International Labour Organization

Non-standard forms of employment in selected countries in Central and Eastern Europe

A critical glance into regulation and implementation

Non-standard forms of employment in selected countries in Central and Eastern Europe

A critical glance into regulation and implementation

Edited by Cristina Mihes

Published with the financial support of the ESAP 2 project
funded by the European Union

First published 2021

ILO. 2021. *Non-standard forms of employment in selected countries in Central and Eastern Europe – A critical glance into regulation and implementation*; ILO Decent Work Technical Support Team and Country Office for Central and Eastern Europe (DWT/CO-Budapest). – Budapest: ILO, 2021

ISBN 9789220347591 (Web PDF)

ILO DWT and Country Office for Central and Eastern Europe

Information on ILO publications and digital products can be found at: **www.ilo.org/publns**

This publication was developed within the framework of the ESAP 2 project funded by the European Union.

Contents

Abstract

This volume aims to offer a retrospective look into the implementation of some non-standard forms of employment (NSFE) in selected Central and Eastern European countries. It captures independent critical views on national regulations and their enforcement of temporary and part-time work, temporary agency work, disguised employment relationships and "simplified" employment.

The chapters examine the level and adequacy of legal and social protection of workers in NSFE, good practice in regulating NSFE through collective bargaining, legal and case law tests for determining the existence of the employment relationship and the link between NSFE and informality, among others.

A number of conclusions are drawn on how national policy and regulatory efforts have materialized into good practice and the extent to which they fulfilled the stated policy goals.

Acknowledgments

This volume resulted from the discussions and research conducted within the Sub-regional Network of Labour Experts in CEE countries (CEELex). The work of CEELex has been undertaken under the Employment and Social Affairs Platform Project (ESAP) funded by the European Union.

We are grateful to the CEELEx member authors of the national chapters for their contributions, collaboration and patience during the book's journey.

We would like to acknowledge the editorial work of Giulia Barbone and Tom Bass.

Thank you to Susanne Nielsen, Ada Huibregtse, Eva Mihlic and Melisa Osmic for their support during the production process of the book. Thanks also goes to Judit Kovács and Veronika Tomka for the smart look of the publication.

We would like to emphasize that the responsibility for opinions expressed in the book chapters rests solely with their authors, and publication does not constitute an endorsement by the International Labour Office.

Contributors

RALUCA DIMITRIU is a Labour Law Professor, Academy of Economic Sciences, Bucharest. Member of the Sub-regional Network of Labour Law Experts CEELex.

SENAD JAŠAREVIĆ is a Labour Law Professor, Law Faculty, University of Novi Sad. Member of the Sub-regional Network of Labour Law Experts CEELex.

ATTILA KUN is Professor and Head of Department (Department of Labour Law and Social Security), Károli Gáspár University (KRE), Faculty of Law, Budapest, Hungary; Associate Professor, National University of Public Service (NKE), Department of Human Resources, Budapest, Hungary; MTA (Hungarian Academy of Sciences) – PTE Research Group of Comparative and European Employment Policy and Labour Law. Member of the Sub-regional Network of Labour Law Experts CEELex.

PLAMENKA MARKOVA is an Associate Professor, Institute for the State and the Law, Bulgarian Academy of Sciences. Member of the Sub-regional Network of Labour Law Experts CEELex.

MONIKA MARTIŠKOVÁ is a Researcher at the Central European Labour Studies Institute (CELSI). Member of the Sub-regional Network of Labour Law Experts CEELex.

CRISTINA MIHES is a Senior Specialist in Social Dialogue, Labour Law and International Labour Standards at the International Labour Organization. Member of the Sub-regional Network of Labour Law Experts CEELex.

DORINA NIKA is a labour lawyer and Consultant to the International Labour Organization. Member of the Sub-regional Network of Labour Law Experts CEELex.

ALEKSANDAR RISTOVSKI is an Assistant Professor, "Iustinianus Primus" Faculty of Law, Ss. Cyril and Methodius University Skopje. Member of the Sub-regional Network of Labour Law Experts CEELex.

VESNA SIMOVIĆ-ZVICER is a Labour Law Professor, Faculty of Law, University of Podgorica. Member of the Sub-regional Network of Labour Law Experts CEELex.

Figures and tables

Albania

Bulgaria

Slovakia

Abbreviations and acronyms

APAS	Association of staffing agencies of Slovakia (Asociácia personálnych agentúr Slovenska)
APSZ	Association of employment services providers of Slovakia (Asociácia poskytovateľov služieb zamestnanosti)
C4W	Cash for work
CC	Civil Code of Hungary
CEACR	Committee of Experts on the implementation of ILO Conventions and Recommendations
CEEP	European Centre of Enterprises with Public Participation
CELSI	Central European Labour Studies Institute
CJEU	Court of Justice of the European Union
CoE	Council of Europe
ESF	European Structural Funds
ETUC	European Trade Union Confederation
EU	European Union
FTC	Fixed-term contract
GLI SA	General Labour Inspectorate Executive Agency of Bulgaria
HAPN	Hungarian Anti-Poverty Network
HIA	Health Insurance Act of Bulgaria
HW	Household work
ILO	International Labour Organization
IMF	International Monetary Fund
KNYSZ	Pensioners' cooperatives of Hungary
LC	Labour Code
LFS	Labour Force Survey
LLR	Law on Labour Relations of 2005 of North Macedonia
MLSP	Ministry of Labour and Social Policy of Bulgaria
NAV	Hungarian Tax Authority
NRA	National Revenue Agency of Bulgaria
NSFE	Non-standard forms of employment
NSFW	Non-standard forms of work
NSI	National Statistical Institute of Bulgaria
OECD	Organisation for Economic Co-operation and Development
OSH	Occupational safety and health
PAS	Entrepreneurs' Alliance of Slovakia (Podnikatelská aliancia Slovenska)
PW	Public Works programme

SAA	Stabilization and Association Agreement
SC	Student Cooperatives
SE	Simplified Employment and Occasional Work Relationships
SER	Standard employment relationship
SLSSI	State Labour and Social Services Inspectorate of Albania
SMER	Social Democratic Party of Slovakia
SOE	State-owned enterprises
TAW	Temporary agency work
UDW	Undeclared work
UNICE	Union of Industrial and Employers' Confederations of Europe
VW	Volkswagen

Introduction
A critical glance into the regulation and implementation of non-standard forms of employment in Central and Eastern Europe

Cristina Mihes

Introduction

Non-standard forms of employment (NSFE)[1] have become a fixture of labour markets across Central and Eastern Europe (CEE). Emerging as new forms of work in the context of globalization, rapid technological advancement and increased competition on domestic and international markets, NSFE are seen as flexible solutions to today's labour market demands and labour shortages, especially after the 2008 global economic and financial crisis.

The regulation of NSFE has gained the attention of scholars and policymakers as a counterweight that can reduce informality and labour market dualization, as workers in NSFE tend to be more frequently in informal employment than those in standard employment.[2]

When well-regulated and properly enforced, some non-standard forms of employment can help enterprises adjust quickly to market dynamics and tackle labour shortages. On the labour supply side, they can facilitate access to the labour market by marginalized groups, such as youth, women, older workers, migrants and, in some instances, can be a "stepping stone" to better jobs. However, when misused as a means to reduce labour costs at the expense of fundamental labour rights, NSFE deprive workers of fair pay and decent working conditions; limit their access to social security; increase inequality, job and income insecurity; and create social dumping.[3]

This volume aims to offer a retrospective look into the implementation of some non-standard forms of employment in selected CEE countries. It gathers national chapters authored by expert members of the CEELex network.[4] Their work has been guided by Terms of Reference, which suggested different angles for research on NSFE, focusing on: level and adequacy of legal protection of workers; challenges and solutions in organizing workers; good practice in regulation through collective bargaining; legal and case law tests for determining the existence of the employment relationship; NSFE and informality; other.

1 According to the conclusions of the 2015 ILO Meeting of Experts on Non-standard Forms of Employment, adopted by the ILO Governing Body these are: temporary employment; part-time work; (3) temporary agency work and other forms of employment involving multiple parties; and disguised employment relationships and dependent self-employment. In this volume some authors prefer the term non-standard forms of work (NSFW) as an equivalent to non-standard forms of employment.

2 "Informality and non-standard forms of employment", ILO paper prepared for the G20 Employment Working Group meeting (2018).

3 ILO, *Non-standard Employment Around the World – Understanding Challenges, Shaping Prospects* (Geneva: ILO, 2016). http://ilo.org/global/publications/books/WCMS_534326/lang--en/index.htm

4 CEELex is a regional, searchable database that collects relevant legal texts found in the national legal systems of 13 Central and Eastern European (CEE) countries.

Centred around the policy goals of maximizing the flexibility of labour relations and curbing informal employment and undeclared work, recent labour law reforms have placed the regulation of NSFE at their core. While the standard employment relationship (SER) has been maintained as the foundation of labour law, a range of legal solutions for regulating temporary work have been legislated or are contemplated, whether an expansion of the scope of fixed-term contracts (FTC) or the registration of casual and seasonal workers for social security purposes. Temporary agency work (TAW) has been introduced in some legislation as a new labour law institution meant to regulate triangular labour relations. The regulation of part-time work is across the board a voluntary employment solution that aims to satisfy the needs of both enterprises and workers. In some jurisdictions, a legal presumption of the existence of an employment relationship is set out by law and the principle of the primacy of facts is applied in judicial practice for its determination. In one analysed case from Slovakia, social partners played an instrumental role in shaping new regulations on NSFE.

It is worthwhile examining how these regulatory efforts have materialized into practice and to what extent they fulfilled their purpose.

Fixed-term contracts

Temporary work has been regulated primarily through the fixed-term contract (FTC). Domestic legislation in CEE countries has transposed international standards laid down in Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (hereinafter, the Directive), ILO Termination of Employment Convention, 1982 (No. 158) (hereinafter, the Convention), and ILO Termination of Employment Recommendation, 1982 (No. 166) (hereinafter, the Recommendation).

The Convention requires that adequate safeguards be provided in law and practice against using fixed-term contracts with the only purpose of avoiding protection against unfair dismissal. The Recommendation suggests limitations on FTC to work which is temporary by nature.

Equal treatment of fixed-term workers, as compared to permanent workers, and prevention of the abuse of FTC are the objectives of the EU Directive. It applies to fixed-term workers, including seasonal workers, with the exception of those placed by a temporary work agency at the disposition of a user enterprise. The Directive defines the fixed-term worker as "a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event". Thus, although it does not require explicitly the objective reason for the conclusion of an FTC, the Directive indicates the objective conditions which shall justify a fixed-term employment arrangement, namely a specific duration, task or occurrence of an event.

In order to prevent the abuse of successive FTCs, the EU Directive requires EU Member States to put in place, after consultations with social partners, one or more of the following limits to the renewal of FTC: (a) objective reasons that would justify the renewal of fixed-term contracts or relationships; (b) maximum total duration of successive fixed-term employment contracts and relationships; (c) permitted number of renewals.

