

EMPLOYEE CAPITAL PLANS IN POLAND – INVESTMENT’S LEGAL FRAMEWORK

Adrian Prusik

Instytut Emerytalny
adrian.prusik@gmail.com

1. Introduction

Employee capital plans are designed to create a long-term saving system for vast majority of employees in Poland. The main aim of the implementation of the PPK is to establish an effective, voluntary funded pension scheme. In political discourse, the PPK is mostly presented as a way of ensuring decent pensions and aims to supplement public pensions with income from pensioner’s own savings. In the economic discourse it is perceived as an alternative to existing long-term savings product for retirement purposes which “thanks to the use of innovative solutions derived from behavioral economics—would convince to save voluntarily for retirement and would contribute to a universal system of retirement savings’ accumulation” (Jedynak 2019, p. 35). The PPK is addressed to 11,4 million (according to data from 2018) of potential participants. The PPK will be tied with employment legal relations which are obligatory subjected to the public social security with exclusion of self-employed.

The act on employee capital plans¹ entered into force in January 2019 and pursuant to the regulation the private savings of employees are co-financed by employees, employers and at some point, by public funds in the form of welcome (250 PLN) and annual (240 PLN) contribution. By 2021, every employing entity which employs at least one person will be obliged to establish the PPK.

To some extent, the PPK system is inspired by the British occupational scheme’s reform. Under Pension Act 2008 British employers are required to enroll their employees in a defined contribution retirement plan. Automatic enrolment has been introduced gradually, starting with the largest employers from 2012 (those with 250 workers or more) and duties applied to employers of all sizes by the end of February 2018 (The Pension Adequacy Report 2018, volume 2, pp. 267). The PPK system pursue similar ideas of additional pension schemes including employers’ obligation to establish the scheme, gradual introduction depending on employer’s size and automatic enrollment of employees with the right to opt-out (Rudolph 2019, pp. 10-11).

¹ The Act of 4 October 2018 on employee capital plans (Dz.U. z 2018 r. poz. 2215) – hereinafter referred to as “the Act”.

Savings collected in the PPK will be invested in completely new investment entities (DDFs) created by private operators (investment companies) in 2019. Their only purpose is to collect and invest savings from the PPK. The PPK investment vehicles are expected to offer long-term investment products based on life cycle investment strategy – “a dynamic asset allocation fund where the asset allocation shifts from riskier investments as the individual ages and gets closer to the target retirement date” (Booth and Chang 2011, p. 55).

Pursuant to the Act, most of the formalities regarding the establishment of the PPK and commencement of the employees’ participation shall be handled by employers. The employer will be responsible to choose an investment company and its DDFs. However, such decision should be made in agreement with employees’ representation, in case of lack of thereof the employer will choose unilaterally.

From a legal standpoint the employer concludes a management agreement with DDF (or DDFs – depending on the internal structure of the investment product there might be a DDF as a one legal entity with internally separated sub-funds or plural number of DDFs each acting as a separated legal entity) operated by the chosen investment company. The management agreement will set the contractual framework of PPK in his enterprise. Afterward, the employer will enroll employees in the PPK. Enrollment in PPK will take place through the conclusion of a contract between the DDF and each employee although without their active role in the process of contract’ conclusion. The contract is concluded by the employer acting on behalf of and for the benefit of his employees. As the most of employees will be enrolled automatically², the employer will act on their behalf as a statutory representative.

Every employer will be also responsible for the transfer of contributions. Pursuant to the Act, the PPK contributions are calculated and deducted from a remuneration paid by the employer to active participants. In general, the employer will deduct 2% from the remuneration and transfer it to DDF’s account. The employer’s contribution will be 1.5% of the employee’s remuneration. Both sides may raise their financial involvement independently by declaring the voluntary contribution up to 2% in case of employees and 2.5% in case of the employers.

