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Selected dilemmas of sickness insurance: sickness allowance

Introduction

The paper is an effect of the nationwide seminar “Dilemmas in sickness insurance: sickness allowance,” organised on 13 June 2018 in Warsaw by the Warsaw-Łódź Branch of the Polish Social Insurance Association [Polskie Stowarzyszenie Ubezpieczenia Społecznego, PSUS] and the Insurance Law Department of the University of Warsaw’s Faculty of Law and Administration. The paper focuses on the coverage of a temporary incapacity for work through sickness allowances granted under the general sickness insurance and sickness, accident and maternity insurance for farmers. The aim of the study is to discuss selected issues of sickness allowance, including the criticism of the legal provisions and a presentation of conclusions. The following research methods have been used in the paper: historical, dogmatic and legal, sociological and statistical.

The first part of the paper briefly presents the evolution of incapacity for work insurance coverage due to sickness. Then, the legal dilemmas related to the acquisition of the right to sickness allowance in the general system were selected and shown. In the third part, attention is paid to the economic balance of the Sickness Fund and changes in the structure of its expenditure over the last decade. The fourth part contains a description of sickness allowance under the farmers’ social insurance and an analysis of applicable solutions in the context of the right to social security and the matching of existing solutions to farmers’ needs. The paper is concluded with a number of specific proposals for changes in the described area. The members of the Polish Social Insurance Association’s Warsaw-Łódź Branch hope that the proposed formula will become a permanent element within academic discourse.

Evolution of temporary incapacity for work insurance coverage

The beginnings of the insurance coverage

The first state-guaranteed benefits in respect of sickness were introduced in Germany in 1883. German sickness insurance provided cash allowances during sickness and assistance in covering the costs of employees’ medical treatment. The developed German models were also applicable in those Polish territories under Prussian rule and have subsequently affected the form of insurance in Poland. In Germany, the burden of contributions collected to finance the benefits was borne by both employees and employers.¹ It was the time when the idea of social insurance employee solidarity was born, with the contribution set in such a way as to ensure the balance between contributions and benefits.²

¹ *Rozwój ubezpieczeń społecznych w Polsce*, ed. C. Jackowiak, Wrocław 1991, p. 91.

² W. Szubert, *Ubezpieczenie społeczne: zarys systemu*, Warszawa 1987, p. 15.

The health care benefits introduced were aimed to cover the costs of medical treatment, and allowances – to partly compensate for lost earnings.³

The first legal act introducing sickness allowances in the newly established Republic of Poland was the Decree on compulsory sickness insurance of 11 January 1919,⁴ which was drafted before the end of the war. Although the Decree was not to come into force, because it had established but a single sickness fund in Sosnowiec, but equally almost all its provisions were transferred to the Act of compulsory sickness insurance of 20 May 1920.⁵ The Act introduced sickness insurance designed to operate on a universal and compulsory basis, taking into account the place of residence. It contained innovative solutions and influenced the development of sickness insurance.⁶ Sickness funds were established to implement compulsory sickness insurance, one for each *poviat*. Compulsory insurance covered all persons in gainful employment, irrespective of the type of employment contract. This means that the Act covered by obligation the insurance of all persons employed on the basis of an employment or service relationship. It should be also noted that the insurance also covered seasonal workers, non-regularly employed persons and those working with them.⁷ The Act was not applicable to nominated government officials, and employees who earned more than PLN 7,500 a year, directly substituting the employer, could be exempt from the insurance obligation.⁸ Self-earning persons were not covered by the insurance. Persons insured compulsorily became members of the fund from the starting date of their employment, and those insured voluntarily – from the moment of notification of being entered onto the list of fund members. In the event of sickness, the insured persons were entitled to a cash allowance, which was paid from the third day of any incapacity for work for a maximum of 26 weeks. Benefit payment could be extended to 52 weeks.⁹ Insured persons were also entitled to free medical assistance – from the first day of sickness, for a period of 26 weeks. Assistance provided by funds which had existed for more than three years, could be extended to 39 weeks.

The cash allowance amounted to 60% of the statutory pay¹⁰ when the insured person stayed at home. In the event of hospital treatment, people with one or more

3 W. Muszalski, *Wprowadzenie do nauki ubezpieczenia społecznego*, Warszawa 1988, p. 30.

4 Decree on compulsory sickness insurance of 11 January 1919 (Journal of Laws of the Polish State No. 9, item 122).

5 Act of 20 May 1920 on compulsory sickness insurance (Journal of Laws No. 44, item 272), hereinafter referred to as the Act of 1920.

6 A. Kaczmarek, *Zakres podmiotowy ubezpieczenia chorobowego* [in:] *Ubezpieczenie chorobowe*, ed. B. Wagner, A. Malaka, Iwonicz Zdrój 2010, pp. 32 and 33.

7 Art. 7 of the Act of 19 May 1920 – non-regularly employed persons are persons whose main source of income is the letting of services and who, without being in a regular working relationship with the same employer, work continuously for one employer for no longer than six days.

8 J. Łazowski, *Ubezpieczenia społeczne w Polsce w pierwszym dziesięcioleciu niepodległości*, “Studia i materiały z historii ubezpieczeń społecznych w Polsce” 1991, Vol. 8, p. 16.

9 J. Sadowska, *Prawno-organizacyjne podstawy ubezpieczenia na wypadek choroby w Polsce (1920–1939)*, “Studia i Materiały z Historii Ubezpieczeń Społecznych w Polsce” 1993, Vol. 9, p. 19.

10 The insurance contribution amounted to 6.5% of the pay and was financed by the employer to 3.5% and by the employee at 2.5%. Contributions for employees remunerated only in kind were fully covered by the employee, see W. Muszalski, *op. cit.*, p. 47.

dependents received half the allowance (home allowance). Persons with no dependent persons, in addition to hospital treatment and maintenance, were entitled to a hospital allowance equal of 10% of their statutory pay. If the insured person fell ill again with the same disease within eight weeks of recovery, the second incapacity was included in the same allowance period. When the insured person has already used up the 26 or 39 weeks allowance period and fell ill again within 12 months, he/she could receive the fund benefit for 13 weeks. The legislator introduced a period of waiting for benefits for homeworkers, persons subject to voluntary insurance and non-regularly employed persons, who acquired the right at the earliest after four and at the latest after six weeks of membership. Other people acquired the right from the very date of employment commencement. The Act also provided for situations in which the insured person was deprived of the right to an allowance, *e.g.*, when after falling ill he/she went abroad without the consent of the fund management board, or for the duration of his/her stay in prison if he/she was imprisoned after falling ill. And in the event of an addiction to drunkenness, the management board of the fund was entrusted to pay allowances to the dependents of the insured. Pursuant to the law, the amount of contributions was to be determined at a level sufficient to cover all expenses and benefits. The fund could increase the amount of benefits above the determined amount when its income was sufficient to cover expenses, and it could introduce extraordinary benefits when the supplementary fund had reached the double amount. Naturally, when the income did not cover expenses, the fund stopped paying benefits.¹¹

Sickness allowance under the Act of 28 March 1933 on social insurance¹²

The Act of 1933, commonly referred to as the Consolidation Act, was nationwide in scope, covering both white-collar and blue-collar workers, but excluding government officials, employees of the Polish State Railways, the clergy, the military, foreigners, permanent and seasonal agricultural workers, as well as short-term employees. It introduced two types of insurance: in the event of sickness and maternity and in the event of the inability to earn money or the death of the insured person as a result of an accident at work, an occupational disease or for other reasons. Tasks in the field of sickness insurance were performed by social insurance companies and by the Sickness Insurance Institution [Zakład Ubezpieczenia na Wypadek Choroby]. Such a legal status was to last but a year. By means of an amendment of 24 October 1934, separate insurance institutions were liquidated and the Social Insurance Institution [Zakład Ubezpieczeń Społecznych, ZUS] was established in their place.

¹¹ M. Kuszewska-Kryś, *Sytuacja finansowa i świadczenia ubezpieczenia na wypadek choroby w latach kryzysu (1930–1935)*, "Studia i materiały z historii ubezpieczeń społecznych w Polsce" 1991, Vol. 8, p. 51.

¹² The Act of 28 March 1933 on social insurance (Journal of Laws No. 51, item 396, as amended).