Most domestic legislation defines the FTC as a type of employment contract to be used only for specific, temporary tasks, for which the duration or purpose is predetermined. For instance, FTC is allowed by law to replace an employee on a leave of absence, maternity or sick leave; in the event of a temporary

increase in the activity of a company; seasonal work and project-based tasks. FTC ends *ex lege* on the date set *a priori* or when the purpose for which it was concluded is fulfilled. Generally, labour law reforms in jurisdictions examined in this book have expanded the scope and extended the duration of FTC. It is renewable at least once, provided that there is an objective reason, for a maximum duration lasting up to three successive years on average, with variations between two and five years.

In some national legislation, a distinct type of FTC regulates casual work as the employment of a worker on an occasional and/or intermittent basis, for a specific short duration task/service, in return for a daily remuneration or as agreed for the work performed. However, in practice, more often than not, casual employment is based on verbal or informal agreement and frequently falls outside or lies at the cusp of labour law protection.

Tellingly, the absence of an explicit obligation by an employer to provide a justified reason when concluding a FTC, and not only when considering renewal, is identified as a source of abuse of this form of employment, for example, in Albania. The chapter on Albania argues that requiring written justification would enable labour inspectors and courts to better assess the actual existence of objective conditions for the use of FTC.

Similarly, amendments to the Law on Labour Relations of 2003, 2005, and 2008 in North Macedonia gradually created a regulatory gap as the law no longer required objective grounds to justify a fixed-term contract. The author observes that employers are able to circumvent the prohibition of concluding a fixed-term contract for more than five years – which, otherwise, must be transformed into a contract for an indefinite period – for the same activity by entering into a new fixed-term contract for activities which are, *de facto*, of the same kind. The chapter argues that the law should prescribe a limitation not in relation to the type of activity but simply prohibit the same employer from concluding additional fixed-term contracts for the same job, if permanent in nature.

In Montenegro, when the time-related limitation of fixed-term contracts only applied to individual employees – and not to the type of work – employers have been allowed to conclude an unlimited number of fixed-term contracts with different employees for jobs which are, *de facto*, not temporary. The chapter suggests some legal changes so that the use of fixed-term contracts is related to the type of job rather than to individual workers.

The 2014 amendments to the Labour Code of Serbia have enabled employers to conclude one or more fixed-term contracts with the same employee for no longer than 24 months, while also providing for exceptions to this rule under certain grounds (e.g. to temporarily replace an absent employee). The chapter argues that this provision *de facto* allows employers to conclude consecutive fixed-term contracts with the same employee indefinitely since employers easily can justify each renewal on any of the listed grounds. The author takes the view that Serbia's courts are hesitant to engage in a proper assessment of whether there is a valid reason behind the use of successive fixed-term contracts or not.

Part-time employment

Part-time employment regulations exist in all the legislation analysed. Across the board, the ILO Part-Time Work Convention, 1994 (No. 175), and the EU Council Directive 97/81/1997 on the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC have been used as benchmarks, especially when it comes to ensuring equal treatment of part-time workers in comparison to their full-time colleagues. Voluntary recourse to part-time work generally is considered a win-win solution for both employers and workers at some point in time during their professional development.

Two chapters in this volume look at part-time work through the lenses of employers and workers, respectively.

The author of the Romanian chapter argues that the following factors in the current domestic legislation prevent sufficient flexibility in relation to the regulation of part-time work and constitute differential treatment between full-time and part-time employees: overtime work by part-time employees is considered undeclared work, attracting harsh fines; and part-time employees are unentitled to individualized work programmes; employers are required to pay part of the social contributions for part-time employees earning less than the national minimum wage. As a consequence, employers are dissuaded from concluding part-time contracts. That being said, the chapter urges the legislature to adopt a well-designed strategy for the regulation of part-time work, taking into account employers' need for flexibility, as well as the protection of labour rights of part-time workers.

The Albanian chapter relies on a range of statistical data covering the period between 2013 and 2018 to show that, whereas the share of fixed-term contracts over total employment has gradually declined over time, the data for part-time workers indicates a significant share – reaching around 40 per cent – of part-time workers of the total number of employees in Albania. According to the author, one of the reasons backing this trend is that employers employ part-time workers to avoid the costs linked to formally declared work. Thus, what it is referred to as "quasi-formal employment" in Albania is associated with the misuse of part-time contracts which are, in reality, disguised full-time employment relationships. Furthermore, the chapter critically analyses the exclusion of a group of part-time employees – those working cumulatively less than 87 hours per month – from social security coverage in relation to health and unemployment benefits.

Temporary agency work

Temporary agency work (TAW) has been only recently, and in some cases partially, regulated in Western Balkan countries, while the legislation of current EU Member States already has been transposed from the EU Directive on TAW before accession to the EU. The regulation of this triangular employment relationship (temporary agency–temporary agency employee–user company) mostly has been guided by standards set out by Directive 2008/104/EC of the European Parliament and of the Council on Temporary Agency Work (hereinafter, the Directive).

Application of the principle of equal treatment (article 5) of temporary agency workers is the purpose of the Directive. According to the Directive, the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user company, at least the same as those that would apply if they had been recruited directly by the said enterprise to occupy the same job. The scope of the Directive expands to cover part-time and fixed-term contract workers. According to article 4 of the Directive, prohibitions or restrictions on the use of TAW shall be justified only by a general interest in protecting TAW workers, occupational safety and health requirements, the prevention of abuse or to ensure the proper functioning of the labour market.

Most CEE legislation has laid down the same conditions for the use of TAW as in the case of FTC: for instance, to replace an absent worker or for work which is temporary in nature and/or does not fall within the scope of usual activity of a company.

An interesting parallel can be drawn from two chapters analysing the application of TAW by employers and workers in a Candidate Country to the EU (Montenegro) and an EU Member State (Slovakia).

The Montenegrin chapter analyses the finding that, in practice, employers are using the vehicle of temporary agency work to circumvent the 24-month time limit applicable to fixed-term contracts. In fact, after the expiration of the 24-month period, FTC employees are referred to temporary work agencies, which in collusion with the employer, re-deploy them for the same job at the same workplace. Thus, temporary agency work is used abusively to prolong fixed-term contracts that otherwise by law should have been transformed into indefinite employment contracts.

The author of the Slovak chapter explains that the legislative changes in relation to temporary agency work occurred as a result of national level consultations and lobbying between social partners and the government. She observes that temporary work experienced a rapid growth after the 2008 economic crisis and a subsequent decrease after the legislative changes in 2015.

Interestingly, this chapter also presents a case study of the strategy used by trade unions at Volkswagen (VW) Slovakia as an example of the effort by unions to regulate the working conditions of temporary agency workers at the company level. The case study reveals how the Modern union at VW in Bratislava managed to organize temporary workers and include them under existing collective agreements. This is presented as an achievement in light of the fact that organizing temporary agency workers is undoubtedly very challenging due to constant fluctuations in the numbers of temporary agency workers employed at the company level. Finally, the author raises the question whether the same strategy pursued by social partners in relation to temporary agency workers may be applicable to foreign workers and be equally effective.

Disguised employment relationships

The most frequent legal solution for tackling the disguise of an employment relationship within a civil or commercial contractual arrangement is to distinguish by law and/or judicial practice the characteristic features of the former. ILO Employment Relationship Recommendation, 2006 (No. 198), has served as reference point for many national regulators. Yet, there are still some "uncharted" areas in regulating the employment relationship, at both the international and national levels. For instance, international and regional instruments do not share common legal definitions of the terms "worker", "employer" or "self-employed" and leave them to be defined by national legislation. The respective national legal meaning of these terms vary, whereas in most of the examined legislation, labour law only applies to employees, i.e. parties to an employment contract. Generally, in CEE legal systems, the law recognizes the existence of the employment relationship only by virtue of the employment contract, thus excluding large groups of informal workers from labour law protection.

Due to its consensual nature, the contractual arrangement between the provider of a certain type of work or service and the beneficiary of that work or service who pays for it is legitimate and produces legal effects, regardless of the fact if it is formalized through a written contract or remains a verbal agreement. Aiming to curb informal employment, the national legislation reviewed in this volume provides for the written form of the employment contract as a condition for validity. However, through this *ad validitatem* requirement, the national regulator has eliminated the legal possibility for a worker part of an informal employment relationship, established, for instance, through a verbal agreement with the employer, to prove in court the existence of such employment relationship in the absence of a written employment contract.

A recent amendment to the 2011 Labour Code of Romania recognized the consensual nature of an employment contract, which implies that the written form of the employment contract is required only *ad probationem*. The amendment allows workers to bring evidence before the courts in order to show that

a civil agreement constitutes, *de facto*, a disguised employment contract. Furthermore, the Romanian chapter argues that, in order to tackle the issue of disguised employment relationships, the Romanian Labour Code should be amended to include a list of legal criteria for the reclassification of disguised agreements in line with ILO Termination of Employment Recommendation, 1982 (No. 166). Criteria set by the Fiscal Code of Romania to determine whether an enterprise carries out independent work to establish the correct tax calculation also could be used as source of inspiration. According to the author, valid criteria may include factors such as employee subordination, periodic remuneration, personal performance of work and the burden of economic risk.

In North Macedonia, the Law on Transformation into Permanent Employment Relationships was adopted in 2015 to convert volunteer contracts, service contracts and authors' contracts prevalent in the public sector into employment relationships of an indefinite duration. However, according to the author, this law ultimately has failed to eradicate the issue of disguised employment relationships. As a viable alternative, the chapter advocates for the application of the principle of the primacy of facts by domestic courts and the introduction of a legal presumption of the existence of an employment relationship in the new Labour Relations Act.

Non-standard forms of employment "on the cusp" of labour law, such as simplified employment, student cooperatives and household work**,** are analysed in the Hungarian chapter. The author argues that, even though these forms of work offer several advantages to workers, simplified employment and student cooperatives are misused, in practice, as sources of cheap labour and alternatives to standard employment relationships, falling outside the protection of labour law. For instance, simplified employment entails salaries lower than the minimum wage and does not foresee entitlement to paid sick leave, maternity leave or parental leave. Similarly, student cooperatives are considered to give rise to triangular forms of employment, which, according to the author, strongly resemble the structure of temporary agency work although they are regulated as *suis generis* legal relationships on the edge of the reach of labour law. The chapter also offers an in-depth analysis of public works programmes (PW) as examples of precarious non-standard forms of employment. Although, as the author observes, PW are decreasing, they still play an important role in the Hungarian labour market as a "stepping stone" to employment. However, PW salaries are lower than the statutory minimum wage and working conditions are unfavourable. The author also argues that this form of employment is unsustainable as it often fails to guarantee a smooth transition into the real competitive labour market.