2. The legal framework of the defined-date funds in the PPK

Pursuant to the Act the DDFs may be created and offered in the PPK system by four kinds of investment companies, which are: investment fund companies (TFI), general pension societies (PTE), labor pension societies (PrTE) or insurance companies (ZU). The principle expressed in the Act assumes that each employer may choose only one investment company³. The savings are invested respectively in mutual fund

² Pursuant to the Act employees between 55 and 70 years old will be enrolled only at their request. Employees between 18 and 55 years old will be enrolled automatically unless they submit to the employer declaration of resignation before the enrollment date.

³ Although the investment company may create more than one DDF.

(or funds), pension funds or in insurance-based investment product operated by a chosen investment company.

The operational dimension of investment products in the PPK is strictly regulated on two levels of legislation. The first level is the “sectoral legislation” – separate for each of the abovementioned kind of investment companies. Pursuant to each “sectoral legislation” investment companies operate under the authorization of the Polish Financial Supervision Authority.

In case of a mutual fund (the specialized open-end investment funds) operated by TFI, as well as a pension fund operated by PTE or PrTE, the “sectoral legislation” provides for separation of legal personality between the fund and the investment company. The distinction between mutual and pension funds has its historical reasons associated with the creation of the second pension pillar over 20 years ago (Maśniak and Lados 2014, pp. 124-127). In practice, both mutual and pension funds have a similar legal design. Insurance form of the PPK is created as an insurance-based investment product and it’s not separated from the legal personality of the insurance company.

The establishment and operation of mutual funds or pension funds is also strictly regulated and requires additional permission of the Polish Financial Supervision Authority, however DDFs are excluded from this authorization process. Nevertheless, further operations of DDFs are supervised by the Polish Financial Supervision Authority within the scope of general aims of the supervision of the financial market – i.e. to ensure the proper functioning of this market, its stability, security and transparency, confidence in the financial market, and to ensure that the interests of the market’s participants are protected.

The second level of regulation is specified in the Act on employee capital plans. Under the Act investment companies need to fulfil the array of statutory requirements to become involved in the management of funds gathered in PPK. The requirements concern at least 3 years of experience in the management of investment funds, appropriate level of own equity capital and specific investment strategy. The financial institutions may operate in the field of PPK after meeting these requirements and obtaining an entry in the public PPK register. Financial supervision based on the Act is also carried out by the Polish Financial Supervision Authority and is exercised in the scope of compliance with the law and the interest of PPK participants (article 51 par. 2 of the Act). The Act should be seen as a *lex specialis* for sectoral legislation applicable to investment companies. The role of the Act is to introduce detailed regulations, especially in the aspect of investment policy of the DDFs or automatic enrollment of participants.

The regulation of investment policy of the DDFs under the Act is based on several basic assumptions:

- investment strategies based mainly on debt and equity instruments
- differentiation of the level of risk based on the aging;
- standardization of investment mechanism;

- automatic enrollment of participants based on age (with the possibility to switch the funds at the request of the participant);
- minimization of the possibility to differentiate investment strategies.

2.1. Investment strategies based on debt and equity

Pursuant to the Act, investment strategies of defined-date funds are based mainly on investments in debt instruments and equity instruments. For the purposes of the Act the definition of the “debt part” of the assets include such debt instruments as money market instruments, bonds, treasury bills, mortgage bonds, certificates of deposit, bank deposits, derivatives based on debt instruments, participation units of investment funds as well as other transferable securities incorporating property rights corresponding to the debt rights.

The “equity part” of the assets include shares, pre-emptive rights, rights to shares, subscription warrants, derivatives based on equity instruments, participation units of investment funds as well as other transferable securities incorporating rights corresponding to the equity (article 2 par. 1 of the Act).

The division of the DDFs’ assets between debt and equity part is not dichotomous. The aim of such division is to shape appropriate risk profile (Zagadnienia prawne 2020, pp. 71-72), therefore debt and equity parts will constitute majority of the DDF’s assets. Nonetheless, pursuant to the Act the DDF may invest limited part of the assets in instruments not assigned to either debt or equity part – e.g. currency derivatives or alternative investments (Prusik 2019, pp. 341-342).