The competence of social insurance companies was left to the area of sickness insurance. The amendment introduced cost-cutting measures unfavourable to sickness insurance, which were aimed to balance the expenses related to the introduction of a new old-age pension insurance for workers.¹³ As a cash benefit, the Act provided for sickness, home and hospital allowance. Initially, the Act granted sickness allowance to insured persons for each day of any certified incapacity for work, starting from the fourth day of incapacity for work, and not from day three, as it had been before. The post-war amendment to the Act granted the right to sickness allowance from the first day of any certified incapacity for work, provided that sickness lasted for at least three days.¹⁴ It was not until 1954 that sickness allowance was granted for each day of work incapacity.¹⁵

In the Consolidation Act of 1933, the sickness allowance rate was reduced to 50% of the average weekly earnings calculated from the last 13 weeks before falling ill.¹⁶ When calculating the allowance, all days of the week were taken into account, unlike in the Act of 1920.¹⁷ The statute of the insurance company could increase the allowance rate for insured persons with more than two dependent children. The allowance amount was restored to 60% in 1937. After the war, the allowance was increased to 70%, and a supplementary allowance was granted for each child.¹⁸ In 1951, the supplementary allowance for children was stopped.¹⁹ The maximum allowance period was 26 weeks (182 days). Benefits in respect of sickness were also supplemented with medical assistance for no longer than 26 weeks. The legislator granted sickness allowance after four weeks of being subject to compulsory insurance, although previous insurance periods were also taken into account.

If, as a result of mass redundancies, the number of allowance recipients exceeded the average number to such an extent as to endanger financial sustainability, the insurance company could reduce the allowance period to 13 weeks, although only for those who had lost their jobs for reasons other than sickness. Such a reduction could be introduced for a period of not longer than half a year.

No sickness allowance was payable for a period during which the insured person was in hospital. In such a case, the insured person was entitled to a home or hospital allowance. The home allowance was payable for the period of hospital treatment if the insured person had one or more dependents living with them. It amounted to half the sickness allowance, however supplementary allowances for children were paid in full. Hospital

¹³ W. Szubert, *op. cit.*, p. 29.

¹⁴ Decree of 13 December 1946 amending the Act of 28 March 1933 on social insurance (Journal of Laws of 1947 No. 2, item 4.); W. Muszalski, *op. cit.*, p. 50.

¹⁵ Decree of 6 May 1954 amending the Act on social insurance (Journal of Laws No. 22, item 78).

¹⁶ "The amount of allowances was far from satisfactory [...]; for persons without any other source of income during sickness it was a significant assistance that enabled many families to survive the critical period" quoted from: M. Kuszewska-Kryś, *op. cit.*, p. 61.

¹⁷ W. Muszalski, *op. cit.*, p. 50.

¹⁸ Based on the Decree of 13 December 1946 amending the Act of 28 March 1933 on social insurance, see footnote 15.

¹⁹ Decree of 29 March 1951 amending the Act on social insurance (Journal of Laws No. 17, item 138).

allowance was granted when an employee had no dependents and was hospitalized. This was granted to the amount of 1/5 of the sickness allowance.

The Consolidation Act allowed the insurance companies to impose a fine on insured persons who violated doctors' instructions or patients' regulations. The amount of the fine could not exceed 40% of the weekly sickness allowance. An insured person who has caused the disease intentionally, through a fight or act of violence, would lose all or a part of the sickness allowance (also hospital allowance).

As a rule, the obligation for insurance companies to grant benefits ceased on the date of the termination of the insurance obligation or continued insurance, unless the disease occurred within three weeks from the date of the termination of insurance, and in the case of diseases with a longer incubation period – within four weeks. An additional condition was the duration of the insurance before the event in question, *i.e.*, for ten weeks or for thirty weeks during the last twelve months. Thus, the legislator extended the period of insurance cover. The turning point affecting the form of sickness allowances was the introduction of the Decree of 2 February 1955 on the transfer of social insurance tasks to trade unions.²⁰ The adoption of legislation tightening the bases for the right to the allowance, and the combating of sickness allowance fraud was the next stage in the shaping of sickness allowances.²¹ Any employee who used sick leave contrary to its intended purpose, and therein evaded work would lose the right to sickness allowance for the entire period of their incapacity for work. If such a situation repeated itself within a year, the employee would lose the right to sickness allowance for the first three days of their incapacity for work.

The amount of insurance allowance in respect of employee sickness benefit was increased by means of the Act of 1972.²² The sickness allowance was granted irrespective of the employee's family status or whether they were at home or in a health care institution. As of 1 July 1974, allowances were increased to 100% of monthly earnings.²³ The allowance for a single day of work incapacity amounted to 1/30 of the monthly allowance. The value of tax and the insurance contribution was excluded from the assessment basis, which means that the assessment basis was equal to net remuneration, and not gross remuneration as before. In the event of work incapacity due to drunkenness, the benefit was not granted for the first three days of the said. In the event of a fight or work incapacity resulting from intentional offence, no allowance was payable for the entire period of the incapacity for work.

20 Decree of 2 February 1955 on the transfer of social insurance tasks to trade unions (Journal of Laws No. 6, item 31); for more, see W. Szubert, *op. cit.* p. 39 *et seq.*

21 Act of 6 June 1958 on combating fraud in the use of certificates of a temporary incapacity for work (Journal of Laws No. 35, item 154, as amended).

22 Act of 6 July 1972 on the increase of social insurance allowances in the event of an employee's sickness (Journal of Laws No. 27, item 191).

23 "Such a rate of sickness allowance is deemed optimal, which would satisfy to the greatest extent possible the needs related to the loss of earning capacity, while not creating an incentive to take advantage of these benefits without sufficient justification" quoted from: W. Szubert, *op. cit.*, p. 157.

Changes in sickness allowances since 1974

The 1972 regulation was short in duration being replaced by the Act of 7 December 1974 on cash social insurance benefits in respect of sickness and maternity.²⁴ Sickness allowance was payable under the Act in the event of incapacity for work due to sickness and it was granted to employees. The Act designated two insurance events: incapacity for work due to sickness and the inability to perform work for reasons specified in the legislation.²⁵

Originally, a person employed for an indefinite period or for an initial period acquired the right to sickness allowance irrespective of their period of employment. Persons employed for a trial period, specified period or for the duration of a specific job acquired the right to allowance after being employed for at least one month. The Act of 1974 also extended the insurance coverage after the cessation of the insurance obligation. Contrary to the previous regulation, it introduced a protective period for all cases of incapacity for work, provided that the incapacity lasted for at least 30 days.

The maximum period for receiving sickness allowance was six months (180 days), and in the event of incapacity for work due to tuberculosis – nine months (270 days). The sickness allowance could also be extended for another three months if there was a fair prognosis regarding the restoration of earning capacity as a result of further medical treatment or rehabilitation. The allowance period included all periods of uninterrupted incapacity for work due to the same disease or various diseases, and the period of any subsequent incapacity for work if the interval between the two periods did not exceed 30 days. The allowance rate for the first year of the Act's validity was 100%. After a year, the allowance rate was differentiated, depending on the employment period. 80% and 75% rates were also introduced.²⁶ When determining the allowance amount, previous employment periods were taken into account. It was not until the 1995 amendment that the allowance rate was standardised at the level of 80%, while the increased rate was retained, *inter alia*, for the period of pregnancy or incapacity for work due to an accident at work.²⁷ The basis for allowance assessment was initially equal to the permanent remuneration received. If the remuneration was not paid monthly to the same amount, the average for the previous three calendar months was taken. The amendment introduced the rule for determining the average amount for the previous six and twelve months if the monthly amounts of remuneration fluctuated significantly. In 1995, the basis for sickness allowance assessment was limited to 250%

24 Act of 7 December 1974 on cash social insurance benefits in respect of sickness and maternity (consolidated text: Journal of Laws of 1983 No. 30, item 143, as amended).

25 W. Muszalski, *op. cit.*, p. 73.

26 W. Szubert, *op. cit.*, p. 157.

27 The Act of 3 February 1995 amending the Act on cash social insurance benefits in respect of sickness and maternity, and amending the Act – Labour Code (Journal of Laws of 1995 No. 16, item 77), hereinafter referred to as the Act amending the Act on cash social insurance benefits in respect of sickness and maternity, and amending the Act – Labour Code.

of the average monthly remuneration.²⁸ Allowances were paid by public enterprises. ZUS branches paid allowances to non-public enterprises and the employees of public enterprises following termination of employment. Ultimately, enterprises constituted allowance payers if they employed more than 20 insured persons.

It should be emphasised that the Act of 1974 covered employees, there is no mention of craftsmen and persons engaged in gainful activity for whom the sickness allowance was introduced by the Act of 18 December 1976 on social insurance for craftsmen and certain persons engaged in gainful activity.²⁹ The Act introduced cash benefits for this group in respect of sickness and maternity, which were granted under the principles set out in the Allowance Act of 1974. The sickness allowance was payable for each day of certified incapacity for work lasting continuously for at least 30 days. The sickness allowance was not due if the contribution had been unpaid for a period exceeding three months. Most of the provisions of the Act of 1974 were transferred to the Act of 1999.

