution) and the profit (benefit), yet only the potential, because it is not granted if there was no risk (no "damage"). For the legal construction of "risk community solidarity", characteristic is inequality in bearing the burden of contributions, both in terms of their duration and amount.[2]

It should also be borne in mind that in the insurance model "a contribution […] is only a measure of the overall input to the creation of an insurance fund,"[3] which means that its payment does not only result in an entitlement to one's own benefits, but also consent to the financing of benefits for other members of the risk community. This rule is an expression of insurance reciprocity, which is sometimes directly identified with the insurance solidarity principle.[4] In my opinion, however, while perceiving the links between these insurance categories, there are sufficiently strong grounds to treat the solidarity of the risk community as the principle of social insurance law[5] – separate from insurance reciprocity – which is based on such elements as: balanced contribution, fair compensation or maintaining the proportion between the contribution and the benefit.[6] This principle, as not laid down *expressis verbis* in the social insurance law, is subject to reconstruction based on the analysis of the applicable legal standards, from which it is reproduced (interpreted).[7]

Non-legal aspects should not be disregarded in the general characteristics of the solidarity of the risk community, because this solidarity also has a deep, though often underestimated, moral and social meaning. As a result of using various types of solidarity

1 The following comments come in part from my previous publications, *i.e.*, from chapter XXXIV of the textbook *Prawo pracy i ubezpieczeń społecznych*, ed. K.W. Baran, Warszawa 2019, pp. 747–748 and the study *Solidarność w prawie zabezpieczenia społecznego (ubezpieczeniach społecznych i zdrowotnym)* [in:] *W poszukiwaniu nowych form solidaryzmu społecznego. Państwo solidarne*, Vol. 3, ed. A. Łabno, Warszawa 2018, pp. 156–159.

2 J. Jończyk, *Prawo zabezpieczenia społecznego*, Kraków 2006, pp. 39–40.

3 T. Zieliński, *Ubezpieczenia społeczne pracowników. Zarys systemu prawnego – część ogólna*, Warszawa–Kraków 1994, pp. 189–190.

4 *Ibid*, pp. 23 and 130.

5 The (social) solidarity principle is also distinguished by K. Ślebzak, *Zasada solidarności w społecznym ubezpieczeniu emerytalnym* [in:] *Z zagadnień prawa pracy i prawa socjalnego. Księga jubileuszowa Profesora Herberta Szurgacza*, ed. Z. Kubot, T. Kuczyński, Warszawa 2011 and (in health insurance) by D.E. Lach, *Zasada równego dostępu do świadczeń opieki zdrowotnej*, Warszawa 2011, p. 111 *et seq.* The solidarism (solidarity) principle as the superior principle for social security law is also mentioned by R. Pacud, *Zasady prawa emerytalnego*, "Państwo i Prawo" 2003, No. 3, p. 58.

6 See J. Jończyk, *op. cit.*, p. 40.

7 This is one way of formulating the principles of law in legal texts (see S. Wronkowska, M. Zieliński, Z. Ziembiński, *Zasady prawa. Zagadnienia podstawowe*, Warszawa 1974, p. 94 *et seq.*).

mechanisms – enabling the redistribution of income from those more wealthy to the poorer, from those who live shorter (men) to those who live longer (women) or from single to married persons[8] – the inequalities in individual input to the cost of insurance are compensated,[9] and – as a result – the social significance of insurance is clearly visible in the mutual (selfless) aid in situations where members of the community are exposed to similar threats. This is how the conditions are created to strengthen social bonds and a sense of responsibility for others according to the saying "one for all, all for one." This also corresponds to the promotion of behaviours in line with the implementation of the idea that the Republic of Poland constitutes the common (collective) good of all citizens (Art. 1 of the Constitution of the Republic of Poland).

At the same time, and this will be addressed by the present paper, legal institutions based on solidarity should not be used in the event of violation of the integrity and financial balance of the risk community, which is reflected in:

1) abuse of the solidarity rules in the form of reaping unjustified benefits from the funds "generated" by the community,
2) avoiding the obligation of social insurance, and hence the obligation to bear burdens (pay contributions) in favour of the community,
3) unjustified integration of certain persons to the risk community.