2.2. Differentiation of the investment risk based on the aging

The basic assumption of the DDFs’ investment policy is the differentiation of the level of investment risk based on the aging. Pursuant to the Act, every DDF will increase the level of debt investments and reduce the level of equity investments along with approaching the defined-date. PPK regulation basically limits the possibilities of choosing an investment strategy only to the life cycle strategy. The Act sets out five levels of equity and debt involvement during the life cycle of the DDF, from its establishment until reaching the defined date (article 40 par. 1 of the Act).

Pursuant to the Act, the establishment of the DDF its equity part should not be less than 60% and may not be more than 80% and with debt part between 20 to 40%. While approaching defined date of the fund its investment policy will gradually decrease the engagement in equities. As from the year in which the fund reaches its defined date, the equity part of its assets may not be more than 15%, and the debt part of its assets may not be less than 85%.

2.3. Standardization of investment mechanism

The important conclusion derived from the Act is that the statutory investment mechanism is implemented in every DDF separately and independently. From the participant's perspective, the cycle of investment policy evolution takes place

within the particular DDF of his choice. Each DDF must fulfill these statutory requirements and adjust its investment policy once it reaches the subsequent level indicated in the Act. Therefore, the differentiation of the investment risk is related rather with the aging of the defined-date fund than with the aging of participants. By the operation of law participants will be enrolled in the DDFs appropriate for their age, nonetheless they are allowed to switch and move their assets and future contributions to other DDF offered by the chosen investment company.

The standardization of the investment mechanism on the level of each DDF requires from the investment company to maintain an appropriate number of such funds. Pursuant to the Act, investment companies are obliged to manage, respectively, investment funds or pension funds in a number corresponding to at least the number of restrictions on the level of investment risk referred to in article 40 par. 1 of the Act. However, the Act specifies elsewhere (article 38 par. 5 of the Act) that the investment company creates a DDFs with defined dates falling every 5 years for the next five age-groups of participants. As it's impossible to establish a fund with more than one defined date, it means the obligation to the investment company to maintain appropriate number of DDFs covering all professionally active age groups of participants.

Each investment company is obliged to manage at least eight DDFs and will create more in every next 5 years. Each DDF will follow the same path in the investment policy evolution as it's set forth in the Act.

The first defined date of such fund is specified in the Act – the 2025 DDF which is dedicated to participants born no later than 1967 (article 136 par. 1 of the Act). Determining the first defined date in the Act is another mean of standardization. It determines the defined dates of subsequent DDFs in each investment company involved in the PPK system.

The scope of standardization affects even the name of the DDFs. The name must specify the fund's defined date – pursuant to the article 38 par. 4 of the Act.

As a result, each of 20 investment companies entered in the PPK register has a similar investment product for PPK.

2.4. Automatic enrollment of participants based on age (with the possibility to switch funds at the request of the participant)

As it was mentioned before, participants are enrolled in the DDF appropriate for their age. The Act sets out in details how to assign participants by age to a given DDF. According to the definition, set out in the Act, the defined date is the “year in which the age of 60 is reached by participants born in the year constituting the middle of the year range of participants for whom the given defined-date funds is appropriate”. Given the abovementioned definition the fund with defined date falling in 2040 is appropriate for participant born between 1978 and 1982 (as participants born in 1980 will reach the age of 60 in 2040).

The participant may invest in one DDF during the whole period. Automatic enrollment to the appropriate DDF would allow to limit the investment risk level along with approaching the age of 60 by participants of the fund.

The important conclusion is that the differentiation of the investment risk is related with the aging of the defined-date fund not with the aging of a specific participant. Therefore, participants are allowed to switch and move assets and future contributions to other fund offered by the chosen investment company and change the life-cycle investment mechanism apply to them. However, participants cannot switch to the funds of different investment company.