Legal characteristics of the right to sickness allowance and selected problems related to its acquisition

The risk of temporary incapacity for work under sickness insurance

Sickness allowance is a social insurance benefit intended to compensate the insured person for earnings lost as a result of any temporary incapacity for work. The very issue of acquiring the right to this benefit is associated with a number of problems requiring in-depth analysis, ones that can only be signalled in this paper.

The discussion of the above issue should begin with explaining the key concept of “disease/sickness.” Sickness is a biotic event, which means that it is a biological phenomenon being an integral part of everyone’s life.³⁰ The doctrine emphasises the possibility of defining this concept both in the biological aspect as a state of disruption to the proper functioning of the body, as well as in a legal aspect. In the second sense, sickness is an event linked to a certain benefit. It should be emphasised that, within the meaning of the law, sickness begins at the moment when a person’s health condition affects his/her capacity for work in a certain way. It is

²⁸ The Act amending the Act on cash social insurance benefits in respect of sickness and maternity, and amending the Act – Labour Code.

²⁹ The Act of 18 December 1976 on social insurance for craftsmen and certain persons engaged in gainful activity (Journal of Laws No. 40, item 235, as amended).

³⁰ I. Jędrasik-Jankowska, *Pojęcia i konstrukcje prawne ubezpieczenia społecznego*, Warszawa 2017, p. 120.

therefore neutral from a legal point of view until its impact on the earning capacity is certified.³¹

Since social insurance does not provide protection for the occurrence of certain random events, but only do their effects referred to as risk – an insurance event – entitle the insured person to certain benefits, it is necessary to consider the very content of the risk, *i.e.*, a temporary incapacity for work.

Apart from the temporary incapacity for work, social insurance also covers other situations, referred to in Art. 6(2) of the Act on cash social insurance benefits in respect of sickness and maternity,³² which is justified by the similarity of the mentioned obstacles to work performance to the biological sickness and by the fact that they evoke the same type of needs.³³

“Temporality” may not be identified with the duration of incapacity as the persistent condition of a lack of earning capacity defined in days or months. “Temporality” means only fleetingness, the possibility of quick cessation. In the event of disruption of the proper functioning of the body, resulting in a permanent lack of earning capacity, the insured person is entitled to coverage under disability insurance, because there is no certainty as to the cessation of incapacity in the foreseeable future.

Within the meaning of the Allowance Act, the risk of temporary incapacity for work does not apply to any work, but only to work currently performed. Therefore, in order to consider that risk has materialised, it is enough to establish that the health condition constitutes an obstacle to the performance of current work without having to take into account the possibility of performing other types of work. In this way, Art. 3 of the Regulation governing the procedure and manner of certifying temporary incapacity for work,³⁴ indicated that when certifying any temporary incapacity for work, one should take into account all the circumstances relevant to the assessment of the health condition and impairment of body functions resulting in the temporary incapacity for work on the part of the insured person, with particular regard to the type and conditions of work. As regards employment in several places at the same time, in accordance with the linguistic interpretation of the law, it would be necessary to evaluate separately the situation for each employment relationship, taking into account the type of work and the nature of the disease causing temporary incapacity to perform such work. Nevertheless, in practice, a medical certificate releases the insured person from any work they perform. The lack of legislator consistency in this respect should be noted, since Art. 12 of the same Regulation provides

31 See Ł. Prasolek [in:] *Społeczne ubezpieczenia wypadkowe i chorobowe. Komentarz*, ed. M. Gersdorf, B. Gudowska, Warszawa 2012, p. 471.

32 Act of 25 June 1999 on cash social insurance benefits in respect of sickness and maternity (consolidated text: Journal of Laws of 2017 item 1368, as amended), hereinafter: the Allowance Act.

33 I. Jędrasik-Jankowska, *op. cit.*, p. 250.

34 Regulation of the Minister of Labour and Social Policy of 10 November 2015 on the procedure and manner of certifying temporary incapacity for work, issuing a medical certificate as well as the procedure and manner of correcting an error in a medical certificate (Journal of Laws item 2013).

that in the event of two or more insurance titles, the doctor issues, at the request of the insured person, a certificate in the relevant number of copies.

Deprivation of the right to sickness allowance for persons taking up employment during sick leave

The issue of deprivation of the right to sickness allowance is connected with the issue of refraining from work during sick leave. In accordance with Art. 17(1) of the Allowance Act, an insured person who performs gainful employment during the period of a certified incapacity for work or uses the sick leave in a manner inconsistent with its purpose, loses the right to sickness allowance for the entire period of the sick leave.³⁵

Gainful employment is understood as any work providing revenue to the insured person. It can be both work performed on the basis of an employment contract, irrespective of the working time, civil law contract, running one's own business, or illegal work.³⁶ It means that the insured person may not perform any work – failure to comply with the above rule results in deprivation of the right to sickness allowance. The Supreme Court has recognised that any gainful employment performed during the period of sick leave results in the loss of the right to sickness allowance, even if the work performance was recommended and contributed to health condition improvement.³⁷ The aforementioned position, which is a consequence of the linguistic interpretation, does not take into account the economic effects for the Social Insurance Fund, because any performance of work recommended for health reasons may result in a shortening of the allowance period. The Supreme Court emphasises that an employee should receive an allowance from both their employers.³⁸ It also emphasises the fact that to cause the loss of the right to allowance, gainful employment within the meaning of Art. 17(1) of the Allowance Act does not have to be performed on a full-time basis.³⁹ The law does not require that work be undertaken with a view to “making a profit.” It is also irrelevant whether certain activities are carried out against payment or free of charge. It is important how they have been actually performed.⁴⁰

This prompts one to analyse the situation of a person covered by insurance under two occupational titles, when temporary incapacity for work concerns only one of them and does not constitute an obstacle to the pursuit of another profession. If a person continues

35 Article 17 para. 1 of the Allowance Act does not cover by its hypothesis the situation when the insured person performs his/her current work. In such a situation, Art. 12 is applicable, which provides for the suspension of the right to any allowance.

36 A. Radziśław, *Ustawa o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa. Komentarz*, Warszawa 2016, p. 97.

37 Judgement of the Supreme Court of 12 August 1998, file No. II UKN 172/98 (OSNP of 1999, No. 16, item 522); the same position was taken by the Supreme Court in the judgement of 20 January 2005, I UK 154/04 (OSNP of 2005, No. 19, item 307).

38 Judgement of the Supreme Court of 19 March 2003, II UKN 257/02 (unpublished).

39 Judgement of the Supreme Court of 6 February 2008, II UK 10/07 (OSNP of 2009, No. 9-10, item 123).

40 Judgement of the Supreme Court of 20 January 2005, I UK 154/04 (OSNP of 2005, No. 19, item 307).

employment to which the incapacity does not apply, he/she will be deprived of his/her right to sickness allowance and remuneration for any such work. An alternative solution would be to give up all work and collect allowance in respect of one or other of the titles, even though the risk does not relate to the other. It means an obligation to pay a higher sickness allowance than would be justified by the real needs of the insured person if they did not have to give up additional employment. The economic effects of this solution, both on the part of the person concerned and the Social Insurance Fund, support the admissibility of collecting allowances and simultaneously performing work that is not affected by the incapacity.

Staying in sickness insurance as a prerequisite for acquiring the right to allowance

It should also be emphasised that in Art. 11 of the Act on the social insurance system,⁴¹ the legislator indicated titles subject to compulsory or voluntary sickness insurance. In this context, voluntary access to sickness insurance deserves special attention. It was stated that sickness insurance may be joined on request only by persons subject to compulsory pension and disability insurance. In the opinion of Inetta Jędrasik-Jankowska, this wording means that persons released from the insurance obligation due to overlapping titles will be deprived of the opportunity to insure themselves against the loss of income from a given activity if risk materialises. She refers to this regulation as the “coupled voluntariness,” while pointing to the irrationality of combining sickness insurance under a given title with compulsory pension insurance under the same title, since this goes beyond the very essence of voluntariness.⁴²

Acquisition of the right to allowance has been made conditional on the materialisation of risk during the insurance period. Under Article 6(1), the sickness allowance is granted to an insured person who has become incapable of work due to sickness during the period of sickness insurance, however the term “during the period of insurance” itself may be understood in two ways. As Łukasz Prasolek has pointed out, some representatives of the doctrine recognise that “holding the insurance title” is identical with the “duration of sickness insurance.” However, according to the prevailing opinion, these are two separate concepts, with the first of them being wider in scope than the second.⁴³

Insurance also covers cases where the risk materialises during the insurance period and the incapacity continues despite the expiry of this period. Protection in respect of continuation is only granted if the incapacity is uninterrupted and it is irrelevant whether this is caused by the same or a different disease. Interruption will mean the need to determine whether there are grounds for acquiring the right to the allowance after the

41 Act of 13 October 1998 on the social insurance system (consolidated text: Journal of Laws of 2017 No. 1778, as amended).