NSFE and informality

There are important overlaps between NSFE, which in some cases does not provide legal protection, either in law or in practice, and informality.[5] However, not all NSFE are informal employment arrangements, nor are they necessarily precarious.[6]

As the share of the informal economy in Bulgaria is among the highest in Europe, the author of the chapter attempts to draw a correlation between the increased flexibilization and hybridization of employment relationships after the economic crises of 1996–1997 and 2008–2009 and the persistence of informality and informal practices (e.g. envelope wages) in Bulgaria. Indeed, the author explores the increased vulnerability and precariousness of workers that arise as a result of both informality and weak

5 The International Conference of Labour Statisticians (2003) defines informal employees as "those whose employment relationship is, [...] in law or in practice, not subject to national labour legislation, income taxation, social protection or entitlement to certain employment benefits (advance notice of dismissal, severance pay, paid annual or sick leave, etc.)".

6 Non-standard concerns the contractual form, whereas precariousness refers to the attributes of the job. See ILO, *Non-standard Employment around the World*.

regulation of non-standard forms of work. Under this approach, precariousness is analysed in terms of non-standard workers' degree and quality of access to social insurance, health insurance, maternity and paternity benefits, unemployment benefits and social assistance benefits. In relation to the issue of informality and informal practices – in the form of wage informalization, forced flexibility in the organization of work and the trend towards increased self-employment – the author argues that there is a strong relationship among involuntary NSFE, informality and precariousness, resulting in the increased vulnerability of non-standard workers. Regrettably, measures adopted to combat informality so far, through increased disincentives, such as penalties, sanctions and the strengthening of inspections, ultimately have failed to address this issue. In light of this, the author suggests that more positive measures should be introduced, including strong socio-economic policies and state intervention to defeat poverty as well as the introduction of legislative changes focusing on the nature of work and formalization.

Some conclusions

In many of the examined cases, the implementation of regulations on NSFE have failed to meet the intended purpose of the legal and policy reforms.

The fundamental principle of equality of treatment is sanctioned by all analysed labour legislation, yet this has not translated into a significant counterweight to labour market duality. In practice, non-standard workers do not always have access to the same legal protection compared to "regular" workers and are more likely to lose their formal jobs and to experience precariousness in their professional lives.

Fixed-term contracts and temporary agency work remain underused in Western Balkan countries, where incomplete or ambiguous regulations of temporary work are a gateway to undeclared work and informality.

Part-time work has gained ground mostly as an involuntary form of employment and has become an informal substitute to full-time employment in some cases. However, too stringent regulation might discourage companies to use part-time work for generating jobs adapted to the needs of both employers and workers.

Simplified forms of employment have been devised and implemented as policies to boost employment of vulnerable workers, such as youth, women, low-skilled and older workers, but they proved to fall short of meeting the minimum labour rights floor. Instead of offering these workers the chance to exit poverty, informality and precarious employment, such "cheap" employment is rather often than not a path to never-ending job insecurity .

The introduction of a legal presumption for the existence of an employment relationship, when its main features are present, and directly linking labour rights and entitlements to an employment relationship established by application of the principle of primacy of facts, regardless of its formalization, might discourage the recourse to disguise it. Yet, according to the examined legislation, the employment contract remains the only available legal "vehicle" to labour and social protection of workers.

Of particular note, social partners' engagement in negotiating when, where and the extent to which non-standard employment can replace regular employment is either non-existent or marginal.

The Covid-19 crisis has exposed and exacerbated many of the vulnerabilities of non-standard forms of employment described above. However, the post-crisis recovery offers an opportunity for national regulators, employers, workers and their organizations to address legislative and implementation gaps in a more coordinated and effective way.

Albania
Fixed-term and part-time employment contracts in Albania

Dorina Nika

Introduction

This chapter provides an overview of the legal regulation of fixed-term and part-time employment contracts in Albania. It explores the current regulations in relation to these two types of non-standard forms of work, providing some general statistical data and summarizing legislative trends and developments to enhance the protection of employees hired under such contracts in relation to working conditions, equal treatment and the conditions for concluding such employment arrangements. This chapter also attempts to identify regulatory gaps and discuss possible solutions to bridge them in order to improve the implementation of the legal provisions and their intended protection.

Following an introduction, this chapter is structured in four sections. The first section presents the historical development of legal regulation of fixed-term and part-time employment contracts to explain the evolution and orientation of legislative choices for the regulation of such non-standard forms of work. In the second section, statistical information is provided to illustrate trends and variations following legislative measures, as well as the need to develop future responses to limit excessive or abusive uses of non-standard forms of work. In the third section, the current regulation of fixed-term and part-time employment contracts is outlined in terms of legal requirements, protection and rights of both categories of workers by addressing recent and proposed future legal measures which impact fixed-term and part-time employees. This section also analyses the likely effectiveness of the recent or proposed legal measures through the identification of some regulatory gaps so that future legislative interventions can establish an appropriate framework for the implementation of the protection afforded to and intended for part-time and fixed-term employees. In the final section, the findings are summarized and conclusions are drawn for future consideration.

Indefinite and full-time employment is the traditional employment pattern in the Albanian labour market. However, labour-related statistics show that fixed-term and part-time employment has increased over the years. The main legal framework governing employment relations in Albania is the Labour Code, adopted by Law 7961 of 12 July 1995, which applies unless a special law governs a specific employment relationship.[1] Although there is no explicit definition in the Labour Code, the Code governs the so-called "standard employment relationship"[2] based on an indefinite duration employment contract as well as

1 Labour Code, article 4 (i.e. Law 152/2013 on Civil Service, Law 108/2014 on State Police, Law 96/2016 on the Status of Judges and Prosecutors in the Republic of Albania and so on, which regulate the employment relationship of the respective categories of employees).

2 A standard employment relationship is understood as work that is full-time, indefinite as well as part of a subordinate and bilateral employment relationship. See ILO, *Non-standard Employment around the World,* 7.

some of the "non-standard forms of employment",[3] including fixed-term employment contracts,[4] part-time employment contracts[5] and temporary employment agency work.[6] Hence, in Albania, both fixed-term and part-time employment contracts are regulated by the labour law and constitute labour law contracts.

The legal definition of the contract of employment is provided under article 12, paragraph 1 of the Labour Code which refers to "an agreement concluded between the employer and the employee governing employment relations and defining the rights and obligations of both parties. Through the contract of employment, the employee undertakes to provide work or services for *a fixed* or *indefinite period of time* under the organization and orders of another person who is called employer, who undertakes to pay a remuneration in return." Article 140 of the Labour Code establishes that the contract of employment is entered into for an indefinite duration or for a specified (fixed) duration, providing a general classification of employment contracts based on the duration criteria into two main categories, namely: (a) indefinite duration employment contracts, and (b) specified-duration employment contracts (hereinafter, referred to as fixed-term employment contracts). The Labour Code sets the general principle that the employment contract is concluded for an indefinite duration, allowing a fixed-term type of contract to be concluded only if justified by an objective reason connected with the temporary nature of work to be performed by the employee. On the other hand, a part-time employment contract is defined under article 14, paragraph 1 of the Labour Code as an employment contract through which the employee accepts to work on the basis of hours, half or complete working days of a normal weekly or monthly duration, shorter than those of full-time employees working under the same conditions.

Albania is a member of the International Labour Organization[7] (ILO) and the Council of Europe (CoE)[8] and is a candidate country for accession to the European Union (EU).[9] Over the years, Albanian labour legislation has evolved under the deep influence of the International Labour Standards adopted by the ILO, the European Social Charter of the CoE[10] and, more recently, by the EU *Acquis Communautaire*. Under the Stabilization and Association Agreement (SAA) between Albania and the European Communities and its Member States,[11] which entered into force in 2009, Albania committed to ensuring that its existing laws and future legislation become gradually compatible with the Community *Acquis* and be properly implemented and enforced.[12] Many amendments to the labour legislation were driven by internal societal developments and others came to reflect the comments of the ILO Committee of Experts on the implementation of ILO Conventions and Recommendations (CEACR), the recommendations formulated in the conclusions of the European Committee of Social Rights of the CoE and as an ongoing effort to bring domestic legislation into conformity with the EU *Acquis*.

3 Non-standard forms of employment is a term that encompasses work that falls out of the realm of the "standard employment relationship". It includes temporary employment; part-time and on-call work; temporary agency work and other multiparty employment relationships; as well as disguised employment and dependent self-employment. ILO, *Non-standard Employment around the World*, 7–8.

4 Labour Code, article 12 and 140.

5 Labour Code, article 14.

6 Labour Code, articles 18, 18/1, 18/2, 18/3, 18/4 and 18/5.

7 Albania was a member of the ILO between 1920 and 1967, and it re-joined as a member since 22 May 1991.

8 Albania is a member of the Council of Europe as of 13 July 1995.

9 Albania applied for the EU membership in April 2009 and received candidate status in June 2014.

10 European Social Charter (revised) was ratified by the Republic of Albania on 14 November 2002.

11 Ratified by the Albanian Parliament by Law 5950, dated 27 July 2006.

12 Stabilization and Association Agreement, Title VII, article 70.

In 2002, Albania ratified the ILO Part-Time Work Convention, 1994 (No. 175),[13] but it has not yet ratified the Termination of Employment Convention, 1982 (No. 158), although its main provisions are reflected largely in the labour legislation. ILO Convention No. 158[14] and the Termination of Employment Recommendation, 1982 (No. 166)[15] require Members States to enact adequate safeguards against recourse to employment contracts for a specified period of time to avoid the protection resulting from the Convention in case of termination of employment at the initiative of the employer. Furthermore, the Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by the European Trade Union Confederation (ETUC), Union of Industrial and Employers' Confederations of Europe (UNICE) and the European Centre of Enterprises with Public Participation (CEEP)[16] requires Member States to prevent abuse of the use of successive fixed-term contracts and to ensure equal treatment of a worker on a fixed-term contract with a comparable permanent worker. We also ought to mention Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by ETUC, UNICE and CEEP, which recognizes the principle of non-discrimination between full-time and part-time workers, while allowing Member States to apply the proportionality rule to quantifiable rights derived from working time (including wages, social contributions, indemnities and performance per unit of time), while absolute equality applies to basic non-quantifiable rights.

The Albanian Labour Code does not provide for a maximum number of successive fixed-term employment contracts or a maximum duration or maximum cumulative duration of fixed-term employment contracts. However, over the years, with a view to prevent recourse to temporary employment, limit abusive practices and ensure the application of the principle of equal treatment, Albanian law has established the following legal safeguards:

- the general principle that the employment relationship is established based on an indefinite duration employment contract, while recourse to a fixed-term contract should be justified by objective reasons in connection to the temporary nature of the work to be performed by the employee;
- administrative fines up to 30 times the minimum wage are imposed on employers by labour inspectors in case of fixed-term contracts not justified by the existence of objective reasons;
- when contracts for a fixed term are renewed on several occasions (several successive contracts) for more than three years, the non-renewal of the last contract by the employer is considered as termination of a contract of indefinite duration. The condition of being successive is met even when there is a short break of no more than three months between the end of a contract and the start of the following contract;
- long fixed-term contracts of more than three or five years can be terminated early, only upon the initiative of the employee, with a prior notice of termination, respectively of two months after the completion of the third year, or of three months after the completion of the fifth year. The right to early termination through a notice period is not accorded to the employer;
- the same procedural rules are required to be followed by the employer in case of early termination of a fixed-term contract as it is the case for contracts of indefinite duration. The burden of proof for observing such procedure lays with the employer;
- severance payment benefits are granted at the end of the employment relationship to fixed-term employees, whose labour relations with the same employer have lasted for more than three years as in the case of termination of the contract of indefinite duration upon the employer's initiative;

13 Ratified by Law 8939 on the Ratification of the ILO Convention 175 on Part-time Work, 1994, dated 12 September 2002.

14 ILO, Termination of Employment Convention, 1982 (No. 158), article 2(3).

15 ILO, Termination of Employment Recommendation, 1982 (No. 166), section I(3).

16 Measures to prevent abuse, Council Directive 1999/70/EC of 28 June 1999, clause 5, concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

- the principle of equal treatment applies, according to which fixed-term employees shall not be subject to less favourable treatment compared to employees under an indefinite duration employment contract in relation to employment conditions, training and career opportunities and the principle of enjoying *pro rata* the same rights as employees under an indefinite duration employment contract;
- employers must inform fixed-term employees of available permanent jobs and guarantee equal opportunities compared to other employees, as well as to facilitate and enable them, as far as possible, to undertake trainings to enhance their skills, career development and work mobility.