2.5. Minimization of the possibility of differentiating investment strategies between the investment companies

The Act introduces detailed requirements regarding the specific investment strategy both in debt as well as the equity part of the assets. As for the equities the Act is referring primarily to investments in companies listed in the Warsaw Stock Exchange (WSE) basic stock indexes. The equity part of the assets – pursuant to the Act – should represent:

- not less than 40% of the value of assets in equity instruments of public companies listed in WIG20 stock index,
- no more than 20% of the value of assets in equity instruments of public companies listed in the mWIG40 stock index,
- no more than 10% of the value of assets in equity instruments issued by other public companies listed on the WSE or companies listed on the organized market in the Republic of Poland.

The Act stipulates also that not less than 20% of the value of assets invested in equity instruments should be invested in foreign organized market in an OECD member countries.

At the debt part of the assets the Act requires to invest majority of the assets in debt securities issued or guaranteed by Polish or UE member states central governments (State Treasury), central banks, local authorities, international organizations, multilateral development banks (not less than 70% of the assets invested in the debt part).

To some extent, the Act requires internationalization of the investment policy. However, such requirement regards only the equity part. The investments in debt instruments may be as well internalized but it's not mandatory.

On the other hand, the Act introduces a limit on foreign exposure, by introducing a limit of assets denominated in foreign currencies – setting the limit at 30% of assets. It is also the minimum threshold that the legislator could introduce in accordance with UE law (see: Directive (EU) 2016/2341).

The foreign investments of the DDFs are limited to the assets denominated in currencies of the UE member states and other OECD members states. Therefore, there is no legal possibility to invest funds in assets denominated in currencies of other countries – such as Russian ruble, Ukrainian hryvnia or Chinese yuan.

The legislator decided to introduce detailed rules regarding the investment strategies of the DDFs, which certainly promotes uniformity on the PPK investments. Such regulation may be considered as another tool of standardization within the legal framework established in the Act.

As a result, the legislation tends to minimize the possibility of differentiating investment strategies between the investment companies. Pursuant to the Act it's impossible to establish the investment fund investing only in debt instruments (however it's possible situation when the fund will reach its defined date) or only in certain categories of foreign equity instruments. Even though DDFs may differ in detail they basically will follow the same pattern in each investment company.

3. The scope of standardization established in the Act

Standardization is seen in the Act at many different levels, beginning with the standardization of the DDFs' names, its diversity and number, automatic enrollment by age, up to detailed requirements established within the scope of the investment policy.

Since February 2020 each of 20 investment companies that entered in the PPK register has established 8 DDFs with the first defined date falling in 2025 and subsequent falling in five-year intervals up to 2060. Only two investment companies established more than 8 DDFs. The first one established already the DDF with defined date falling in 2065 and the second has established 10 defined-date funds including defined date of 2020 and 2065.

Standardization also applies to investment policy. From the perspective of the statutory requirements, for every 100 PLN of a participant's contributions to a 2055 DDF, at least 24 zlotys will be invested in 20 public companies listed in WIG20 stock index (the equity part of the 2055 fund is to be at least 60% of its value of assets, and at least 40% of the equity part is to be invested in equities of companies listed in WIG20).

It is difficult to determine at this stage how the statutory requirements will affect the differentiation of rates of return between investment companies active on the PPK market. Nevertheless, it clearly affects the unification of the risk categories of the DDFs, as indicated by the SRRI risk and reward profile. Most of the DDFs has been categorized on 3rd or 4th level in the SRRI (synthetic risk and reward indicator) scale, according to information revealed in its Key Investor Information Document (source: <https://www.mojeppk.pl>).

The area not specified in detail in the Act consists of investments denominated in foreign currencies. It may be expected as a factor enabling a greater diversity of investment approach or rates of return in future.

4. The assessment of the statutory legal framework

Simplicity and clarity are among desired features of additional pension scheme (Jedynak 2016, p. 37). If PPK is perceived in terms of an additional pension scheme, the reason for standardization clearly aims to achieve simplicity of the entire PPK system.