Therefore, it is worth considering whether, taking into account the existing legal regulations in the field of social insurance, the scope of solidarity of the risk community has been properly formed.

## Abusing the risk community solidarity

The phenomenon of abusing risk community solidarity is connected with the imbalance between the input (contribution paid) and the level of the benefit received, which, as a consequence, gives grounds for an opinion of unfair compensation of "damage," and sometimes also leads to unequal treatment of the insured persons in the calculation of benefits,[10] although the conditions of social insurance coverage are the same.

To illustrate this issue, at the outset, one should indicate the cases of obtaining excessive remuneration in the short period (*i.e.*, an income constituting the contribution basis, and also the benefit calculation basis), which leads to the receipt of maximum benefits from sickness insurance (sickness or maternity allowance) in the long term. There is no place for discussing these issues in this paper, but they have been widely analysed both

8 See M. Żukowski, *Wielostopniowe systemy zabezpieczenia emerytalnego w Unii Europejskiej i w Polsce. Między państwem a rynkiem*, Poznań 1997, pp. 43–44.

9 Addressing of inequalities understood in this way is referred to as "social compensation" (*Ibid,* p. 43) or "commonality" of risk (see D.E. Lach, *op. cit.*, p. 124).

10 Art. 2a(2)(3) of the Act of 13 October 1998 on the social insurance system (consolidated text: Journal of Laws of 2019, item 300, as amended, hereinafter: the Social Insurance System Act).

in the subject literature[11] and in the case law.[12] Ultimately, formally speaking, the related controversies have been removed in connection with the ruling of the Constitutional Tribunal of 29 November 2017,[13] in which the Tribunal stated that:

> [...] the amount of contractual remuneration, which affects the contribution assessment basis, may and should be subject to verification due to [...] the public-law nature of the insurance relationship;

in this way, it "prevents various attempts to obtain undue or excessive benefits under false pretences [...]." In other words, there is no social (related to the protection of the risk community) justification for obtaining benefits from the social insurance system if it is done in violation of the rules of the loyalty of one group of insured persons to another group, which in this case consists in taking advantage of one's personal situation (*e.g.*, pregnancy). Although, the enhancement of the quality of insurance cover is not, in itself, reprehensible, this should not be done by unlawful actions, *i.e.*, increase in the basis for contributions assessment in spite of the actual non-performance of work or non-payment of increased remuneration. Such conduct is detrimental to the interests of the risk community as a whole, and thus undermines the rules of solidarity.

Another type of transgression of the solidarity limits of the risk community is the institution of contributions distribution on the sub-account (Art. 40e of the Social Insurance System Act) and the guaranteed payment (Art. 25b of the Act on pensions from the Social Insurance Fund[14]). The mentioned institution of contributions distribution on the sub-account duplicates the legal solutions adopted in chapters 12 and 13 of the Act on the organisation and functioning of pension funds,[15] governing the distribution of funds in the event of divorce or marriage annulment and the death of a member of an Open Pension

11 K. Ślebzak, *Kontrola przez ZUS ważności umów o pracę stanowiących tytuł do ubezpieczenia społecznego – wybrane zagadnienia*, "Praca i Zabezpieczenie Społeczne" 2017, No. 2; A. Jabłoński, *Kontrola sądowa podstawy wymiaru składki na ubezpieczenie społeczne (chorobowe)*, "Opolskie Studia Administracyjno-Prawne" 2015, No. XIII/2; A. Cicherska, *Związek prawa ubezpieczeń społecznych z prawem cywilnym – wybrane zagadnienia*, "Opolskie Studia Administracyjno-Prawne" 2018, No. XVI/3.