42 See I. Jędrasik-Jankowska, *op. cit.*, pp. 115–116.

43 See Ł. Prasolek, *op. cit.*, p. 475.

cessation of insurance, as defined in Art. 7 of the Allowance Act. For the assessment of whether incapacity for work after cessation of the insurance title is an insurance event, it does not matter if it is the first or subsequent incapacity due to the same disease – for it is the moment when the incapacity has arisen that is decisive.

Qualifying period as a prerequisite for acquiring the right to sickness allowance

Acquisition of the right to allowance has been made conditional on the materialisation of risk during the insurance period. In addition, the legislator requires the insurance to last for a specific period. This requirement is defined as the qualifying period. The ratio legis of this requirement was the desire to eliminate cases where, after a short period of paying contributions, an insured person could take advantage of this insurance even for a few months.⁴⁴

Pursuant to Art. 4 of the Allowance Act, an insured person acquires the right to sickness allowance:

- 1) after 30 days of uninterrupted sickness insurance, if he/she is subject to compulsory insurance;
- 2) after 90 days of uninterrupted sickness insurance – if he/she is insured voluntarily.⁴⁵

This means that different qualifying periods have been adopted depending on the compulsory or voluntary nature of the insurance. This issue became the subject of a Constitutional Tribunal ruling,⁴⁶ which stated that Art. 4(1)(2) of the Allowance Act is compliant with Art. 32(1) and Art. 2 of the Constitution of the Republic of Poland to the extent that it provides for a longer period of uninterrupted sickness insurance required to acquire the right to sickness allowance for those engaged in a non-agricultural business activity and subject to voluntary sickness insurance than for persons subject to compulsory sickness insurance. When assessing the mentioned regulation from the perspective of the principle of equality and taking into account the purpose of the challenged Act, the Constitutional Tribunal recognised the status of a person insured in respect of sickness and maternity and incapacity for work due to sickness as important relevant features. In its opinion, the main purpose of differentiating qualifying periods was to ensure a proper correlation between the amount of contributions paid and the amount of benefits within each category of insured persons. In its justification, the Tribunal paid particular attention to the financial aspects, *i.e.*, the possibility of covering expenses for sickness allowances due, however, it ignored issues related to the functioning of the market, which is particularly evident in the case of the other voluntary entitlement to

⁴⁴ *Ibid.*, p. 466.

⁴⁵ The law provides for incorporating previous insurance periods within the qualifying period if the gap between them does not exceed 30 days or was due to child-care leave, unpaid leave, or active military service by a non-professional soldier. Art. 4(3) of the Act gives an advantage to certain categories of insured persons by releasing them from the qualifying period requirement, thus granting the right to sickness allowance from the first day of insurance.

⁴⁶ Judgement of the Constitutional Tribunal of 6 November 2010, P 86/08.

sickness insurance, *i.e.*, performing work under a commission contract.⁴⁷ In this case, employment instability requires not only that the qualifying period be equated with the qualifying period for persons covered by compulsory sickness insurance, but also that analysed be the effects of shortening the indicated period below 30 days.

Impact of legislative changes on the Sickness Fund's balance over the last decade

The Sickness Fund is one of four funds separated under the Social Insurance Fund. It guarantees the payment of cash benefits in the event of random events, such as sickness or maternity: the following are paid in this respect: sickness allowance, rehabilitation benefit, compensatory allowance, maternity allowance and care allowance.

The sickness insurance contribution amounts to 2.45% of the basis for contributions assessment and is paid out from the insured person's funds.

Sickness Fund balance-sheet for the years 2009–2018

The financial situation of the Fund has been gradually deteriorating over the last decade. Table 1 summarises the Fund's receipts from contributions and their derivatives, as well as the Fund's expenditure. In the first year of the period under review, revenues exceeded expenditure, but starting from 2010, the difference is already negative, and its absolute value is increasing year on year. The reasons for this situation will be discussed below.

Table 1. Financial situation of the Sickness Fund [data in PLN thousand]

Year	Own revenues	Expenditure	Difference
2009	10,553,386	10,180,927	372,459
2010	9,387,575	10,981,965	-1,594,390
2011	9,876,231	11,535,962	-1,659,731
2012	10,324,053	12,841,043	-2,516,990
2013	10,695,880	14,331,627	-3,635,747
2014	10,809,624	17,106,671	-6,297,047
2015	11,300,106	19,080,947	-7,780,841
2016	12,022,953	20,277,252	-8,254,299
2017	13,150,319	21,278,070	-8,127,751

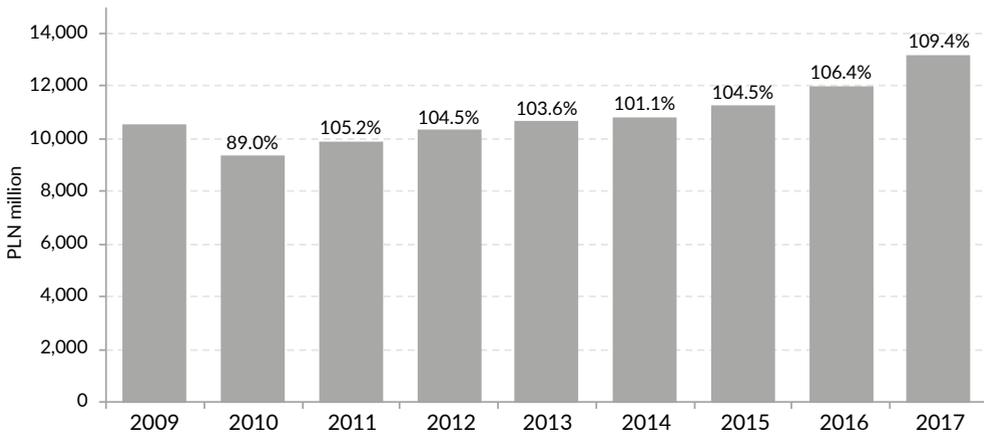
Source: own study based on ZUS data

Attention should be paid to the Fund's revenues (Diagram 1) and its expenditure (Diagram 2) separately. From 2010 to 2014, a relatively slow but systematic increase in the

⁴⁷ Art. 6(1)(4) of the Allowance Act.

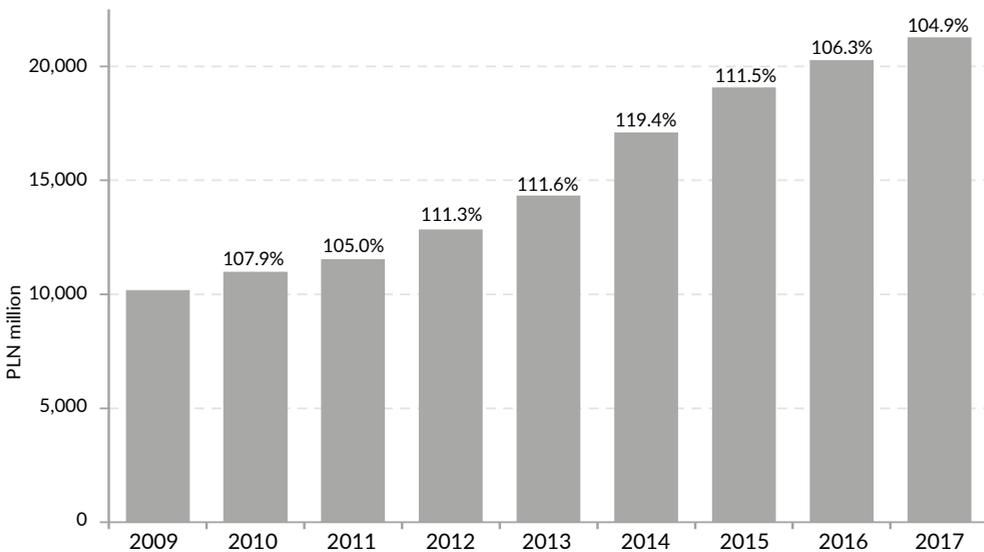
amount of inflows could be observed. In the subsequent period there was stronger growth, and as a result the average annual growth of this item in the years 2010–2017 was at the level of 5%. The gradual increase in inflow from contributions and their derivatives is related to such economic parameters as increases in wages and growing employment in the national economy. Expenditure grew more dynamically. 2014 requires special attention, since expenditure in this year increased by as much as 19% compared to the previous year. Only in the last two years of the decade under discussion did the expenditure level stabilise, and its year-on-year increase amounted to 6.3% in 2016 and 4.9% in 2017 respectively.