On the other hand, the Albanian Labour Code provides for the application of the principle of equal rights of part-time employees and full-time employees carrying out the same work, unless the working conditions are directly related to the working time, in which case the principle of *pro rata temporis* applies. Furthermore, the Labour Code provides for the obligation of employers to inform part-time employees of available full-time jobs and ensure equal opportunities.

Historic development of fixed-term and part-time contract regulation

After the collapse of the communist regime in the early 1990s and in response to societal changes brought forward by a new constitutional and economic system, the Albanian legislature adopted Law No. 7526 on Employment Relationships on 3 December 1991, which repealed several chapters of Law No. 6200 on the Labour Code of the Socialist Peoples' Republic of Albania of 27 June 1981. This paved the way for reforms of labour legislation, the removal of former political influences and Marxist-Leninist ideology, and the moderation of the establishment, change and termination of labour relations in Albania.[17] Law 7526/1991 introduced the concept of employment relations being established through an agreement between two parties – the employee and the employer – based on their free will: the employee is obliged to carry out work as per his profession, specialty or other conditions stipulated in the agreement, being subject to the internal work order as defined by the employer, while in return the employer is obliged to pay the employee remuneration for the work performed and guarantee normal working conditions.[18] The law prescribed three types of employment contracts: (a) contracts for an indefinite duration; (b) contracts for a specified duration (no longer than one year); (c) contracts for the duration necessary to carry out a specific task/job.[19] Part-time employment was neither regulated under Law 7526/1991 nor under Law 7724 on Working Time and Leave from 21 June 1993.

An entirely new Labour Code was adopted in 1995 with Law 7961 of 12 July 1995, repealing the previous legal arrangements concerning employment relationships and several other laws regulating working time, trade union activity and collective agreements. The new Labour Code introduced a legal definition of the employment contract, referring to an agreement between the employer and the employee, which governs the juridical employment relationship, as well as the rights and obligations of each party to the agreement.[20] The legal definition did not make any explicit reference to the duration of the employment relationship. However, article 140 of the Labour Code introduced a distinction between indefinite employment contracts and fixed-term employment contracts, using the time necessary to complete a

17 Kudret Cela, *Labour Law* (Tirana 2005), p. 44.

18 Law 7526 on Employment Relationships, dated 03 December 1991, article 4.

19 Law 7526 on Employment Relationships dated 03 December 1991, article 9.

20 Law 7961 on the Labour Code, dated 12 July 1995, article 12. Hereinafter, Labour Code.

certain job or task as the criterion for defining the contract duration.[21] The new Labour Code also introduced the concept and definition of part-time employment contract in article 14, providing that, under a part-time employment contract, the employee accepts to work on the basis of hours, half or complete working days for a normal weekly or monthly duration of work, shorter than that of a full-time employee working under the same conditions. The same provision introduced the principle of *pro rata temporis* as concerning the rights of part-time employees compared to full-time employees.[22]

One year after its adoption, in 1996, many of the provisions of the Labour Code were amended by Law No. 8085 of 13 March 1996. The new definition of the employment contract in article 12 was reformulated[23] to introduce, in addition to concepts of subordination, dependence and remuneration, the element of time duration, while the provisions of article 140 remained the same without any further changes as to the conditions for entering or selecting each type of employment contract.

In 2003, the Labour Code was reformed again by Law No. 9125 of 29 July 2003, which brought a very important change to the second paragraph of article 140 of the Labour Code. It introduced the general principle that the contract of employment is concluded, as a rule, for an indefinite period, while the conclusion of a fixed-term contract must be justified by objective reasons related to the temporary nature of the work for which an employee is hired.[24] The amendment established indefinite duration employment relations as a general standard, while restricting the use of fixed-term contracts for work of a temporary nature. This development came as a reaction to the broad use and abuse of fixed-term employment contracts. This legislative choice was a clear expression of the intention to limit recourse to fixed-term contracts.

The principle of indefinite contracts of employment was reinforced further by the most recent amendments to the Labour Code introduced by Law No. 136/2015, which removed the phrase "as a rule", from the formulation of article 140, paragraph 2, clearly stating that the employment contract is concluded for an indefinite duration.[25] The legal requirement for allowing fixed-term contracts remained basically the same: the law requires the existence of an objective reason connected with the temporary nature of the work to be performed by the concerned employee. An interesting development was the introduction of an explicit provision concerning the liability of the employer for not observing the rule of paragraph 2, which is sanctioned by the labour inspector with an administrative fine up to 30 times the minimum wage. Furthermore, the law explicitly provided for the application of the principle of no less favourable treatment of fixed-term employees concerning employment conditions, training and career

21 Labour Code (1995), article 140: "(1) The employment contract is concluded: a – for an indefinite duration; b – for a defined duration. (2) The employment contract can be concluded for the necessary time (duration) to carry out a specific job. If the duration is clearly defined by the parties during the conclusion of the contract, the contract shall be considered as a contract of defined duration. If the duration is not clearly defined by the parties, the contract shall be considered as a contract of indefinite duration."

22 Labour Code, article 14(2): "The part-time employee is entitled proportionally to the same rights as the full-time employee."

23 Labour Code, article 12, as amended: "The employment contract is an agreement between the employee and the employer, by which the employee undertakes to provide services for a defined or indefinite period of time, under the organization and orders of another person, who is called employer; the latter undertakes to pay a remuneration."

24 Labour Code, article 140 (2), as amended by Law 9125, dated 29 July 2003: "[...] (2) As a rule, the employment contract is concluded for an indefinite duration. The conclusion of the employment contracts for a fixed-term should be justified by objective reasons related to the temporary nature of the task/job for which the employee is hired. If the duration of the employment contract is not clearly defined by the parties during the conclusion of the contract, it shall be deemed as a contract of indefinite duration."

25 Labour Code, article 140, as amended (currently in force): "(1) The contract of employment is entered into: a – for an indefinite duration; b – for a fixed duration. (2) The employment contract is concluded for an indefinite duration. A contract of employment for a fixed duration should be justified by objective reasons related to the temporary nature of the work for which the employee is hired. Failure to observe this provision does not affect the validity of the contract, but the employer is held responsible as defined in paragraph 2 of [a]rticle 202 of this Code."

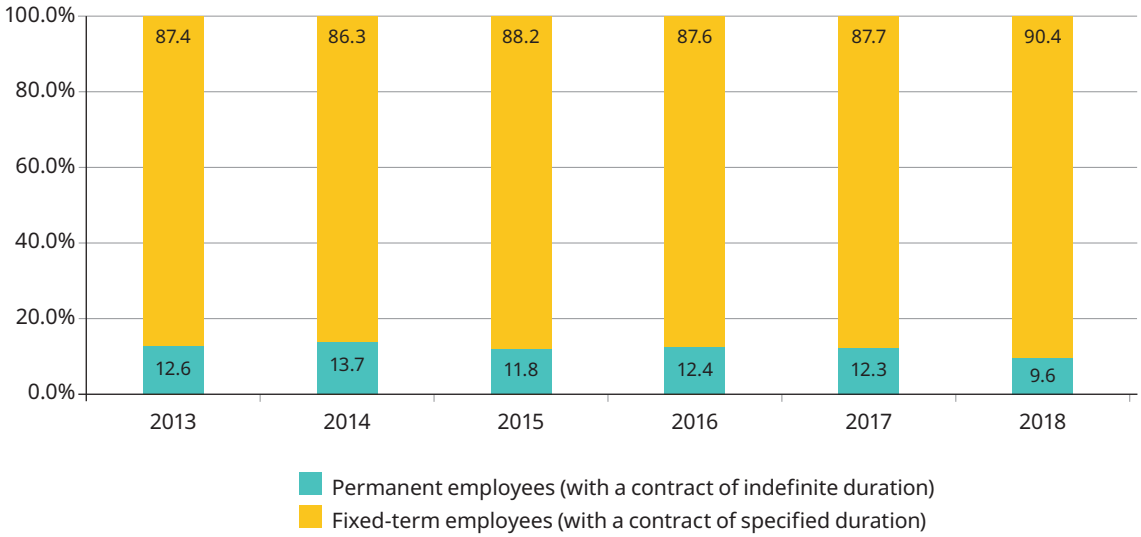
opportunities and the principle of enjoying *pro rata* the same rights as permanent employees; in addition, employers were obliged to inform fixed-term employees of available permanent jobs and ensure equal opportunities and enable them, as far as possible, to undertake trainings to enhance their skills, career development and work mobility.

The amendments of 2015 also affected the legal provision on part-time employment contracts. The second paragraph of article 14 was reformulated so as to explicitly recognize the principle of equal treatment between full-time and part-time employees performing the same job, while the application of the *pro rata temporis* principle was reserved only to working conditions directly related to working hours. Furthermore, Albanian legislature obliged employers to inform employees of available part-time and full-time positions within their respective enterprises in order to facilitate transfers from full-time to part-time jobs or vice versa.

Statistical background of fixed-term and part-time employment contracts[26]

Estimations of the Labour Force Survey for the period 2013–2018 show that employees on a fixed-term employment contract counted for 9.6 per cent to 13.7 per cent of total employees (figure 1). In 2018, fixed-term employees represented 9.6 per cent of total employees in Albania, amounting to 52,500 people. The share of fixed-term employees against total employees has contracted over time as a result of declining temporary employment after 2016, while overall employment has sustained a positive trend, increasing annually by an average of six per cent over 2013–2018.