PPK is intended to be a common product for vast majority of the employees. Differentiation of PPK products would increase complexity of the system and in effect discourage participation. It could also increase investment risk. In future it could be a source of political risk in the event of radical differences in profitability, particularly in terms of rates of return or security of the investments. The history of open pension funds indicates that political risk factors are crucial for the sustainability of the long-term investment system.

On the other side, the Act clearly limits the possibility of individual approach to investment strategy and offers the same approach to nearly 12 million of potential participants. In practice, the PPK participants cannot avoid life-cycle investment strategy. The alternative option was to create an existing legal framework as a default option, but enabling participants to choose a different assets allocation strategy and ultimately resign from a life cycle on their own decision. In practice, each investment company could rely on two or three DDFs – focusing respectively on equities, debt instruments and alternative investments. The default option could be established as a system of automatic assets allocation between these DDFs with variable proportions depending on age. Such solution would allow to establish individual allocation. Moreover there would be no necessity to create more DDFs. Such a solution would allow for co-occurrence of passive participants with the default option and active participants taking control in fitting the strategy and the risk for themselves. The PPK system would be more flexible and take greater account of the savings holders' will, however it would increase both complexity and the risk of wrong investment decisions.

The other effect of such standardization is the limitation of the active role of the participants. In the PPK, it is the employer who actually chooses the investment company to entrust participants' savings. Savings holders' have no formal influence on this choice, nor can they force an employer to change the investment company. A participant (or an employee as a potential participant) cannot open a PPK account with an investment company other than the one chosen by his employer. Therefore, the savings holders' decision and freedom of choice within the scope of the Act is limited to simple "yes" or "no" in regard to his active participation. Those who are dissatisfied with this scope of freedom or with the employer's choice will lose the opportunity to receive additional payments from the employer and from public funds.

It also has other potential effect. In the future, the decision of the employer itself may result in mass and sudden "exit" of a large number of participants from single DDF, e.g. as a result of a decision to change the investment company. In such situation, the employer enrolls his employees to a new financial institution and initiates a mechanism of the transfers of their savings to the new financial

institution (although the participant has the opportunity to oppose the transfer of funds, he cannot oppose changing the institution as for future contributions). This situation, depending on the size of the employing entity, may relate to a significant part of the assets of the DDF and may other participants. Unlike the management of individual investors' funds, where the risk of a significant and sudden outflow of assets is associated with massive decision-making by individual investors, the group investment mechanism may lead to one decision taken by the 'organizer' of a given group of investors.

Another issue is the precise definition of the rules for investing in the equity part of the DDF's assets in public companies enlisted in Warsaw Stock Exchange indexes. The introduction of a minimum exposure limit for public companies listed in WIG20 may result in stable and long-term inflow of funds and demand for equities of 20 biggest companies on Warsaw Stock Exchange. Standardization at this level means that DDFs might support each other in their investments. One should also not forget about the need to ensure an adequate level of investment liquidity. On the other hand, however, such an investment requirement may appear to be excessively restrictive, depriving managers of an appropriate level of discretion, for example in the event of an overvaluation of equities prices.

The statutory legal framework aims to achieve simplicity, clarity and standardization within the whole PPK system. Nevertheless, these objectives are attained at the expense of limited freedom of choice of own investment strategy. The Act could create mechanisms that would enable the coexistence of the default option and the possibility of individual asset allocation. Lack of such possibility may weaken the popularity of the PPK as a universal system dedicated to nearly 12 million of potential participants.

5. Legal paternalism

Standardization should also be assessed in terms of the principles of contract law and interference of legal paternalism (Kronman 1983). The Act itself is created on assumptions arising from behavioral economics described as "libertarian paternalism" which insists on preserving choice but favors the proper decisions. It interferes especially with the concept of freedom of contract. The scale of such interference is in question. Some provisions of law "preserve freedom of contract but impose procedural or substantive restrictions on those who seek to move in directions that seem, to the planner, to be contrary to their welfare" (Sunstein and Thaler 2003, p. 27).