Diagram 1. Sickness Fund revenues in the years 2009–2017



Source: own study based on ZUS data

Diagram 2. Sickness Fund expenditure in the years 2009–2017



Source: own study based on ZUS data

Legislative changes having a significant impact on the Sickness Fund's balance

The reasons for the rapid increase in expenditure observed first of all in 2010 and then in 2012–2015 should be seen within changes in the scope of entitlements and the scope of persons entitled to various benefits from the Sickness Fund, which were quite marked in the decade under discussion:

- 1) since 7 July 2008, the assessment basis of contributions and benefits paid from the social insurance has been increased by additional components previously not taken into account⁴⁸ (such as discretionary awards and bonuses),
- 2) since 1 January 2009, the qualifying period to acquire the right to sickness allowance for voluntarily insured persons has been shortened from 180 to 90 days, and the allowance period for pregnant women has been extended from 182 to 270 days,⁴⁹
- 3) from 1 February 2009, the period of sickness allowance payment by the employer has been shortened from 33 to 14 days for persons who have reached the age of 50,⁵⁰
- 4) from 1 January 2010, an additional maternity leave of two weeks has been introduced in the case of the birth of one child and three weeks in the case of the birth of more children,⁵¹
- 5) from 1 January 2010, the right to maternity allowance has been granted to fathers for a period of paternity leave of one week until the child reaches one year of age, and from 1 January 2012, paternity leave has been extended to two weeks,⁵²
- 6) from 1 January 2012, additional maternity leave has been extended to four weeks in the case of the birth of one child and to six weeks in the case of the birth of more children,⁵³
- 7) from 17 June 2013, additional maternity leave has been extended by two weeks, and parental leave of up to 26 weeks was additionally introduced,⁵⁴
- 8) from 14 August 2015, additional entitlements to care allowance in special circumstances have been introduced,⁵⁵

48 Pursuant to the judgement of the Constitutional Tribunal of 24 June 2008 (Journal of Laws No. 119, item 771).

49 Act of 6 December 2008 amending the Act – Labour Code and some other Acts (Journal of Laws of 2009 No. 237, item 1654).

50 Act of 19 December 2008 amending the Act on employment promotion and labour market institutions, and amending certain other Acts (Journal of Laws of 2009 No. 6, item 33).

51 Announcement of the Minister of Labour and Social Policy of 23 December 1997 on publication of a consolidated text of the Act – Labour Code (Journal of Laws of 1998 No. 21, item 94, as amended), hereinafter referred to as the announcement on publication of a consolidated text of the Act – Labour Code.

52 Announcement on the publication of a consolidated text of the Act – Labour Code.

53 Announcement on the publication of a consolidated text of the Act – Labour Code.

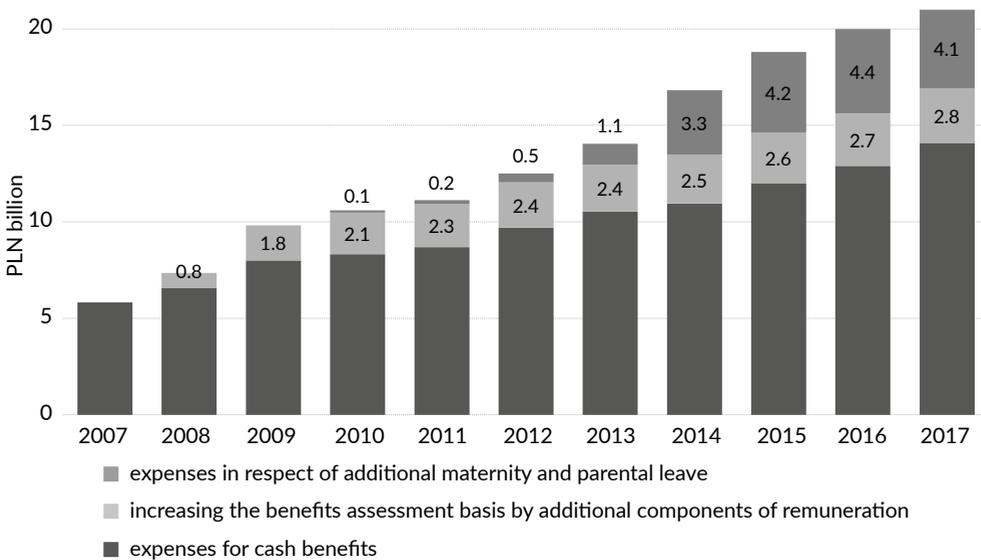
54 Act of 28 May 2013 amending the Act – Labour Code and some other Acts (Journal of Laws item 675).

55 Act of 15 May 2015 amending the Act on cash social insurance benefits in respect of sickness and maternity and certain other Acts (Journal of Laws item 1066).

9) from 1 January 2016, the additional maternity leave has been included within the parental leave and introduced has been an option of taking advantage of the parental leave of up to 16 weeks until the end of the calendar year in which the child reaches six years of age.⁵⁶

Not all of these changes resulted in a drastic increase in the Sickness Fund expenditure. The most significant changes include an increase in the assessment basis of allowances and other benefits, as well as changes in maternity, paternity and parental leave. Diagram 3 presents the Sickness Fund expenditure with estimated expenses incurred in connection with these changes.

Diagram 3. Sickness Fund expenditure with distinguished expenses resulting from the introduced legal changes (estimated amounts)



Source: own study based on ZUS data

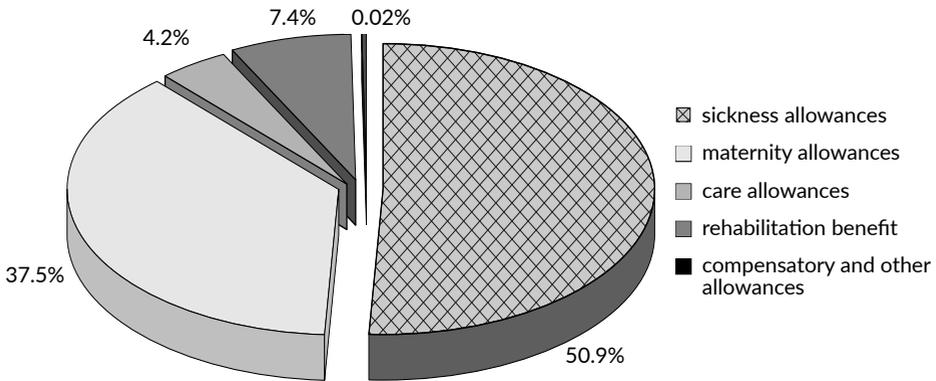
Structure of the Sickness Fund expenditure

Before making a statement of revenues and expenditure of the Sickness Fund and assessing its self-financing, attention should be paid to the Fund's expenses broken down by individual benefits (Diagram 4). It is worth noting that almost 90% of the Fund's expenditure is allocated to the payment of sickness allowances and maternity allowances, however, although the share of the mentioned allowances in the total amount of the Fund's expenditure in each year of the analysed period does not change much, but with introduction of parental leave (from 2014), the share of maternity allowances alone has increased significantly (by about 10%). In the analysed period, care allowances maintained

⁵⁶ Announcement on the publication of consolidated text of the Act – Labour Code.

a level of a 7-8% share in the Sickness Fund expenditure, while the share of rehabilitation benefits ranged from 4 to 5%.

Diagram 4. Structure of the Sickness Fund expenditure in 2017



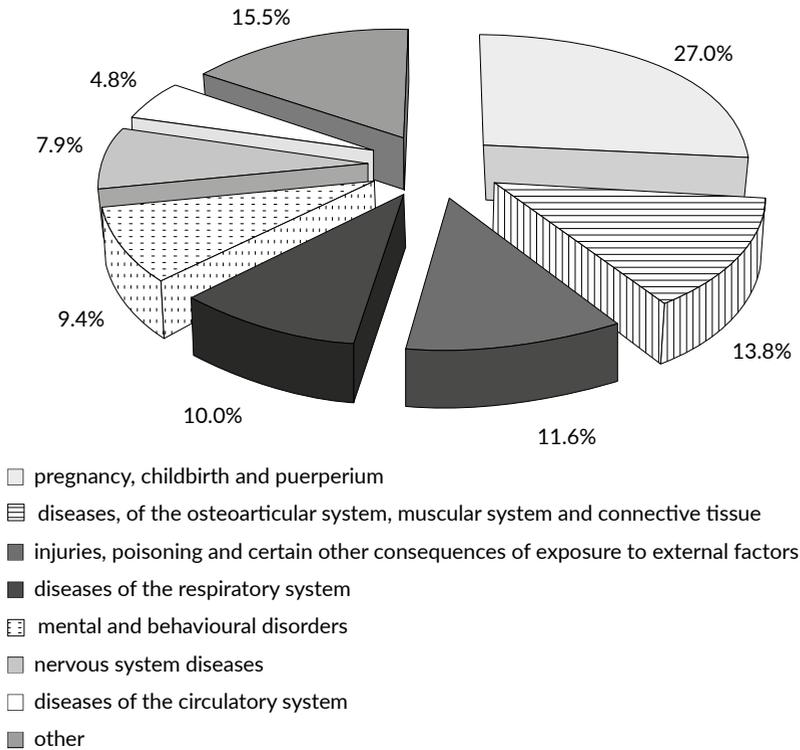
Source: own study based on *Informacja z wykonania planów finansowych FUS, FEP, FRD oraz planu budżetu państwa w części 73 – ZUS za 2017 r.* [Information on the implementation of the financial plans of the Social Insurance Fund, Bridging Pensions Fund, Demographic Reserve Fund and the state budget plan in part 73 – ZUS for 2017], <http://bip.zus.pl/finanse-zus-i-fus/sprawozdania-roczne/informacja-z-wykonania-planow-finansowych-fus-fep-frd-oraz-planu-budzetu-panstwa-w-czesci-73-zus> (online access: 25.10.2019)