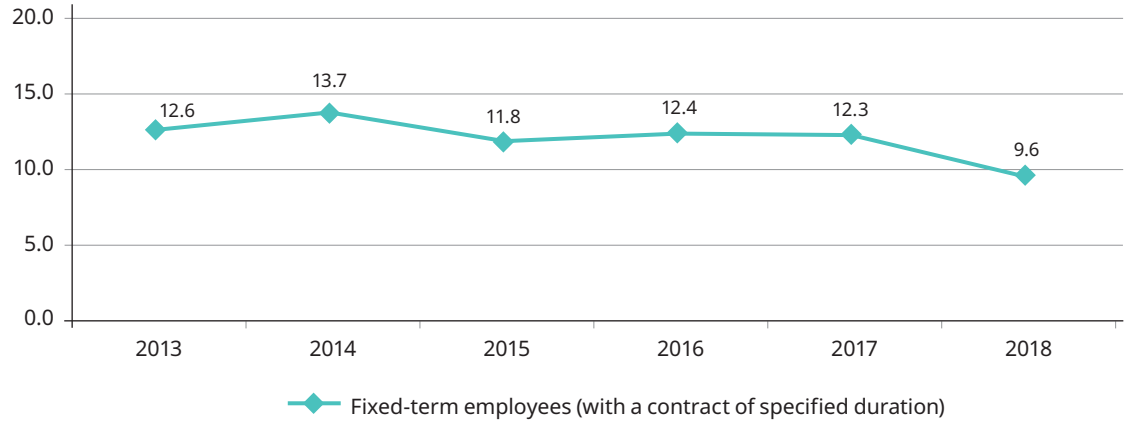
▶ Figure 1. Share of fixed-term and permanent employees to total



Source: INSTAT, LFS Estimations.

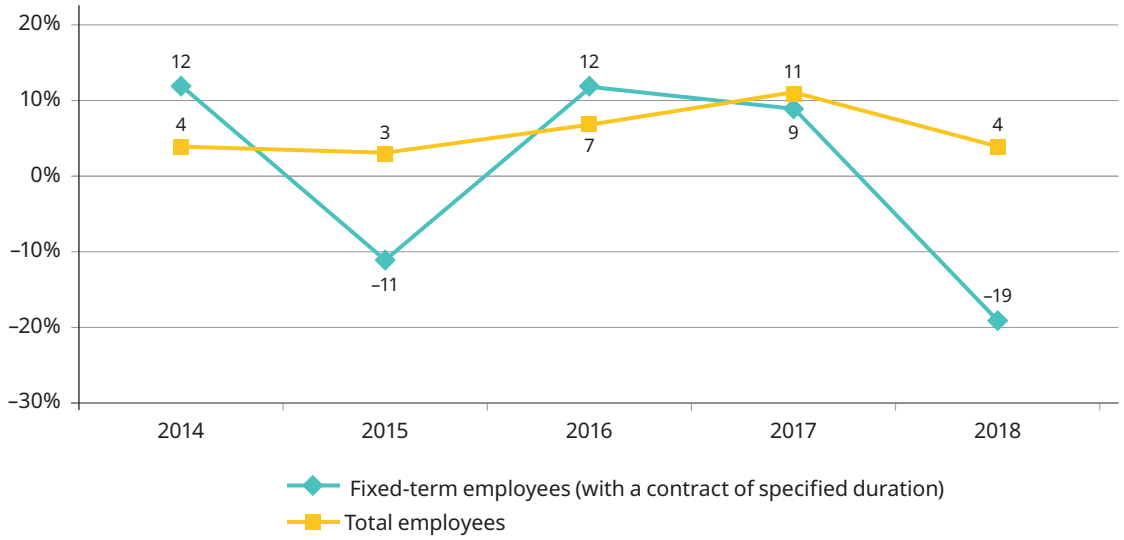
26 Note: The statistical background source are estimations from the Labour Force Survey referring to employees by type of contract and based on full-time/part-time distinction.

▶ Figure 2. Share of fixed-term employees under a fixed-term contract to total employees, 2013–2018



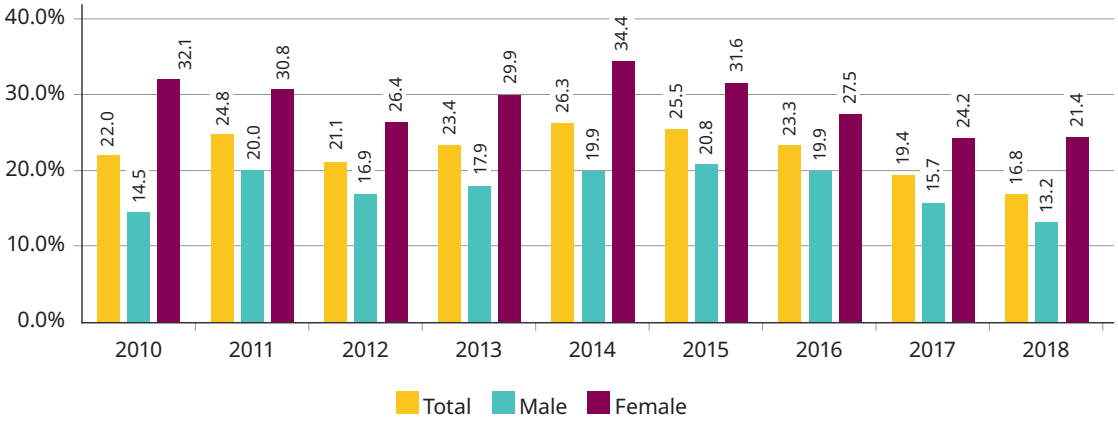
Compared to 2013, the share of fixed-term employees over total employees has declined by three percentage points, or a 24 per cent contraction in the share of fixed-term employees versus total employees during 2013–2018. Annual change rate of temporary employees remains volatile with a negative turn after 2016 (figure 3).

▶ Figure 3. Annual change rate of fixed-term employees vs. total employees



On the other hand, INSTAT data reflect a considerable volume of part-time work in Albania varying from 16.8 to 26.3 per cent of total employment, with women presenting higher rates in part-time employment compared to men (figure 4).

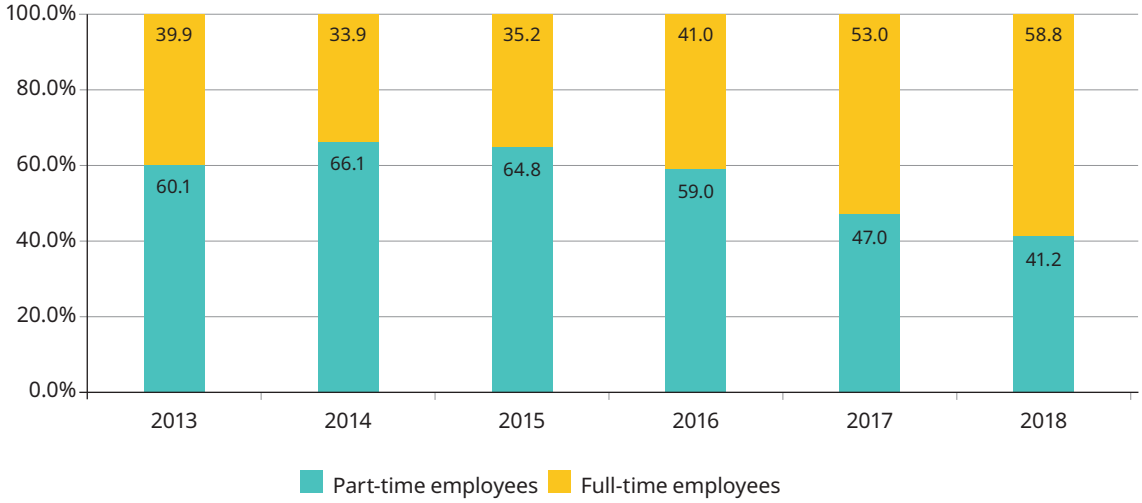
▶ Figure 4. Share of part-time work to total employment by gender, 2010–2018



Source: INSTAT Database.

In theory, part-time work often is associated with the need for flexible working arrangements because of family responsibilities or educational obligations that limit the availability for full-time employment, as well as the lack of full-time job opportunities. Beyond the above-mentioned reasons, part-time work occasionally is used intentionally by employers as an instrument to reduce or avoid the costs of formally declared employees.[27] Based on LFS data estimations in Albania, the share of part-time employment contracts (part-time employees) to full-time employment contracts (full-time employees) is even higher. For the period 2013–2018, part-time employees counted for 41.2 to 66.1 per cent of total employees (figure 5).[28] Around 225,400 individuals were reported to work under part-time employment contract arrangements in 2018, representing 41.2 per cent of the total employees (figure 6).

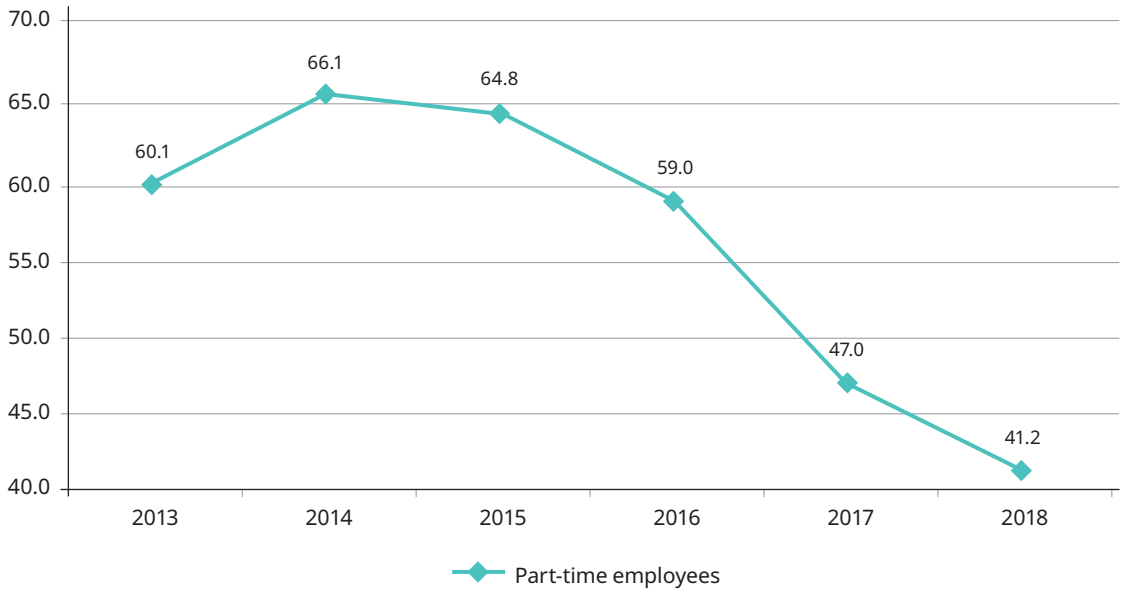
▶ Figure 5. Share of part-time and full-time employees to total employees



27 Another category of quasi-formal employment is where a business employs a person on a part-time contract but the person actually works full-time. For more, see Brunilda Kosta and Colin C. Williams, *Diagnostic Report on Undeclared Work in Albania* (Brussels: ESAP 2018), 23.