12 This concerns in particular the resolution of the Supreme Court of 27 April 2005, II UZP 2/05, OSNPUSiSP 2005, No. 21, item 388, in which the Supreme Court did not challenge Social Insurance Institution (ZUS) entitlements to question the amount of remuneration constituting the basis for assessing sickness insurance contributions, if the circumstances of the case show that it had been paid on the basis of a contract, which was incompatible with law, principles of social coexistence or which was designed to circumvent the law (Art. 58 of the Civil Code). However, this view does not apply to persons subject to voluntary sickness insurance (*e.g.*, persons engaged in non-agricultural activities), because the Supreme Court in its resolution of 7 judges of 21 April 2010, II UZP 1/10, OSNPUSiSP 2010, No. 21–22, item 267 concluded that ZUS was not entitled to challenge the declared amount (Art. 18[8] in conjunction with Art. 20[3] of the Social Insurance System Act) as the basis for assessing the contribution if it falls within the limits set by law, *i.e.*, from 60 to 250%; see K. Antonów [in:] *Kodeks postępowania cywilnego. Postępowanie odrębne w sprawach z zakresu prawa pracy i ubezpieczeń społecznych. Komentarz*, ed. K. Antonów, A. Jabłoński, Warszawa 2014, pp. 307–308.

13 Ruling of the Constitutional Tribunal of 29 November 2017, P 9/15, OTK-A 2017, item 78.

14 Act of 17 December 1998 on pensions from the Social Insurance Fund (consolidated text: Journal of Laws of 2018, No. 1270, as amended), hereinafter: the Pension Act.

15 Act of 28 August 1997 on the organisation and functioning of pension funds (consolidated text: Journal of Laws of 2018, item 1906 as amended), hereinafter referred to as: the Pension Funds Act).

Fund. Without going into details,[16] under the applicable legislation, contributions are paid out (once or in instalments) in the amount of 50% (if the deceased insured person was married at the time of death) or 100% (if the deceased insured person was not married at the time of death) of the indexed amount of contributions, resources, interest for late payment and a prolongation fee, recorded on the sub-account. This payment is made in cash to the entitled persons or, if they have not been indicated, to the heirs of the deceased insured member of the Open Pension Fund. The problem, however, is that these payments, taking into account the pay-as-you-go method of financing benefits, burden the risk community, reducing the cash generated thereby and intended for the payment of current pensions. This results not only in the depletion of Social Insurance Fund revenues, but also disintegrates the risk community, and this is because the beneficiaries of these transfers are often people outside this community, *i.e.*, persons who do not have the status of an insured person[17] under the Social Insurance System Act as a result of not being covered by this insurance (*e.g.*, payment after death of the insured person for a judge, prosecutor, professional soldier or police officer or an officer of other uniformed services).

And as regards the guaranteed payment,[18] this institution allows the pensioner to name one or several individuals as beneficiaries, in favour of whom a lump-sum cash payment is to be made after the pensioner's death. However, the pensioner is not allowed to indicate, without the consent of the spouse, a person other than that mentioned in Art. 67 of the Pension Act (*i.e.*, a person entitled to a survivor's pension) and the right to this benefit may only be acquired if the death of the pensioner occurred within three years from the month from which the pension was first paid. And a failure to indicate a beneficiary means that the spouse has been indicated as a beneficiary, provided that at the time of death, the pensioner remained with him or her in the statutory marital community. Otherwise, the guaranteed payment is included within the estate. As a result of these provisions – similarly as in the case of the institution of contributions distribution on the sub-account – some resources allocated for the payment of current pensions are distributed to spouses, and when there are no spouses, to other heirs of the pensioner, including those from outside the risk community, if the spouses or other heirs (except for children – see footnote 17) were not covered by general social insurance. Bearing this in mind, the critical assessment of such regulations expressed in the analysis of the distribution of contributions on the sub-account remains in force.

Hence, it can be briefly summed up that the existing legal solutions allow – at the expense of the risk community – to make asset transfers to persons who have not borne any social insurance burdens (have not paid any contributions), as they have not been the members of this community and have not participated in the creation of funds with the strictly defined purpose associated with the coverage of pension expenditure. This way of managing public funds (satisfying the private interests of persons outside the risk community) distorts the

16 For this matter precisely see K. Antonów, *Sytuacja prawna składek zaewidencjonowanych na subkoncie w ZUS w razie rozwodu lub śmierci ubezpieczonego albo śmierci emeryta*, "Praca i Zabezpieczenie Społeczne" 2011, No. 5.