As was already mentioned, sickness allowances constitute the largest group of the Fund’s expenditure and are paid to insured persons primarily in the event of temporary incapacity for work. Pregnancy, childbirth and puerperium are the dominant “sickness group” in this category – the expenditure in this respect amounted to PLN 4.4 billion⁵⁷ in 2016.⁵⁸ Other places are occupied by such diseases as: diseases of the osteoarticular system, muscular system and connective tissue (PLN 2.2 billion), injuries, poisoning and certain other consequences of exposure to external factors (PLN 1.9 billion), diseases of the respiratory system (PLN 1.6 billion), *etc.* (see Diagram 5). It is worth mentioning that some diseases (*e.g.*, diseases of the osteoarticular system, muscular system and connective tissue or diseases of the nervous system) show a systematic year-on-year increase in terms of days taken off for being sick as a result of the said. In the case of other diseases (*e.g.*, respiratory system diseases) it is difficult to conclude as to the existence of any specific trend.

⁵⁷ Data on expenditure on benefits for specific disease groups come from the study *Wydatki na świadczenia z ubezpieczeń społecznych związane z niezdolnością do pracy 2016 r.* [Expenditure on social insurance benefits related to incapacity for work 2016], compilation E. Karczewicz, A. Kania, Warszawa 2017, <http://www.zus.pl/baza-wiedzy/statystyka/opracowania-tematyczne/wydatki-na-swadczenia-z-ubezpieczen-spoecznych-zwiazane-z-niezdolnoscia-do-pracy> (online access: 27.10.2019).

⁵⁸ Data for 2017 as of 31 July 2018 were not yet available.

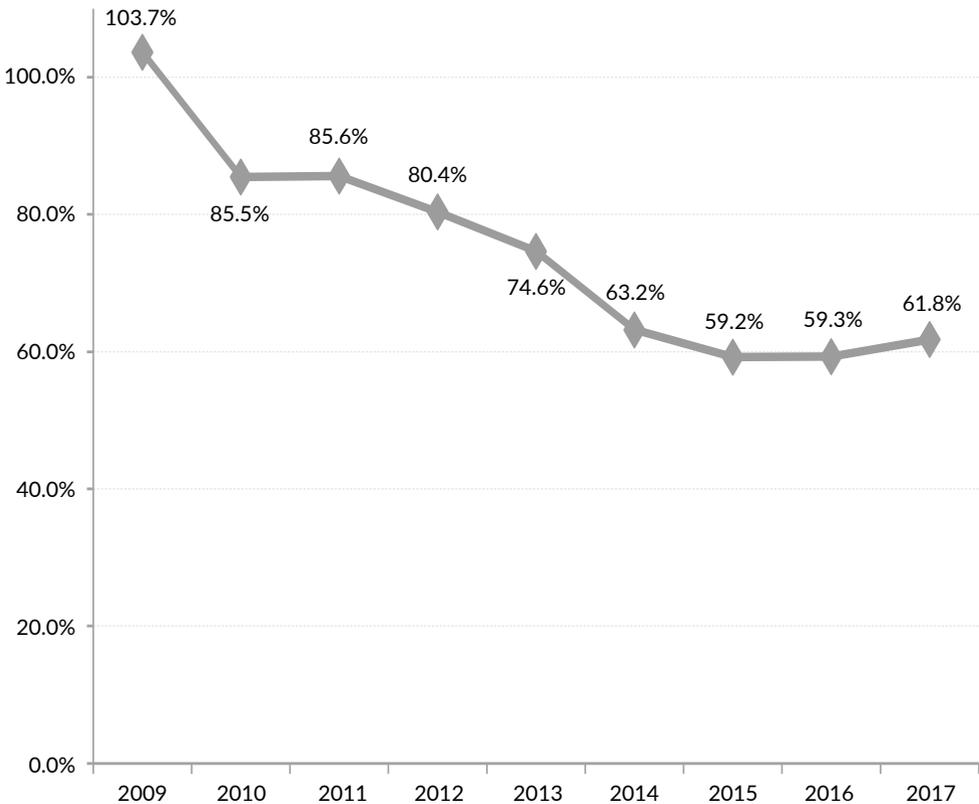
Diagram 5. Structure of expenditure in respect of sickness absenteeism in 2016 (includes expenses financed from the Social Insurance Fund and from enterprises' funds)



Source: own study based on *Wydatki na świadczenia z ubezpieczeń społecznych związane z niezdolnością do pracy 2016 r.* [Expenditure on social insurance benefits related to incapacity for work 2016], compilation E. Karczewicz, A. Kania, <http://www.zus.pl/baza-wiedzy/statystyka/opracowania-tematyczne/wydatki-na-swiadczenia-z-ubezpieczen-spoecznych-zwiazane-z-niezdolnoscia-do-pracy> (online access: 25.10.2019)

Analysis of the degree of coverage of fund expenditure by revenues from contributions

In the period under review, only 2009 proved to be the year in which the Fund was self-financing. In subsequent years, the Fund's situation gradually deteriorated – in 2015–2016 its capacity dropped even below 60%. The decreasing level of coverage of expenditure by revenues mainly results from extension of the scope of persons entitled (as described above) in the event of insurance risks materialisation, while maintaining the original rate of the sickness insurance contribution. Fund shortage is covered by the state budget subsidy to the Social Insurance Fund, because, pursuant to Art. 2(3) of the System Act, the state guarantees the solvency of social insurance benefits.

Diagram 6. Sickness Fund performance in the years 2009–2017

Source: own study based on ZUS data

Financing sickness allowance in the social insurance for farmers

Farmers' social insurance is a separate system of social risk protection. The current model was introduced in 1991, *i.e.*, at the beginning of the structural transformation. It was aimed to limit the effects of structural changes in society, including first of all the effects of the implementation of market economy principles within agriculture. Due to the significant fragmentation of agricultural holdings, and thus the limited possibility of bearing social burdens, the legislator has introduced a mixed system of financing farmers' social insurance. Pension insurance is financed from the state budget with a small percentage share of farmers' contributions, paid in a manner characteristic of social protection, and this is an element of the state's agricultural policy. Sickness, accident and maternity insurance is based on a structure typical for social insurance, *i.e.*, on financing short-term benefits from farmers' contributions.

General characteristics of farmers' sickness, accident and maternity insurance

Self-financing is a distinctive feature of farmers' accident, sickness and maternity insurance. The Act of 20 December 1990 on social insurance for farmers⁵⁹ and the statute of the Contribution Fund of Farmers' Social Insurance⁶⁰ do not provide for the possibility of supplementing the Fund's deficit with a state budget subsidy. Pursuant to Art. 77(2) of the Farmers' Social Insurance Act, short-term benefits, with the exception of maternity allowance, are financed from contributions paid to accident, sickness and maternity insurance and from other sources defined in the statute of the Contribution Fund. Pursuant to Art. 3(2) of the statute these are: revenues from the management of acquired real estate and from business activities, *inter alia* consisting in the provision of health care and social assistance services. As an exception, in the event of the Contribution Fund deficit, a loan is taken in the amount necessary to cover the deficit (Art. 77[4] of the Farmers' Social Insurance Act). If it is not possible to repay the loan from the currently accumulated contributions, two options are possible. The first of them is another loan. The second possible option is to increase the sickness, accident and maternity insurance contributions. Pursuant to Art. 8(4) of the Farmers' Social Insurance Act, the President of the Fund announces in the Official Journal of the Republic of Poland "Monitor Polski" the monthly contribution set by the Farmers' Council for one or several subsequent quarters, at least 14 days before the first day of the given quarter. If due to the increase in the contribution some insured persons are not able to pay it or if there are other reasons for doing so, the minister in charge of rural development, at the request of the Farmers' Council, may, by means of a regulation, set a discount in the amount of the contribution, specifying the detailed rules and procedure for its granting.