The basic principles of private law is the equality of parties and the theory of contract is based on "fundamental premise that a contract is the expression of the free will of two consenting individuals" (Cserne 2012, p. 82). As in Poland, the contract law is based on the intent of contracting parties. A contract is based on parties' intent to create, transform or terminate given legal relationship. From the perspective of Polish legal doctrine, the freedom of contract is understood as a freedom to enter into contract, freedom of choice of parties, freedom of shaping

the content of a contract and freedom to terminate a contract (Machnikowski 2020, pp. 520-521).

To some extent, the reason for paternalistic approach is to enhance the equality between contracting parties or to balance the interests within the legal relations deprived of such balance by its nature.

From the PPK participants' legal perspective their participation in the PPK has a contractual nature. The Act assumes that the contract between the DDF and the employee, by which the participation in the PPK begins, is concluded in absence of one of the parties – the employee. Pursuant to the Act the contract is concluded on behalf of the participant by the employer, acting for majority of employees as a statutory representative. Although each employee may resign from participation before the conclusion of the contract on his/her behalf, the Act does not require the employee to be notified or to be informed before the conclusion of the contract of his rights and legal consequences of assuming his implied intent. The employer “has the right” but no obligation to inform his employees on terms and conditions related with the PPK. The exercise of this right might be weakened by fear of criminal charges for discouraging employees from saving in the PPK. In fact, the first hard obligation to provide information lies with the financial institution after the conclusion of the contract. It should be added that the context of the Act implies inability to terminate the contract during employment period. The participant may resign from active participation and from contributing to the PPK but such declaration does not mean the contract will be terminated.

The conclusion of an explicit contract on behalf of employees as stipulated in the Act underlines the importance of considering the extent to which the behavioral economics' mechanism interfere with the concept of freedom of contract. There is a difference between assuming the implied intent and ignoring the matter of conscious intent in contractual relations.

Therefore, the PPK legislation might be seen as a significant breach of basic principles of private law in Poland, in which the disposition of private property based on contractual relation needs freely undertaken actions by the parties themselves. It might be questioned whether the Act assumes implied intent of the participant or whether ignores his intent in such contractual relation.

In terms of behavioral economics, the automatic enrollment may be seen as useful tool increasing the participation level (Szczepański 2017, p. 44). The automatic enrollment in the PPK system from legal perspective is a bright exception in terms of creating contractual relationships in private law. Even the option of resignation after the conclusion of contract does not mean the contract is terminated. Therefore, the voluntary nature of the PPK after establishing legal relations for the participant is limited to the possibility of unilateral resignation from making further contribution not as a termination of legal relations.

In this context, the standardization may appear as a kind of safeguarding the interests of participants. As entering into contractual relations and even investing the first contribution might happened beyond participants will, the Act specifies in details terms and conditions of such relations and investments. While in general

participants are omitted in the decision process of choosing an investment company and contract conclusion, standardization resulting from the Act reduces the risk associated with the unlimited scope of possible investment strategies that might be applied while investing employees' savings or with wide range of potential terms and conditions that may interfere with employees interests. That might be called a "vicious circle" of paternalistic interference in freedom of contract where the primary interference leads to another.

Not without significance is the fact that the employer is the real decision-maker in the process of choosing an investment company to be entrusted with employee's savings. From the employer's perspective, such a decision carries a significant burden of responsibility towards employees so the standardization may tend to ease it by reducing the risk and differences between possible choices.

6. Excessive complexity and unnecessary formalities deriving from the statutory legal framework

From the perspective of the organization and operation of the DDFs as well as from the employer's perspective, the legal framework established in the Act involves in part excessive complexity and the creation of unnecessary formalities.