17 Of course, this reasoning does not include children who are not insured by their nature.

18 Cf. as regards this institution: D. Dzienisiuk, *Wypłata gwarantowana jako odrębne świadczenie ze społecznego ubezpieczenia emerytalnego*, "Ubezpieczenia Społeczne. Teoria i praktyka" 2016, No. 1.

structure of social insurance, where the application of the solidarity mechanism should at least depend on the willingness[19] to incur insurance costs by persons who are members of that organisation by virtue of being covered by a given type of social insurance.

In the analysis of issues related to the abuse of risk community solidarity, attention should be also paid to the issue of the pension rights of miners. And I do not criticise the lower – than the universal (60 and 65 years) – retirement age of this professional group (determined according to Art. 50a of the Pension Act at the level of 55 or 50 years irrespective of gender)[20] or even the special right to a mining pension irrespective of age and occupied position after at least 25 years of mining work carried out underground permanently and full time (Art. 50e of the Pension Act). Of special concern is the way of calculating mining benefits in relation to the bridging pensions. Since special employment is the criterion for separating both benefits, remembering also that contrary to the mining pensions, the payment of bridging pensions is financed from funds created specifically for this purpose (Bridging Pensions Fund) whose revenues, apart from subsidies from the state budget, come from a special (at the level of 1.5% of the assessment basis) contribution paid for employees performing work in special conditions or of a special nature[21] (see Art. 30[1][1], Art. 32[1][1], Art. 35[1] and Art. 36[1] of the Bridging Pensions Act) – it is unacceptable to have such a far-reaching differentiation in the calculation of the amount of these benefits. It consists in the fact that while the amount of mining pensions is calculated using the defined-benefit formula (Art. 53[1] of the Pension Act), the formula of defined non-capitalised contribution is used to calculate the bridging pensions (Article 14[1]-[2] of the Bridging Pensions Act).[22]

Therefore, the rate of mining pensions to a much greater extent than the rate of bridging pensions is affected by elements not related to the individual course of insurance (especially

19 I am writing about the willingness to incur insurance costs, realising that there are situations in which – due to the rapid realisation of social risk (*e.g.*, the occurrence of an accident at work shortly after starting employment and related insurance) – the input to incurring these costs may be minimal in relation to the value of due benefit of a long-term or even permanent nature. However, the granting of such benefit in this situation is not contrary to the principle of solidarity, because the sense of solidarity of the risk community is expressed precisely in the existence of such inequality (see J. Jończyk, *op. cit.*, p. 40).

20 When we look at the conditions of acquiring the right to the mining and the bridging pension, it seems that – if miners were covered by the Act of 19 December 2008 on bridging pensions (consolidated text: Journal of Laws of 2018, item 1924; hereinafter: the Bridging Pensions Act) – the conditions for granting the pension (in terms of age and employment period) would probably differ from the general conditions for acquiring the right to the bridging pension formulated in Art. 4(2)-(3) of the Bridging Pensions Act and would be defined similarly as in Art. 50a of the Pensions Act as a result of covering miners by a separate provision, as this is currently happening in relation to some persons who perform work in special conditions or of a special character, listed in Art. 5–11 of the Bridging Pensions Act.

21 Thus, due to the way bridging pensions are financed differently than the financing of the rest of pensions (including mining pensions), persons entitled to this benefit create an autonomous risk community, which, however, uses to some extent the external funds due to the existing mechanism of paying contributions to the Bridging Pensions Fund also for these employees who are covered by the retirement insurance for work in special conditions or of a special character, but who cannot acquire the right to such old-age pension due to part-time work or work performed from 1 January 1999 (see the resolution of 7 judges of the Supreme Court of 28 September 2016, III UZP 10/16, LEX No. 2113358).