The amount of sickness allowance for farmers in the context of the Constitutional right to social security

The sickness allowance amount is correlated with the farmers' contribution to short-term insurance. Due to the self-financing of the Contribution Fund,⁶¹ the allowance amount depends on the insured farmers' ability to pay the contribution in a certain amount. The exceptional nature of the construction used in the social insurance for farmers is due to the fact that it is the Farmers' Council (a quasi-self-government of those insured) that adopts a resolution on the amount of the contribution paid in subsequent quarters. For example, the Farmers' Council may increase the contribution, which will result in

59 Act of 20 December 1990 on social insurance for farmers (consolidated text: Journal of Laws of 2017, item 2336, as amended), hereinafter: The Farmers' Social Insurance Act.

60 Regulation No. 35 of the Minister of Agriculture and Rural Development of 23 December 2008 on the statute of the Contribution Fund of Farmers' Social Insurance (Official Journal of the Ministry of Agriculture and Rural Development No. 30, item 37, as amended).

61 For more, see J. Wantoch-Rekowski, *System ubezpieczeń społecznych a budżet państwa*, 2014.

a surplus in the Fund, thus allowing for the acquisition of real estate or an increase in benefits, *e.g.*, sickness allowance or a one-off compensation payment. If it is not possible to take a loan or extend it, exceptionally, the Farmers' Council is obliged to set a higher contribution for the subsequent quarter. In the event of a surplus in the Contribution Fund, the Farmers' Council may set a lower contribution than in previous quarters.

The present low contribution rate, affecting the sickness allowance amount, raises doubts. Analysing the sickness allowance evolution, it can be concluded that the primary objective of the legislator was and is to maintain the low level of contributions, which results in the low quality of protection granted to farmers. The contribution to the accident and maternity insurance is determined in a uniform manner for insured persons, irrespective of the area or income of the agricultural holding.⁶² In 2018, the contribution to sickness, accident and maternity insurance amounted to PLN 42.⁶³ Persons entitled only to one-off compensation, pay a contribution of 1/3 of the basic amount. The construction of the flat-rate contribution means that its amount must be determined in a way enabling a farmer covered by compulsory insurance to pay it (it means that it must take into account the economic capacity of the weakest agricultural holdings with an area of 1 conversion hectare to finance the contribution). The uniform contribution means that in sickness and accident insurance, unlike farmers' pension insurance, there is no higher burden imposed on farmers with higher farm areas for the benefit of the smallest agricultural holdings. The introduction of the flat-rate contribution was correlated with sickness allowance, the amount of which does not take into account the farmer's actual lost income. The construction of the flat-rate short-term insurance contribution is a basic barrier to the introduction of differentiated sickness benefits ensuring real protection of the lost income. The sickness allowance amount for each day of incapacity for work in 2018 was PLN 10 (PLN 300 for 30 days of incapacity for work).⁶⁴ It is worth noting that this amount has not changed since 2009.⁶⁵ This means that the allowance amount does not take into account economic factors (*e.g.*, inflation, rising prices or wages). What is more, this amount is lower than the amount determining the minimum subsistence level, and the following analysis of the relationship between the sickness allowance in the Agricultural Social Insurance Fund [Kasa Rolniczego Ubezpieczenia Społecznego, KRUS] and the minimum subsistence level shows the decrease in the level of protection in relation to the poverty level, from which biological degradation of the individual occurs.

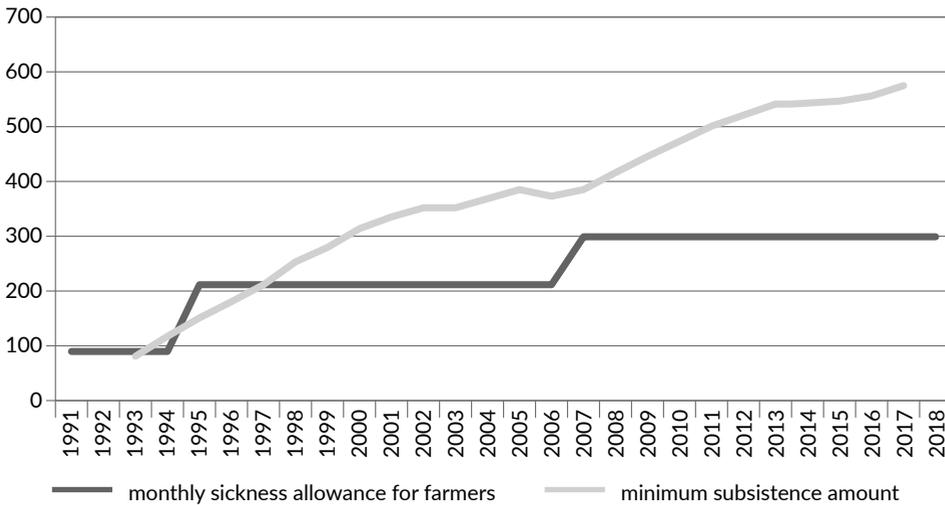
62 In farmers' pension insurance, the amount of the contribution depends on the area of the agricultural holding. Higher contributions are also paid by farmers engaged in non-agricultural business activity.

63 Announcement of the President of the Agricultural Social Insurance Fund of 4 June 2018 on the amount of the monthly contribution for accident, sickness and maternity insurance in the third quarter of 2018 (Official Gazette "Monitor Polski" item 551).

64 Regulation of the Minister of Agriculture and Rural Development of 16 May 2007 on determining the amount of one-off compensation in respect of an accident at agricultural work or agricultural occupational disease and sickness allowance (Journal of Laws of 2015, item 1150, as amended).

65 For more, see E. Jaworska-Spičak, *Zasilek chorobowy dla rolników z perspektywy KRUS*, "Ubezpieczenia w Rolnictwie. Materiały i Studia" 2011, No. 40, p. 85.

Diagram 7. Ratio between the value of the monthly sickness allowance for farmers and the minimum subsistence amount between 1991 and 2018



Source: own study based on data of Institute of Labour and Social Studies [Instytut Pracy i Spraw Socjalnych, IPiSS], *Minimum socjalne i minimum egzystencji*, ed. E. Gimalska, 2013, https://www.ipiss.com.pl/aktualnosci_stale/min%C2%ADi%C2%ADmum-soc%C2%ADjal%C2%ADne-i-min%C2%ADi%C2%ADmum-egzystencji (online access: 25.10.2019) and KRUS, *Wymiar kwartalnych składek*, <https://www.krus.gov.pl/krus/krus-w-liczbach/wymiar-kwartalnych-skladek-na-ubezpieczenie-spoleczne-rolnikow/> (online access: 25.10.2019)

Setting the sickness allowance amount below the minimum subsistence level may also be at odds with the essence of the right to social security as defined in Art. 67(1) of the Constitution. It is emphasised in the subject literature that the prohibition to violate the essence of the right to social security is the impassable limit on any interference with this right.⁶⁶ The legislator (in compliance with the provisions of the Constitution – author’s footnote) is obliged to guarantee a minimum scope of the right to social security corresponding to the Constitutional essence of this right.⁶⁷ In the case law we can find numerous references to the mutual relationship between the insurance benefits amount and the right to social security. In its judgement of 19 December 2012,⁶⁸ the Constitutional Tribunal, while examining compliance with the Constitution of changes to the indexation mechanism, ruled that

the violation of the essence of the right to social security occurs when the legislator determines the amount of benefits below the minimum standard of living, the minimum required for subsistence.

66 S. Jarosz-Żukowska, *Komentarz do art. 67 Konstytucji Rzeczypospolitej Polskiej* [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Volume II*, ed. L. Garlicki, M. Zubik, Warszawa 2016.

67 J. Wantoch-Rekowski, *op. cit.*

68 Judgement of the Constitutional Tribunal of 19 December 2012, K 9/12 OTK-A 2012/11/136 (Journal of Laws item 1555).

In turn, in its judgement of 4 November 2015,⁶⁹ while examining the compliance with the Constitution of the provisions governing the payment of pensions from resources accumulated in Open Pension Funds, the Tribunal emphasised that

it is the legislator's obligation to establish and maintain a system that will allow persons incapable of work as a result of old age to receive means enabling their subsistence.

In its judgement of 10 December 2015,⁷⁰ the Court of Appeal in Warsaw emphasised that

the principle of social protection, contained in the aforementioned Art. 67 of the Constitution, requires the regulations governing the social security benefits (specifying, for example, the amount, frequency, indexation, *etc.*) to ensure that the demand for the protection of persons affected by risk is more realistic. Social protection cannot be purely illusory, *e.g.*, due to the low level of benefits.

In turn, the Court of Appeal in Łódź in its judgement of 11 December 2015⁷¹ pointed out that

the statutory regulations must therefore be formed in such a way as to take into account, on the one hand, the existing needs, and on the other hand, the possibility of satisfying them. The limits of these possibilities are defined by other protected Constitutional values.