6.1. Unnecessary explicit contract

Pursuant to the Act, the establishment of PPK by employers requires two legal steps. First step is related with the choice of an investment company. The step is concluded by the management agreement with DDF (or the DDFs – depending on the internal structure of the investment product) managed by the chosen investment company.

The second step will be the enrollment of the employees which will take place through the conclusion of contracts for them – the agreements for operating PPK with DDF as a second party. The contracts are concluded by the employer acting on behalf and for the benefit of employees. Each employee becomes the participant of the PPK upon signing this agreement unless he/she submits to the employer a declaration of resignation before the contract conclusion.

The introduction of a formal and explicit contracts between DDF and the participants does not contribute much from legal perspective. The essence of the contract in private law is to create or shape a legal relationship between parties. In this case, most of the rights and obligations in the relationship between the participant and the DDF arise either from the Act or from the internal regulations and statutes of the DDF. Mostly, the content of the contract between the participant and the DDF is informative and does not create basic rights and obligations on its own.

Similar legal configurations on the occupational pension schemes assume the existence of an implied contractual relation between an employee and an employer (Sierocka 2010, p. 253). The core legal relation between an investor and a mutual fund exists due to the purchase of participation units and transfer of money.

Participation units represents participant's property rights. Only by holding participation units an investor has a claim towards the mutual fund to repurchase them and receive invested money back together with generated profit.

The Act creates therefore different scope of legal relation between the investment fund and its participants as such contract exists even without purchasing the participation units and with no money transfer. By introducing a new type of contract, the legislator also created a dilemma related to the need to bypass the role of one of the parties.

For employers, concluding formal contracts on behalf of and for the participant involves inconvenient formalities. The employer must set a deadline by which he should conclude the relevant contract, determine whether the employee has previously submitted a resignation declaration. As the contract is concluded for each employee, so this duty is repetitive.

6.2. The problem of the PPK accounts' multiplication

Participation in the PPK is related to a specific employer. In contemporary economic realities, characterized by the mobility of employees, it means the problem of multiplication of the PPK accounts. From a long-term perspective, an employed person may have split his/her savings between several or even several dozen of the PPK accounts at various financial institutions depending on the frequency of employment changes.

Accounts created with a given employer become inactive after termination of employment and there is no possibility of making direct payments from the current place of employment (indirect possibility requires making transfer payments between the accounts held).

With regard to funds accumulated in previous places of employment, the Act provides for a "consolidation" mechanism which takes place when new employment starts. The mechanism is initiated by the employee, however it creates additional obligations for the new employer who should act on behalf of the employee during the transfer procedure. The new employer should inform the employee of his intention to carry out the transfer from previous workplaces unless the employee will raise a written objection to that. The consolidation mechanism seems to be complicated and formalized and as it's initiated by the employee's action it could be ineffective as well.

Multiplying accounts in PPK means complicating the system and multiplying administrative and legal obligations.

The negative effect of such a solution may be the phenomenon of "abandoned accounts". It cannot be ruled out that over the years, part of the population of participants may "forget" about their accounts, and as a result of discontinuing the update of identification data, the financial institution's communication with the participant will be limited.

6.3. The excessive formalities in the operation of DDFs

The assumption adopted by the legislator means that each DDF has a specific lifetime. After obtaining the defined date, no further policy modifications are foreseen. Reaching the defined date by the particular DDF will probably be associated with a successive decrease of assets and, ultimately will lead to a merger with other DDF (or to liquidation). After reaching the defined date, the growing number of participants will be entitled to make withdrawals. As the Act does not prohibits withdrawals in full (although such withdrawal involves taxation by capital gains tax), the ratio of such withdrawals will affect the speed of the decline of assets. It may have a negative impact for the rest of the DDF's participants.

In the long-term, investment companies will be required to gradually create more DDFs (for subsequent groups of participants entering the labor market), which will be a duplication of those previously created and to merge the existing ones.

7. Conclusions

The statutory legal framework of the PPK is based on standardization of investment products and minimalization of the possibility to differentiate investment strategies.