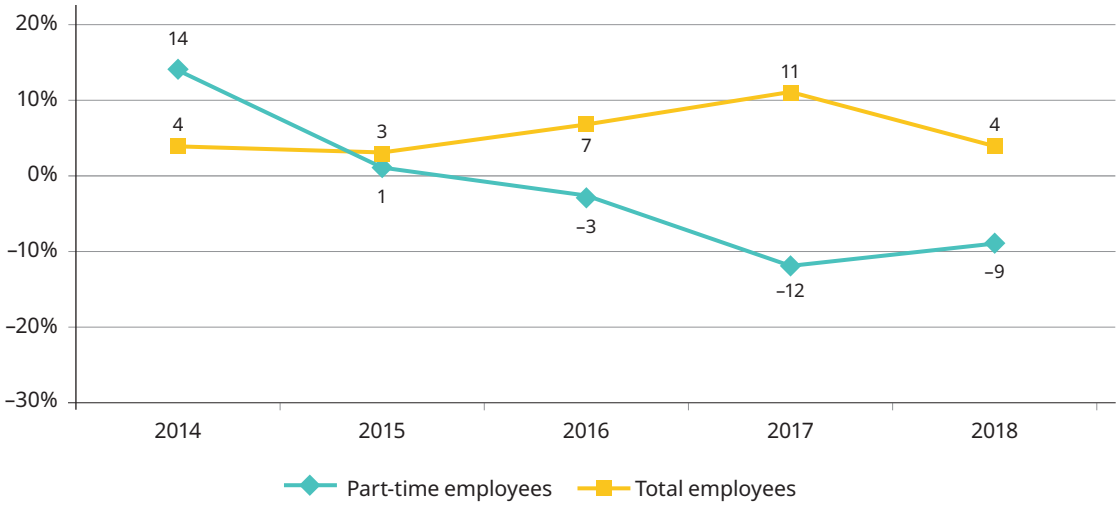
28 The estimations refer only to the total number of employees (salary earners) under an employment contract (both indefinite and specified duration), and the distinction full-time and part-time employees.

▶ Figure 6. Share of part-time employees to total employees, 2013–2018



The importance of part-time employees to total employees declined during 2013–2018, compared to 2014, and the share of part-time employees in 2018 contracted by 25.6 percentage points (figure 6). Part-time employees' dynamics are reverted compared to total employees or full-time employees. Part-time employment contracts are characterized by a negative change rate over the years 2015–2018. Total employees and full-time employees are increasing and have positive annual rate of change, which on average amounts to six per cent (figure 7).

▶ Figure 7. Annual change rate of part-time employees vs total employees, 2014–2018



Legal regulation of fixed-term and part-time employment contracts

Fixed-term employment contract

A fixed-term employment contract is a labour law contract governed by the Labour Code. Its use is mostly associated with the need to respond flexibly to changes in demand, temporary needs of the employer or to replace temporarily absent workers. However, this is not always the case. In fact, it is not unusual for Albanian employers to impose "fixed-term contracts" on their employees without an objective reason in relation to the temporary nature of the work to be performed by the employee. The preference for fixed-term contracts in such cases is explained by the fact that there are no requirements for announcing the termination of the contract, no notice period or reasons to be provided by the employer to justify the end of the employment relationship with the employee, beyond reaching the end date of the fixed-term contract. Indeed, article 149, paragraph 1 of the Labour Code states that a fixed-term contract expires at the end of the specified time. Thus, parties are not required by law to communicate its termination.

Legal requirements: written form and mandatory elements

Article 21, paragraph 1 of the Labour Code requires an employment contract to be concluded in written form. This is a general mandatory provision for both types of contracts (indefinite duration and fixed-term employment contracts). Furthermore, the same article lays down the essential elements that should be specified in an employment contract, such as the identity of the contracting parties, the place of work and a general job description, among others. In addition, article 21, paragraph 3 of the Labour Code provides that, in case of a fixed-term contract, the contract should specify a *"duration period"*,[29] treating such an item as one of the essential elements of fixed-term employment contracts. The written form and the essential elements of an employment contract are mandatory, and therefore subject to labour inspection. Non-compliance by the employer is sanctioned, based on article 202, paragraph 2 of the Labour Code, with an administrative fine up to 30 times the minimum wage.

The existence of an objective reason

The Labour Code sets a general principle that an employment contract is concluded for an indefinite period of time, with the exception of cases when, for objective reasons related to the temporary nature of the work performed by an employee, a fixed-term contract is permissible. The Labour Code does not further elaborate on what are objective reasons justifying the conclusion of a fixed-term contract, nor does it provide for an exhaustive or indicative list of reasons. However, Albanian labour law theory and case law sustain that objective reasons connected with the temporary nature of work might embrace various circumstances, such as the casual, seasonal nature of some jobs or the limited financial resources or limited duration of a specific project/task which affects the duration of contracts of staff hired for this purpose.[30] Another situation that might justify the use of fixed-term contracts is the temporary replacement of an employee who is on leave (i.e. maternity leave) or absent due to illness or injury.[31] The assessment of the existence of an objective reason that justifies the conclusion of a fixed-term employment contract or the renewal of such fixed-term contract is carried out on a case-by-case basis by a labour inspector and/or court, if the matter is submitted for judicial review.

29 Labour Code, article 21 (3)(d).

30 Albana Shtylla, "Commentary of the Labour Code" (2017), p. 256.

31 Administrative College of the High Court, Decision No. 00-2014-1281 (122), dated 18 February 2014.

The choice of the Albanian legislature since 2003 as reflected in the Labour Code is to restrict the use of fixed-term contracts only to situations when, due to objective reasons connected with the temporary nature of the work to be performed by the employee, the conclusion of a fixed-term contract is considered justified. However, explicit reference to the objective reason that leads to the conclusion of a fixed-term contract is not a mandatory element to be included in a written contract. This can be derived from a literal interpretation of article 21, paragraph 3 of the Labour Code, which, while listing the essential elements, does not include an obligation to specify the reason for concluding a fixed-term contract. This is not the case with the duration of a fixed-term contract, which as mentioned previously, must be specified in the contract document. Arguably, however, the concrete reason why a fixed-term contract is concluded should be viewed as a mandatory item to include in a written contract; this would enable and facilitate a better assessment on behalf of labour inspectors and courts of the fulfilment of the legal requirement of objective reasons connected with the temporary nature of work performed by an employee.

Administrative assessment of objective reasons

The existence of an objective reason for concluding fixed-term contracts is one of the legal requirements that are checked and enforced by labour inspectors. Article 140, paragraph 2 of the Labour Code authorizes labour inspectors to impose an administrative fine equal to up to 30 times the minimum wage against employers abusing fixed-term contracts, bearing in mind that employers are the strongest party in an employment relationship and might impose their will in relation to the duration of a contract. Referring to the inspection data of the State Labour and Social Services Inspectorate (SLSSI), labour inspectors have identified 112 cases when a violation of article 140, paragraph 2 of the Labour Code has occurred.

▶ Table 1. Cases of violation of article 140, paragraph 2 of the Labour Code in connection to the existence of an objective reason

Employers/entities	Total number of employed persons	Administrative measure		
		Administrative fine	Administrative Warning	Instruction for compliance
112	4 230	1	13	98

Source: Data obtained from the database of the SLSSI.

The SLSSI data show that, since the entering into force of amendments to the Labour Code (June 2016), 112 entities/employers were identified to have hired employees based on fixed-term employment contracts lacking an objective reason. The labour inspector imposed a fine equal to 10 times the minimum wage in one case, while in 13 other cases a warning was issued to employers. In all other cases, the labour inspector informed and advised employers to comply with the requirements of the Labour Code in relation to the duration of the employment contract and to amend the employment contract accordingly. The 112 non-compliant employers, as shown in table 1, operate in the following economic activities: hospitality and tourism (53), manufacturing (26), construction (3), mining (2), electricity, gas and water supply (2) and other activities (26). However, the data does not show how many of the 4,230 employees in the inspected establishments were hired on the basis of fixed-term contracts, as the number 112 only refers to violators (i.e. employers). Thus, violations could be to the detriment of all or only part of 4,230 employees. Nevertheless, the introduction of an explicit administrative penalty against employers, along with awareness raising through inspection visits and media, might arguably have contributed toward a contraction in the share of employees employed under fixed-term contracts as previously shown in figure 2, reaching a level of 9.6 per cent in 2018.

Judicial assessment of the objective reason

As of 2003, the existence of an objective reason justifying the conclusion or renewal of a fixed-term contract has been subject to judicial assessment in the framework of claims arising from the termination of employment. Quite often, the court has acknowledged the lack of an objective reason in concluding or renewing a fixed-term contract, and, consequently, it has considered the contractual duration term invalid, deeming the contract to be a contract of indefinite duration.[32, 33] Nonetheless, case law sometimes makes use of a very broad interpretation of the objective reason, leading even to misinterpretations of the concerned legal provision stepping beyond the temporary nature of the work performed by an employee.[34] This compromises the main aim of preventing recourse to fixed-term contracts beyond work of a temporary nature. Therefore, objective, predetermined and transparent criteria should be defined in the law allowing verification of whether such contracts actually respond to a genuine temporary need. This could be done by providing complementarily for a clear mandatory, or at least indicative, list of objectively valid reasons justifying the use of fixed-term contracts. For example, valid reasons could be seasonal work or the temporary need for a specific type of work. In the latter case, the law also should provide that such temporary need must be defined precisely by the employer, fall outside the normal activity of the enterprise and it must be limited in duration. In case of replacement of an absent employee, the law should state that a fixed-term contract can be concluded to replace temporarily an employee who is on leave (maternity, sick, educational leave or other types of leave) or who, for some other reason, cannot temporarily perform work, where there is an obligation to retain that job position (e.g. suspension from work due to disciplinary reasons, to fulfil some legal obligation or to serve as an elected official in trade unions, the judiciary and so forth). However, such a contract should not be used to replace more than one employee at a time. Furthermore, it must be stated clearly that fixed-term contracts should not be used to avoid other legal guarantees provided under the Labour Code, such as the maximum allowed time for probation.

At the same time, the formulation of the last sentence of the second paragraph of article 140, as amended in 2015, states that, despite a violation being in found in connection to the choice of employment contract category, such a violation does not affect the validity of a contract. The employer is held liable only for not complying with the law, being sanctioned by the labour inspector with an administrative fine. The reference to the validity of a contract *per se* is an interesting development. In fact, in the past, the court

32 Court of Tirana, Decision 10077, dated 16 July 2014: "[...] The written evidence examined by the court did not justify or support the existence of justified reasons for the change of the contractual term. The nature of the work that the plaintiff continues to perform as 'Sanitary' in its nature cannot be temporary. Furthermore, entering into a fixed-term contract after almost 5 years of continuous (verbal) service with the same employer carrying out exactly the same tasks as before, should be considered abusive, while the real reason behind, is the intention of the employer to avoid obligations under an indefinite employment contract.... The Court therefore sustains that the contractual (fixed) term of the employment contract as stipulated in Article 2 thereof, is invalid." Following this reasoning, the Court deemed the contract to be of indefinite duration, and consequently indemnities were awarded based on the provisions for notice period and unjustified termination of an indefinite duration employment contract.