In accepting the point of view indicated in the case-law, it should be noted that the current amount of sickness allowance for farmers does not ensure a minimum level of protection for insured persons, and thus violates the essence of the right to social security.

Adjustment of the sickness allowance structure to the actual needs of insured farmers

The benefit due to farmers also does not take into account the possibility of substitution for a farmer. In every agricultural holding, the failure to perform specific operations, *e.g.*, necessary spraying or lack of adequate care over livestock during the period of hospitalisation, can substantially reduce the income from a given agricultural holding, and in the event of an incapacity lasting for several months, deprive the holding of income for the subsequent year. For this reason farmers, to ensure the continuity of agricultural production on the holding, either perform work during the period of certified incapacity for work, or make use of informal arrangements, *e.g.*, neighbourhood assistance. It means that there is no legal construction that would

69 Judgement of the Constitutional Tribunal of 4 November 2015, K 1/14 OTK-A 2015/10/163 (Journal of Laws item 1917).

70 Judgement of the Court of Appeal in Warsaw of 10 December 2015, III AUa 2048/14 (LEX No. 2109263).

71 Judgement of the Court of Appeal in Łódź of 11 December 2015, III AUa 1042/15 (LEX No. 1983737).

not only enable the farmer to regain his/her earning capacity (maintenance during the period of incapacity for work or purchase of medicines whose value is often higher than the amount of the allowance), but would also finance the necessary substitution. As emphasised by Ewa Jaworska-Spičak,⁷² in Germany, during the period of a farmer's temporary incapacity for work, agricultural work in his/her holding is performed by persons specially designated to replace him/her during that time. This last proposal could be implemented both under farmers' social insurance and under commercial insurance. The same applies to special branches of agricultural production, where the farmer who is incapable of work takes advantage of the assistance of his/her closest family or has to employ another person who will act as his/her substitute during the period of work incapacity.

Sickness allowance from farmers' social insurance is an exceptional benefit due to the fact it was designed by the legislator as a merger of two benefits existing within the general system: sickness allowance and rehabilitation benefit. As a result, allowance periods in ZUS and KRUS are comparable. The difference is due to the fact that the allowance period in the general insurance is 182 days (26 weeks in accordance with the International Labour Organization (ILO) Convention 102 of 1952), and the same benefit in KRUS is payable for 180 days, without taking into account the period of sickness allowance extension. The sickness allowance is not due for the period of the insured person's stay, at the expense of the Fund, in a health care institution for rehabilitation purposes, after cessation of insurance, as well as during the period of receiving maternity allowance. Exclusion of the right to the benefit in the event of a work incapacity lasting continuously for less than 30 days is questionable in view of the proposal to ensure the feasibility of protection of persons at risk.⁷³ Firstly, such a solution excludes sickness allowance for most diseases (*e.g.*, seasonal infections, minor injuries).⁷⁴ So, the protection covers primarily incapacity for work during pregnancy, the period of recovery and rehabilitation as a result of serious injuries not related to agricultural activity, injuries suffered as a result of an accident at work or an occupational disease. Secondly, the trend of "optimising" the period of sickness appears in agriculture. Being aware that the allowance is granted in the event of an incapacity lasting longer than 30 days, people insured either simulate sickness, or in spite of incapacity cessation, take advantage of medical certificates issued for a period that will enable them to acquire the right to sickness allowance. This problem is also noticeable in general insurance.

72 E. Jaworska-Spičak, *op. cit.*, p. 93.

73 The minister in charge of rural development, after consulting the Farmers' Council, may set, by means of a regulation, the amount of the sickness allowance and define those situations in which sickness allowance is granted in the event of an incapacity for work lasting continuously less than 30 days, taking into account the financial condition of the Contribution Fund.

74 For more, see D. Puślecki, *Zasilek chorobowy z ubezpieczenia społecznego rolników*, "Ubezpieczenia w Rolnictwie. Materiały i Studia" 2011, No. 39, p. 58.

Proposals

The dilemmas presented give some ground for a number of proposals regarding changes to the guidelines underlying the protection of temporary incapacity for work. Some of them can be found among solutions already employed in the past, others can be introduced from other systems of risk protection, while others have yet to be designed.

Among the previously applied solutions, it is worth mentioning the dependence of the sickness allowance rate on the insurance period, which was introduced under the Act of 1974. People with longer insurance periods should receive sickness allowance set at a higher rate than people with shorter insurance periods. In terms of expenditure on sickness allowances, the 1920 regulation was a practical solution, which ensured the self-financing of benefits from contributions. It would be worth exploring the possibility of setting contributions at a level sufficient to cover expenditure on sickness allowances (see conclusions concerning farmers' insurance). The 1933 solution based on the possibility of introducing periodic restrictions on the duration of the allowance period is also a good option if the number of allowance recipients exceeded a certain ceiling due to mass redundancies. Within the framework of control of sick leaves and their correct use, an interesting solution that could be considered was the introduction of additional sanctions for persons using sick leaves contrary to their intended purpose, *e.g.*, by introducing an additional qualifying period, reducing the sickness allowance rate on the next sick leave, or withdrawing the right to allowance for the first three days on any subsequent sick leave.

At the same time, one should not overlook the issue of deprivation of the right to allowance in the case of work performed during the period of sick leave by a person holding several jobs. The possibility of simultaneous receipt of the sickness allowance and performing a job of work to which this incapacity does not apply is to be considered. When confronting the content of Art. 17(1) of the Allowance Act with the very essence of sickness insurance itself, we should allow the person concerned to perform work if their health condition constitutes an obstacle to them pursuing a completely different profession. To implement this proposal, the legislator should also interfere with the certification of incapacity for work, by introducing an obligation to examine separately the impact of the disease on the ability to perform any work without the possibility of issuing copies of a medical certificate in the event of employment in several places at the same time. And taking into account the realities of the current labour market, and in particular the widespread use of contracts entitling one to voluntary sickness insurance, it is worth considering equalisation and even the shortening of the qualifying period to be covered by this insurance, since commission contracts are generally concluded for a shorter period than are employment contracts.

When assessing the financial situation of the Sickness Fund, it should be noted that the numerous legal changes introduced in the last decade have resulted in a decrease in the Fund's capacity. Introduction of legal regulations resulting in additional benefits for insured persons and the costs incurred in this regard, in such way as not to overlook the need to secure funds for this purpose – is an open question, for discussion primarily among politicians. A very important recommendation to maintain a satisfactory (positive or at least zero) balance for the Sickness Fund is to “tighten up” the sickness allowance system. Activities aimed at detecting and eliminating fraud, such as the introduction of electronic medical certificates (e-ZLAs) or limitation of the basis for the assessment of allowances for persons running a business with a short insurance history, should be continued, and here employing modern analytical tools and methods. It is also worth making comparative analyses between the system of sickness allowances in our country and systems operating in countries where the level of expenditure on these benefits is at a satisfactorily low level, and to look for solutions that could be applied in Poland. An interesting example of relatively low sickness absenteeism is the United Kingdom, where a consistent pro-health policy has been pursued for many years, including financial incentives for employees and employers, education of employers and employees, health prevention, optimisation of access to doctors, promotion of occupational health insurance, safe working conditions, as well as a systematic tightening of the system of sick leaves and allowances.⁷⁵ An analysis of the financial situation of the Sickness Fund shows that measures aimed at improving the balance should be a priority and appropriate steps should be taken as soon as possible to improve the Fund's capacity.

Farmers' sickness insurance requires even more urgent intervention and substantial changes. Self-financing of the Contribution Fund should be considered the greatest asset of the current regulation. The solution whereby the insured persons are obliged to cover the needs of the Fund should remain unchanged, and what is more, it could serve as a model for sickness and accident insurance within the general insurance system. The biggest drawback of the current regulation is the fact that it does not provide the insured persons with basic protection. The low amount of the allowance results in a situation in which some insured persons continue gainful activity, giving up on their benefit. The adopted solution, making the amount of the contribution and benefit independent of the farmer's income, means that for some insured persons, the compensation will amount to a mere few percent of the income lost. The thirty-day period of uninterrupted work incapacity for entitlement to benefits should be also subject to criticism. Exclusion of most sickness events, when incapacity lasts from several to over a dozen days, justifies the thesis that not short-term, but medium- and long-term incapacity for work is covered by insurance. There are also doubts as to the lack of separate regulation in the event

75 J. Gierczyński, *Absencja chorobowa pracujących jako problem ubezpieczeniowy w Polsce i w Wielkiej Brytanii*, “Wiadomości Ubezpieczeniowe” 2014, No. 3.

of accidents at work and occupational diseases. Sickness allowance in the amount of PLN 300 per month means that the insured person one incapable of work will receive a total of PLN 1,800 for a six-month period, which makes it impossible to satisfy even basic needs, while the protection burden is transferred to family members, the local community or the state as a whole.

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