22 Pension formulas are explained by U. Kalina-Prasznic [in:] *Wielka encyklopedia prawa. Prawo socjalne*, Vol. 12, ed. H. Szurgacz, Warszawa 2017, pp. 74–75.

the social part of the pension), as well as those which are dependent on the insurance period, but are constructed in a different way (*e.g.*, calculation of the basis of assessment of the mining pension from a specified insurance period, but not the whole insurance period, as is the case with the bridging pension). Considering this – even taking into account that the ratio of the assessment basis is limited to 250% (Art. 15[5] of the Pension Act), which results in the so-called flattening of benefits (degression)[23] – the pension formula concerning miners puts this professional group in a clearly more advantageous financial situation in comparison with many representatives of other professions included in the group of people who perform work in special conditions or of a special character. Hence, due to the model of calculating the amount of benefits (Art. 2a[2][3] of the Social Insurance System Act), it is an example of unequal treatment of beneficiaries distinguished for the same significant feature (special employment). The distorted equality in the realisation of benefits from insurance after the occurrence of social risk also has a negative impact on the perception of solidarity, because it is believed that one of the insured groups is favoured in relation to others. There is, indeed, a violation of the financial balance of the risk community, which results from the fact that expenditures on mining pensions are not really balanced with receipts from the contributions, because if they came exclusively from employment in mining, they would not cover liabilities in respect to mining pensions.[24] Therefore, if miners have a special (more favourable) – in comparison with other persons performing work in special conditions or of a special character – system of determining the pension amount, and at the same time the cost of their financing, differently than in the case of bridging pensions, is incurred also by other people covered by pension insurance, it seems justified that one should either create a separate risk community with its own insurance fund adjusted to the payment possibilities of this occupational group, or increase the amount of contributions for performing mining work to make the incurred insurance cost (relatively low) more realistic as compared with the (relatively high) level of insurance cover.

## Avoiding social insurance burden for the benefit of the risk community

A typical example of avoiding insurance burdens (insurance coverage and payment of contributions) is the phenomenon of ostensible employee outsourcing (euphemistically referred to as the so-called optimisation activities), in fact consisting in reducing the

23 See K. Antonów [in:] *Prawo...*, *op. cit.*, pp. 816–817.

24 According to the Supreme Chamber of Control, in 2007-2015, the estimated value of the deficit of the Social Insurance Fund, resulting from the lack of coverage of mining disability and old-age pension payments by contributions to these benefits transferred by hard coal mining entities, totalled approximately PLN 58.4 billion; annually from about PLN 4.7 billion in 2007 to about PLN 7.7 billion in 2015 (see Najwyższa Izba Kontroli, *Funkcjonowanie górnictwa węgla kamiennego w latach 2007–2015 na tle założeń programu rządowego. Informacja o wynikach kontroli*, LKA.410.038.2015, Warszawa 2017, pp. 61–62).

costs of business activity, in particular regarding the payment of public levies (taxes and contributions). Formally, such practices usually involve a faulty transition of a part of the workplace to another employer pursuant to Art. 231 of the Labour Code, due to the fact that it is not uncommon that the working conditions are not changed because the work is still performed in the same place, using the same tools and under the orders of the same people, and with the continued payment of remuneration from the resources of the previous employer, only subsequently through an outsourcing company.[25] In practice, therefore, it is a fictitious referral of employees to another economic entity, however, with the actual use of the effects of their work by the previous employer, but without paying social insurance contributions. Therefore, in such a situation there can be no question of changing the contribution payer (from the original one to the supposedly acquiring entity) and all social insurance obligations burden the existing employer, even if the acquiring entity has been paying social insurance contributions, because they are reckoned *ex officio* towards the dues in respect of the contributions of the actual contribution payer (*i.e.*, the one identified by Social Insurance Institution [ZUS]) (Art. 38a[4] of the Social Insurance System Act).

When writing about avoiding social insurance burdens, one should also mention the elimination of contribution charges as a way to increase competitiveness in tendering procedures for cleaning services or property supervision services. This is done mainly by means of offering such services to be performed by persons employed under civil law contracts, in particular contracts for specific work exempted from the social insurance obligation. However, it is rightly argued in the case-law that the provision of services of cleaning, guarding objects or packing fruit or vegetables does not result in the creation of actual work, because the objective is not to achieve a certain effect but to carefully perform certain operations.[26] According to the judgement of the Supreme Court of 26 March 2013,[27] the contract for the specific work does not consist in simple and repetitive operations (*e.g.*, pruning plums), as they do not have a separate (individual) character and purpose. Therefore, these works may not be performed under the specific-work contracts or even – in the case of a public contract for services or construction works – commission contracts in a situation where the awarding entity specifies in the description of the object of the contract the requirement that the contractor or subcontractor should employ on the basis of an employment contract persons to perform activities indicated by the awarding entity within the scope of the contract, if the said activities are to be carried out in the manner defined in Art. 22(1) of the Labour Code (see Article 29