33 In a concrete case, the Tirana Court of Appeal examined the employment relationship between the parties that was established through the conclusion of four consecutive fixed-term contracts on 16 January 2007, 16 April 2007, 12 May 2007 and 13 August 2007 (last contract specified a three-month duration). While examining the case, the Tirana Court of Appeal, in Decision No. 343 of 26 February 2010, reasons that by interpretation of article 140 of the Labour Code, the employment contract may be concluded and renewed for a fixed term only if justified by an objective reason, which was lacking in the case. Therefore, the employment relationship was deemed to be of indefinite duration and the non-renewal of the last contract was considered as unjustified termination of immediate effect.

34 Administrative College of the High Court, Decision No. 00-2014-1281 (122), dated 18 February 2014: "[...] Some of the cases when the renewal of the fixed-term contract is based on an objective reason might be the temporary nature of the work to be performed by the employee; the need to replace an absent employee on maternity leave, etc.; cases when the institution or enterprise are under, or are expected to enter, transformation, re-organization, or job cuts, liquidation etc., not necessarily connected to the concrete type of work to be performed by the employee; cases when very short employment contracts are concluded to perform same work, considering that the Labour Code sets the general rule that the probation period shall be 3 months, and in such case it is justified the need not only to complete the probation period but also the need to further verify the appropriate professional skills of the employee and to consolidate the trust of the employer toward the employee through the conclusion of several fixed-term contracts."

has examined the duration of a fixed-term contract on the basis of whether it is justified or not based on objective reasons and has assessed separately the validity of such contractual term in relation to the employment relationship. If a fixed-term employment contract was concluded and renewed without an objective reason, it was sometimes[35] presumed to be an indefinite duration employment contract. The rationale behind the formulation "it does not affect the validity of the contract" was to ascertain the fact that, despite the violation in connection to contract type, the employment relationship was still valid. However, this can lead to controversial interpretations by courts in relation to the validity or not of the contract duration clause, thus compromising the main aim of preventing recourse to fixed-term contracts to evade the protection provided under the provisions of termination of employment concerning the procedure, notice period and reasons for termination. The existence of an objective reason is a legal requirement for the conclusion of a fixed-term contract, and, if not met, the contractual term determining the duration of the contract should be assessed separately and declared invalid, while the existing employment relationship should be deemed an employment relationship of indefinite duration. Although the administrative fine imposed by the labour inspector is arguably an effective measure to limit abusive (unjustified) recourse to fixed-term contracts under the fear of an administrative sanction, it is not enough to ensure the protection of the weakest party in an employment relationship (i.e. an employee). Fixed-term employees are typically in this situation against their will; they accept a fixed-term contract to perform tasks that are not temporary in nature as their only option to earn a living, although they often would prefer to work under a permanent contract. Consequently, the requirement of having an objective reason, clearly framed in law through a list of permissible reasons, should be complemented by a clear legal presumption deeming the contract to be of indefinite duration if such a reason is invalid. That would lead to uniformity in case law and a better implementation of the concerned labour law provision in practice.

Defining the contract term (duration)

The Labour Code does not make any explicit reference to how contract duration is defined; it only states that a contract is concluded for a specified period of time. However, considering doctrinal and case law elaborations of the reasons that allow the conclusion of a fixed-term contract, it could be argued that the determination of the expiry of a fixed-term contract is made either by direct reference to a specific time unit or by other methods related to the completion of a specific task or the occurrence of a specific event. The convention to determine the expiry date of an employment contract is to refer in a precise, explicit and direct way to a time subdivision (i.e. day, month, year). In this case, the duration clause of a contract states that the contract comes to an end or expires by reaching a specified moment in time which is defined precisely. In other cases, a contract might state that it is concluded for a specific period of time (specified days, months or years) being calculated from the time of contract signature or beginning of employment. In such case, the ending date, although not defined precisely, is calculated based on general rules for calculating deadlines.

Uncertainty in relation to the exact expiration moment arises when the end of the contract is connected to completion of a certain task or occurrence of a certain event. In civil law theory, it is accepted that the fixed-term character is established even in cases where the "when" element is uncertain (*dies incertus quando*), but the "if" element is certain (*dies certus an*). On this basis, although the expiry date is not defined precisely in advance (no reference is made to the time subdivision), the contract is still for a fixed-term (i.e. in case of replacement of an employee who is on sick leave). However, for a contract to be considered a fixed-term contract, the scope of the contract (i.e. to replace temporarily an absent employee on sick leave) should not only be referred to as the reason for recruiting the employee, but – in line with the mutual will of the parties – it should be referred to and be related clearly to the duration

35 There is no unified or consistent court interpretation on the issue.

clause of the contract itself. The uncertainty in such a case arises from the fact that the exact expiration moment is unknown. The law does not consider this to be incompatible with the fixed-term nature of the contract, since the law does not provide for any clear requirement on how the specified period of time should be determined in the contract. However, theory and case law accept that an employment contract is concluded for a particular project, task or the occurrence of a specific event, provided that its duration depends on the completion of the project, which is temporary, or the occurrence of the event will happen for certain. The contract in such case is a fixed-term contract even though the date of completion cannot be determined from the beginning.

Until recently, the Albanian Labour Code provided that, where contract duration was not precisely defined by the parties within the contract, the contract was deemed to be an indefinite duration contract, thus requiring an explicit and precise determination of the duration. The amendment of article 140 of the Labour Code removed such formulation, which, apparently, allows more space for determining contract duration based on elements such as the purpose and scope of the fixed-term contract and other elements as it might be the case. The uncertainty in relation to contract duration negatively affects employees and limits their freedom to seek and find another job to ensure work and income continuity. Therefore, the requirement of having a clear and precise determination of contract duration should be re-established, and, in case of uncertainty, the contract should be legally deemed of indefinite duration as was the case before the 2015 amendments to the Labour Code. If, after the expiration of the fixed-term contract, the contract is tacitly renewed, paragraph 2 of article 149 of the Labour Code states that the contract is deemed to be concluded for an indefinite duration.

Termination of fixed-term contracts

Article 149, paragraph 1 of the Labour Code provides for the expiration/termination of fixed-term employment contracts. A fixed-term employment contract expires at the end of the specified duration set and agreed by the parties in the contract without prior termination. The natural ending of the contract is not considered as termination of the contract but as a natural expiry of the employment relationship. Thus, the parties are not required to observe any procedures or notice periods unlike the case of indefinite duration contracts. During the term of their contract, employees employed under a fixed-term contract are generally in a better position regarding their job security than those under a contract of indefinite duration since the normal termination procedures are not applicable.

The Labour Code explicitly requires the observance of the procedure of termination in case the fixed-term contract is terminated before its expiry date, without containing any reference as to the valid reasons for which early termination is allowed.[36] In such case, the employer is required to observe a three-step written procedure of termination required for termination of indefinite duration employment contracts, which protects employees in terms of procedure and notification of the termination reason, and also guarantees the right to be heard and provide a defence. However, early termination of a fixed-term contract must be justified by reasons allowing for an immediate termination of the employment contract, in the context of articles 153 and 154 of the Labour Code. On the contrary, if there is no justified reason for terminating the contract before the deadline, the termination is considered as termination without justified reasons under article 155 of the Labour Code and the employee is entitled to the salary for the entire period until the expiration of the fixed-term contract,[37] in addition to any other compensation (e.g. compensation for non-observance of the procedure of termination, seniority benefits if the employment relationship has lasted more than three years). Sometimes, in practice, employers include in fixed-term

36 Labour Code, article 149(3).

37 Labour Code, article 155(1): "The employee is entitled to the wage that would have received if the employment relationship would have ended by the end of the notice period as defined by the law or the contract, or until the end of the fixed term contract."

contracts specific clauses that contain definitions, procedures and terms of early termination of the fixed-term contract, which create ambiguous situations in terms of regulating employment relationships and the protection of employees. In such cases, employers seek to benefit from options provided by the Labour Code for the termination of an indefinite duration contract, connected with the performance or conduct of an employee or based on the operational requirements of the undertaking. However, a fixed-term contract of employment can be lawfully terminated before its expiry only in the event of specific justified reasons (serious misconduct or repeated light misconduct despite the written warning of the employer). Case law consistently has decided not to recognize financial difficulties or operational needs as constituting justified reasons for early termination of fixed-term contracts.[38]

Maximum duration or maximum number of fixed-term contracts

In the Albanian Labour Code there are no time limitations on the minimum or maximum duration or the maximum number of fixed-term contracts, so long as these contracts are concluded based on objective reasons connected with the temporary nature of the work to be performed by employees. However, the Labour Code lays down rules that guarantee that workers retain their acquired rights in a continued relationship or even in case of brief interruptions, aiming to narrow the gap between employees with fixed-term contracts and those with indefinite duration contracts. Thus, if the parties have concluded several successive fixed-term contracts for at least three years, non-renewal of the last contract by the employer is deemed as termination of the contract of indefinite duration. Fixed-term contracts between the same parties are considered to be successive even in cases where there is a short interruption of no more than three months between the end of a contract and the following contract.[39]

Long fixed-term contracts

As mentioned above, the Labour Code does not provide for a minimum or maximum duration of fixed-term contracts. However, the Code distinguishes fixed-term contracts by classifying them into two categories: fixed-term contracts (up to three years) and long fixed-term contracts (long fixed-term contracts which are defined as fixed-term contracts that last between three and five years, and fixed-term contracts lasting more than five years). The special provisions of article 151, paragraph 2 of the Labour Code on long fixed-term contracts deal exclusively with the termination of such contracts. Aiming to protect employees on a long-term contract by guaranteeing their contractual and professional freedom, the law provides that an employee may terminate the contract before its term, while it does not grant any such right to an employer. The latter is required to remain bound by the contract until the end of the contract term, unless there is a justified reason for immediate termination.

The cumulative conditions to be met by an employee[40] for valid early termination are as follows:

a) termination can be announced by an employee after the completion of three years in case of employment contracts lasting between three and five years, and after five years for fixed-term contracts lasting more than five years;

38 Court of Tirana, Decision No. 2061/2011: "[...] The fixed-term employment contract requires specific justified motivation for its early termination. Any employer has the legitimate right to introduce organization changes either for financial reasons or for any other lawful reason. However, this legitimate right does not justify the fact that individuals who do not meet the new job requirements, or who are planned to be dismissed from the job, should be abruptly dismissed from work. This is due to the fact that the employer is legally obliged to comply with the notice period in case of indefinite duration employment contracts, or the duration term of the fixed-term employment contract. Article 149 of the Labour Code does not grant the employer any right to initiate an early termination of the employment contract without a justified reason."

39 Labour Code, article 151(1), as amended in 2015, to harmonize the Code with clause 5 of the Council Directive 1999/70/EC.

40 Labour Code, article 151(2): "[...] (2) When the contract is entered into for more than three to five years, the employee may terminate it after three years. In this case, the deadline notice is two months, and it is extended until the end of the second month. When the contract is entered into for more than five years, the employee may terminate it after five years. In this case the deadline notice is three months, and it is extended until the end of the third month."

b) an employee should observe a notice period for the termination of the contract before the deadline set respectively at two months (for three to five years fixed-term contracts) and three months (for fixed-term contracts of more than five years).