The statutory legal framework aims to achieve simplicity, clarity and standardization within the whole PPK system. Nevertheless, these objectives are attained at the expense of limited freedom of choice of participants own investment strategy. The Act could create mechanisms that would enable the coexistence of the default option and the possibility of individual asset allocation. Lack of such possibility may weaken the popularity of the PPK as a universal system dedicated to nearly 12 million of potential participants.

The PPK participation is based mainly on automatic enrollment. The participation in the PPK has a contractual nature although the enrollment may occur without providing information to potential participants on their rights and legal consequences. The employer "has the right" but no obligation to inform his employees on terms and conditions related with the PPK. The exercise of this right might be weakened by fear of criminal charges for discouraging employees from saving in the PPK. In fact, the first hard obligation to provide information lies with the financial institution after the conclusion of the contract (automatic enrollment) on behalf of an employee.

The conclusion of an explicit contract on behalf of employees as stipulated in the Act underlines the importance of considering the extent to which the behavioral economics' mechanism interfere with the concept of freedom of contract and limits of legal paternalism. There is a difference between assuming the implied intent and ignoring the matter of conscious intent in contractual relations. Therefore, the PPK legislation might be seen as a significant breach of basic principles of freedom of contract.

From the perspective of the organization and operation of the DDFs as well as the employer's perspective, the Act involves excessive complexity and the creation of unnecessary formalities.

References

- Booth L., Chang B., (2011), *Target-date funds: Good news and bad news*. Journal of Risk, 13(3), 55-82.
- Cserne P., (2012), *Freedom of contract and paternalism: prospects and limits of an economic approach*, Palgrave Macmillan.
- Jedynak T., (2016), *The Directions of the Development of Supplementary Pension Scheme in Poland*, Journal of Insurance, Financial Markets, Consumer Protection, 3(22), 34-48.
- Jedynak T., (2019), *How to effectively encourage Poles to save for retirement? The use of achievements of behavioural economics in the construction of Employee Capital Plans*, Problemy Polityki Społecznej, 2019/2, 33-46.
- Kronman A., (1983), *Paternalism and the Law of Contracts*, The Yale Law Journal vol. 92 (5), 763-798.
- Machnikowski P., (2020), § 26. *Swoboda umów*. [in:] Osajda K. (Ed.), *Prawo zobowiązań – część ogólna*. System Prawa Prywatnego tom 5, C.H. Beck, 520-561.
- Maśniak D., Lados D.J., (2014), *Pension Reforms in Poland and Hungary from the Legal Perspective – similarities and differences*, Insurance Review, 4, 123-142.
- Pension Adequacy Report 2018, vol. 2, Current and Future Income Adequacy in Old Age in the UE, 2018, Publications Office of the European Union.
- Prusik A., (2019), *Fundusze inwestycyjne i fundusze emerytalne, w których gromadzone są środki w PPK*. [in:] Jakubowski S., Prusik A. (Eds.) *Ustawa o pracowniczych planach kapitałowych. Komentarz*, Wolters Kluwer.
- Rudolph H.P., (2019), *Pension Funds with Automatic Enrollment Schemes: Lessons for Emerging Economies*, World Bank Policy Research Working Paper No. 8726.
- Sierocka I., (2010), *Pracownicze programy emerytalne*, Wyd. Temida 2.
- Sunstein C.R., Thaler R.H., (2003), *Libertarian paternalism in not an oxymoron*. The University of Chicago Law Review, vol. 70 no. 4, 1159-1202.
- Szczepański M., (2017), *Quasi-obowiązkowe uczestnictwo w pracowniczych programach emerytalnych na przykładzie Wielkiej Brytanii. Szanse i zagrożenia*. Wrocław Economic Review 23/3, 33-46.
- Zagadnienia prawne w zakresie ustawy o PPK (2020), PFR Portal PPK, <https://www.mojeppk.pl>.