25 See the judgement of the Supreme Court of 27 January 2016, I PK 21/15, LEX No. 1975836 and the judgement of the Supreme Court of 19 January 2016, I UK 28/15, LEX 2043737, and (in the context of the so-called tax optimisation) the judgements of the Voivodeship Administrative Court: in Kraków of 21 September 2017, I SA/Kr 137/17, LEX No. 2384011 and in Rzeszów of 15 March 2018, I SA/Rz 71/18, LEX No. 2467863.

26 For example the Supreme Court in its judgement of 25 October 2016, I UK 446/15, LEX No. 2163323. See also orders of the Supreme Court: of 10 April 2018, II UK 265/17, LEX No. 2490629 and of 21 March 2018, II UK 239/17, LEX No. 2490627.

27 The judgement of the Supreme Court of 26 March 2013, II UK 201/12, LEX No. 1341964.

paragraph 3a of the Public Procurement Law[28]).[29] Therefore, both in the case-law and in the applicable law, barriers are created to stop the instrumental use (for the purpose of circumventing the provisions of social insurance law) of contracts for specific work as one of the forms of employment.

At the end of the discussion, we should mention the issue of cooperation between the insured person and the contribution payer in avoiding the obligation to pay contributions. If such a practice is discovered, ZUS may refuse to record on the insured person's account an unpaid (due) pension insurance contribution and to cancel the one that has already been recorded (Art. 40[8] of the Social Insurance System Act). Due to the fact that the practical use of this provision by pension authorities is not widely known, one can only speculate as to the scale of this conduct by both parties to the insurance relationship. However, we certainly deal with such types of conduct in the so-called grey economy, where income from business activities is concealed, *e.g.*, in the form of paying (covered by insurance and taxed) minimum remuneration for work along with unregistered (not covered by insurance and untaxed) additional income for work actually performed. Such actions, aimed at lowering current labour costs, often gain the approval of persons employed (insured) thus increasing their actual earnings by that part which would be the gross wage/salary. However, this is done with the obvious disadvantage for the risk community and at the risk of the unprotected employee (not always aware of the situation) who, by obtaining temporary financial advantage in respect of the unrecorded income, exposes him/herself (and also his/her family) to a very low level of insurance protection (and thus a low quality of life), for example in the event of long-term sickness absence or an incapacity for work resulting out of the general condition of health or due to an accident at work, and – in the long run – also to negative consequences in terms of lower benefits after reaching the retirement age, not to mention the consequences of the death of such a "cheaply" insured person.

## Unjustified integration of certain persons to the risk community

The issue of unjustified integration of certain persons to the risk community by covering them by compulsory pension insurance entails setting limits for the excessive extension of this obligation to non-profit-making social insurance titles. Thus, if the socio-economic

28 The Act of 29 January 2004, Public Procurement Law (consolidated text: Journal of Laws of 2018, item 1986, as amended).

29 In the literature on public procurement it is emphasised that, in particular, the operations performed by cleaning staff (cleaning activities) and bodyguards (security services) have the nature of an employment relationship. See J.E. Nowicki, *Prawo zamówień publicznych. Komentarz*, Warszawa 2018, commentary to Art. 29(46); E. Wiktorowska, *Prawo zamówień publicznych. Komentarz aktualizowany*, LEX/el 2018, commentary to Art. 29.

purpose of social insurance is to mitigate the effects of social risks arising in connection with the performance of paid work or gainful activity, so – considering that contributions for non-profit-making activity are paid from the state budget (see, *e.g.*, Art. 16[8] of the Social Insurance System Act) – the extension of insurance coverage to persons who do not take part in bearing the cost of social insurance must be a well-founded exception. In other words, the reason for granting this protection in such cases should be strongly related to the life (personal) situation of the insured person who is temporarily not able to perform some sort of gainful activity, for example due to sickness, childbirth or child raising in the early stages of life.

As regards sickness, bearing in mind the typical shortness of such a physical condition on the one hand and its frequency on the other hand, a lack of insurance obligation during the period of incapacity for work in this respect is understandable, which does not change the fact that a protective mechanism is introduced here, under which the sick pay periods, periods of receiving rehabilitation and sickness benefits are deemed to be contributory periods (Article 14[3] of the Social Insurance System Act). This means that the fact that these benefits are received for over 30/90 days does not result in the cessation (interruption) of sickness insurance, and thus in the resumption of the qualifying period for the acquisition of the right to the next sickness allowance pursuant to Art. 4(1) of the Act on cash social insurance benefits in respect of sickness and maternity.[30] The situation is different in the case of childbirth and child care until the child reaches the age of 6 years (in typical situations). Those titles have been covered by the insurance obligation in connection with the receipt of maternity allowance and the use of the child-care leave (Article 6[1][19] of the Social Insurance System Act) and the exercise of personal care over the child (Art. 6a and 6b of the Social Insurance System Act). This is fully justified both from the insurance and social point of view, because these periods are closely related to the earning-related title to social insurance (*i.e.*, some form of employment covered by the insurance obligation),[31] and at the same time they deserve to be covered by insurance due to pursuing the important social purpose, *i.e.*, the "well-being of the family" and "assistance for mothers before and after childbirth," also in the constitutional understanding of these concepts (see Art. 71 of the Constitution of the Republic of Poland).

In my opinion, such a strong justification cannot be formulated in relation to two other types of non-profit-making insurance titles. I mean here the insurance titles laid down in the following regulations:

1. Art. 6(2) of the Social Insurance System Act in conjunction with Art. 42 of the Act of 12 March 2004 on social assistance,[32]

30 Act of 25 June 1999 on cash social insurance benefits in respect of sickness and maternity (consolidated text: Journal of Laws of 2019, item 645).

31 In particular, the maternity (parental) leave and the child-care leave are included within the employee's seniority (they form part of the employment period).

32 The Act of 12 March 2004 on social assistance (consolidated text: Journal of Laws of 2018, No. 1508, as amended).

2. Art. 6(2a)-(2c) of the Social Insurance System Act in conjunction with Art. 16a–17 of the Act of 28 November 2003 on family benefits[33] and the Act of 4 April 2014 on the determination and payment of allowances for carers.[34]

The above regulations provide for compulsory coverage by the pension insurance of persons who resign from employment or other gainful activity or even do not take them at all (as in the case of persons receiving care allowance, special care allowance or a carer's allowance) due to the necessity of taking direct personal care of a long-term or seriously ill family member and mother, father or siblings not residing together (point 1) or due to the permanent care of a person with a ruling on a severe degree of disability or a decision on disability with the following indications: the need for permanent or long-term care or assistance of another person due to the significantly reduced possibility of an independent existence and the necessity of the constant participation of a child's carer on a daily basis for the process of a child's treatment, rehabilitation and education (point 2).

The justification of the insurance coverage under the above titles seems much weaker in comparison to the birth and raising of a child, because there is no relation to the profit-making title to social insurance, if the insurance coverage is granted under the condition of refraining from or giving up employment or other gainful activity. Hence, it is possible under the applicable legislation, that a person who has never been covered by social insurance in respect of any employment, may be entitled to benefits without first making their own input to the risk community, because their contributions have been paid (for no longer than 20/25 years)[35] from budgetary funds (appropriated allocations). This way of ensuring social protection is much closer to the ancillary and not insurance method of social security, in which benefits are financed from tax sources: and instead of the risk community there is a national (general social) community ensuring rights to benefits "in situations where the individual is not able to overcome certain life difficulties due to the lack of their own (paid) rights."[36] Understanding the differences between social security provided in an insurance or ancillary form has been recently shown in the Act of 31 January 2019 on parental supplementary benefit,[37] which is provided to a mother who has given birth to and raised or who has raised at least four children or to a father who has raised at least four children – in the event of the death of the mother or the abandonment of children by the mother or a long-term cessation of the children's upbringing by the mother (Article 3[1] of this Act). However, unlike in the case of the non-profit making titles discussed above,

33 The Act of 28 November 2003 on family benefits (consolidated text: Journal of Laws of 2018, No. 2220, as amended), hereinafter the Family Benefits Act.

34 The Act of 4 April 2014 on the determination and payment of allowances for carers (consolidated text: Journal of Laws of 2017, item 2009, as amended).

35 Payment of contributions for old-age and disability pension insurance during this period is necessary to acquire the right to at least the minimum pension at the age of 60 or 65 years (see Art. 87[1] of the Pension Act).

36 See K. Antonów [in:] *Prawo...*, *op. cit.*, p. 740.

37 The Act of 31 January 2019 on the parental supplementary benefit (Journal of Laws, item 303), hereinafter referred to as: the Parental Benefits Act.

the parental supplementary benefit and its servicing costs are financed from the state budget (Art. 10[3] of the Parental Benefits Act), which undoubtedly determines the non-insurance qualification of this benefit.

## Summary

At the end of these deliberations, it should be stated that the principle of solidarity of the risk community in terms of financing the cost of social insurance – although based on the assumption of inequality in terms of bearing contribution burden and taking advantage of benefits[38] – cannot allow for a too far-reaching loosening of the relationship between one's own input (contribution) and the expected, potential profit (benefit). The barrier to the use of solidarity mechanisms should therefore be the abuse of insurance coverage (*e.g.*, the use of a particular personal situation to obtain high benefits while employment is fictitious), disloyalty to the risk community (*i.e.*, avoiding social insurance obligation or the concealment of income that is subject to deductions for contribution purposes) or encumbering the risk community with the payment of benefits in favour of persons who are not members of the community (*e.g.*, in the event of not taking up employment or any other paid occupation due to the need for the personal care of an ill family member). Each acceptance for this type of activities (which are contrary to solidarity) leads to violation of both the integrity of the risk community and its financial balance, which in consequence is connected with the inability to correctly define the scope (boundaries) of applying the legal rules of solidarity.

38 This means that sometimes the financial contribution will exceed the value of the benefit (if the benefit is paid at all), and in other times the expenses for the given benefit will be higher than the total amount of the contributions paid to an individual account.

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# Zakres solidarności wspólnoty ryzyka

Autor opracowania traktuje solidarność wspólnoty ryzyka jako zasadę prawa ubezpieczeń społecznych wyrażającą się w nierównym (co do czasu i rozmiaru) ponoszeniu ciężaru finansowania kosztu ubezpieczeń społecznych (opłacania składek) w stosunku do oczekiwanej (lecz tylko potencjalnej) korzyści, tj. świadczenia otrzymywanego wyłącznie w razie ziszczenia się socjalnego ryzyka i spełnienia ustawowych warunków przyznania świadczenia. Przy określaniu granic (zakresu) stosowania mechanizmów solidarnościowych nie należy zatem tolerować zachowań lub wprowadzać rozwiązań, których celem jest nadużywanie ochrony ubezpieczeniowej (np. w postaci wykorzystywania określonej sytuacji osobistej dla celów przyznania wysokich świadczeń przy jednoczesnej fikcyjności zatrudnienia), nielojalność wobec wspólnoty ryzyka (tj. unikanie obowiązku ubezpieczeń społecznych czy ukrywanie przychodów podlegających oskładkowaniu) czy też obarczanie wspólnoty ryzyka wypłatą świadczeń na rzecz osób faktycznie pozostających poza jej kręgiem (np. w razie niepodejmowania zatrudnienia lub innej pracy zarobkowej z powodu sprawowania opieki nad chorym członkiem rodziny). Akceptacja dla tego typu działań prowadzi do naruszenia integralności wspólnoty ryzyka i równowagi finansowej ubezpieczeń społecznych.

**Słowa kluczowe:** równowaga finansowa systemu ubezpieczeń społecznych, nadużywanie ochrony ubezpieczeniowej, prawo ubezpieczeń społecznych, solidarność wspólnoty ryzyka