Moreover, fixed-term employees, whose employment relationship with the same employer has lasted for a period of not less than three years, are entitled to seniority benefits at the end of their employment, as in the case of termination of indefinite duration contracts by employers.

Equal treatment of fixed-term employees

The Labour Code has been amended[41] with the aim of approximating domestic legislation to the EU *Acquis* and improve the quality of fixed-term work by ensuring the application of the principles of non-discrimination and equal treatment, as well as to ensure that fixed-term employees are informed of and guaranteed employment opportunities. The new provisions added to the Labour Code,[42] articles 149/1[43] and 149/2,[44] aim to ensure equal opportunities for fixed-term employees to be employed in their jobs for an indefinite period as well as to facilitate as much as possible their training and skills enhancement, career development and occupational mobility. Article 149/2 of the Labour Code requires that fixed-term employees must not be treated in a less favourable manner than indefinite term employees in relation to employment terms and conditions, training and career development opportunities. The same article introduces the *pro rata temporis* principle by establishing that fixed-term employees enjoy, proportionally, the same rights as permanent employees. Article 149/1 introduced a positive obligation on employers to inform employees on fixed-term contracts of permanent vacancies and to provide them equal opportunities to be employed in full-time jobs as other employees. However, this legal provision only contains a general statement on the obligation to inform, without providing for any legal requirement in relation to the modalities of fulfilling such an obligation (e.g. posting a permanent job position vacancy on a public notice board in the enterprise). The employer is required to facilitate fixed-term employees as far as possible by providing appropriate training to upgrade their skills, career development and occupational mobility. However, despite specific reference to such trainings, the legal provision remains only declarative in character, as the general formulation "as far as possible", which is in practice an exact translation of the second paragraph of clause 6 of the EU Directive, does not provide for clarity as to what conditions should be fulfilled by the employer and claimed by the concerned employee. Therefore, in practice, implementation of such a provision is problematic.

Part-time employment contracts

Albania has ratified ILO Part-time Work Convention, 1994 (No. 175), with Law No. 8939, dated 12 September 2002. The Convention aims to promote equal treatment between part-time and full-time workers through the promotion of equality of employment conditions and social protection coverage for part-time and full-time workers in similar positions. Furthermore, the European Council Directive 97/81/EC concerning the Framework Agreement on part-time work addresses the removal of discrimination

41 Law 136/2015, Some Addendum and Changes to the Labour Code of the Republic of Albania, dated 5 December 2015, refers to the partial approximation of the Labour Code with Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work.

42 Added by Law 136/2015 on Some Addendum and Changes to the Labour Code of the Republic of Albania, dated 5 December 2015.

43 Partial approximation with clause 6 of the Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-Term Work.

44 Partial approximation with clause 4 of the Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-Term Work.

against part-time workers, the improvement of the quality of part-time work and the development of part-time work on a voluntary basis to contribute to the flexible organization of working time in a manner which takes into account the needs of employers and workers. In light of the aforementioned international law, the most recent amendments to the Labour Code introduced changes to the special provision of article 14 on part-time employment contracts.

Legal definition

Article 14 of the Labour Code provides for the legal definition of part-time employment contracts stating that: "Through a part-time employment contract, the employee accepts to work on the basis of hours, half or complete working days for a normal weekly or monthly duration, which are shorter than those of full-time employees working under the same conditions." To define part-time work, the Albanian legislator's choice was to use the wording "full-time employee working under the same conditions" to refer to the concept of comparable worker as defined in Convention No. 175 and Recommendation No. 182. The definition focuses on defining part-time work as involving quantitatively less hours than those (normal weekly or monthly hours) of a full-time employee working under the same conditions (the comparable employee). Thus, within the meaning of a part-time employment contract falls any part-time work (for instance two, three or four hours per day), as well as part-week work (for instance, two, three or four full or half days of work in a week) and also part-month work (for instance, five, twelve, or sixteen days of work in a month), and so on. In this respect, the legal regulation is quite flexible as there is no minimum or maximum hours of work set by law for part-time work. The provision stipulates the definition of part-time work, considering as such any time of availability of the employee for fixed hours, half-day, working day for a normal weekly or monthly duration, less than that of employees who work full-time under the same conditions. The maximum weekly working hours in Albania as per article 83 of the Labour Code is 40 hours/week, set by decision of the Council of Ministers, collective agreement or the individual employment contract (within the 40 hours upper limit set by law). Usually, 174 normal working hours per month are counted for calculation purposes.[45] In any case, normal hours of work are calculated weekly or monthly with reference to a full-time employee working under the same conditions. For example, within an enterprise, the normal working hours per week might have been set at 35 hours (instead of the upper limit of 40 hours/week) by collective agreement. In such case, an employee working for 35 hours per week is considered a full-time employee and any others working less than 35 hours per week are considered part-time employees.

Written form, type of employment contract and working schedule

A part-time employment relationship can be established through either an indefinite employment contract or a fixed-term employment contract as the law does not state any further requirement, based on the general rules that apply to each type of contract. The form required to conclude a part-time contract is not specified in the Labour Code. However, since it is a labour law contract, the general rule stipulated in article 21 applies, requiring any employment contract to be in writing. Consequently, a part-time employment contract must be concluded in writing and, depending on its type (indefinite or fixed-term), it must contain all the essential elements as defined in paragraph 3 of article 21, including the normal weekly working time.[46]

Quasi-formal employment is present in the Albanian labour market. One of the typologies of quasi-formal employment is associated with misuse of part-time employment contracts: employees are formally hired and declared for part-time work while, in reality, they work full-time. The work exceeding the part-time

45 DCM 809 on Minimum Wage at National Level, dated 26 December 2018.

46 Labour Code, article 21 (3)(f).

schedule is not registered, and it is not formally paid.[47] This phenomenon is hard to track by labour inspection and even tax authorities as the employees present in the inspected establishments are formally declared according to the law.

The normal weekly working time is one of the main elements to be included in an employment contract. For a part-time employment contract, the working hours and schedule should be considered mandatory elements of the written contract so as to facilitate the work of labour inspectors in checking compliance with Labour Code provisions and in fighting this form of informality (i.e. quasi-formal employment).

Equality and *pro rata temporis* principle

Initially, when adopted in 1995, the Labour Code provided that part-time employees enjoy proportionally the same rights as full-time employees, thus introducing the *pro rata temporis* principle. Furthermore, the Labour Code explicitly provides that every hour of work carried out beyond normal working hours by a part-time employee must be considered overtime work.[48] This provision is important in relation to compensatory leave or financial benefits received in case of overtime work which are equivalent to the leave or financial entitlements of a full-time employee working under the same conditions.

The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) in 2008, 2011 and 2014 submitted direct requests to the Albanian Government concerning the application of ILO Part-Time Work Convention, 1994 (No. 175). The issues raised by CEACR concerned the protection of part-time workers' rights in matters of freedom of association, occupational safety and health (OSH) and non-discrimination as per article 4 of the Convention and measures to ensure that part-time workers benefit from conditions equivalent to those of full-time workers in respect of employment rights such as maternity protection, paid annual leave and sick leave. Moreover, the CEACR reminded the Albanian Government that the Convention, under article 8, permits part-time workers to be excluded from the coverage of statutory social security schemes, if their hours of work or level of earnings are below specified thresholds, except as regards to employment injury benefits.

For two decades the provision of article 14 of the Labour Code remained the same until 2015, when article 14 of the Labour Code was amended to provide as a general principle the equality of rights between full-time and part-time employees, while the *pro rata temporis* rule only applies if working conditions are directly related to employees' working time. The Albanian legal framework guarantees universal coverage of basic rights that are not quantifiable such as the right to organize, collective bargaining, OSH and anti-discrimination, with part-time employees receiving the same protection as full-time employees. However, according to paragraph 2 of article 14, as reformulated, some rights which are directly connected to working time are granted on the basis of *pro rata temporis* principle. This is the case, for example, for paid annual leave. A full-time working employee is entitled to not less than four calendar weeks annual leave, while a part-time employee is entitled to a proportional annual leave for a duration calculated based on the hours or days worked.

Social security coverage of part-time employees

The Labour Code provision on part-time employment contracts does not make any distinction for part-time employees when it comes to social security coverage. However, classification is envisaged by social security legislation, which provides for a legal threshold of 87 hours of work on a monthly basis. The approach adopted by the social security legislation as reflected in the Decision of the Council of Ministers on

47 Brunilda Kosta and Colin C. Williams, *Diagnostic Report on Undeclared Work in Albania*, 23.

48 Labour Code, article 88(2).

mandatory social security contributions and benefits from social security and health insurance system, (No. 77), dated 28 January 2015, relies on an hourly threshold to differentiate treatment amongst part-time employees: part-time employees working for 87 hours per month or more enjoy better protection than those working less than 87 hours per month, since they are covered for all branches of social security (sickness, maternity, old-age, unemployment, work accidents and occupational sickness and health insurance). Social and health contributions for this category of employees are calculated on a gross salary, at a total rate of 24.5 per cent and 3.4 per cent, divided between the employer (15 per cent and 1.7 per cent) and the employee (9.5 per cent and 1.7 per cent), respectively, in any case for not less than the minimum level. Those who work for less than 87 hours per month have their social security rate decreased to a total rate of 23.3 per cent, divided between the employer (13.9 per cent) and the employee (9.4 per cent) with the health contribution being the same at the level of 3.4 per cent, for not less than the minimum level.[49] However, employees working less than 87 hour per month are not insured for the sickness and unemployment branch of the social security system.

The ILO Convention, under Article 8, allows for part-time workers to be excluded from the coverage of statutory social security schemes if their hours of work or level of earnings are below specified thresholds, except as regards employment injury benefits.[50] However, the threshold should be sufficiently low to avoid excluding an unduly large percentage of part-time workers, and it should be periodically reviewed. Consideration should be given to the progressive extension of protection to excluded workers.[51]

The threshold of 87 hours per month was introduced in 2008 by Decision No. 1114 of 30 July 2008 of the Council of Ministers that repealed previous Decision No. 167 of 29 March 2006, which set the threshold at not less than 24 hours per week. If we take a comparative review of the threshold used to determine protection and coverage of part-time workers over the years, *prima facie* it looks like the threshold was reduced. However, if we compare it with the maximum working time of a full-time employee over the years, it can be noticed that, on average, the threshold has remained almost the same (50 per cent of the statutory maximum working hours, weekly or monthly, of a full-time employee), while, as of 2001, the coverage for employees under the threshold was extended to include also injury benefits (work accidents and occupational diseases).

In 2001, by Decision No. 402, dated 11 June 2001, social security coverage for employees was based on the hourly threshold of 24 hours per week. This threshold represented 50 per cent of the maximum weekly working time set at 48 hours of work.[52] Part-time employees working less than 24 hours per week enjoyed coverage only for maternity, old-age, injury and health insurance at minimum level (excluded from sickness and unemployment).[53] In 2003, the Labour Code provision concerning maximum weekly working time was reduced and the maximum weekly hours changed from 48 to 40 hours. However, the threshold remained the same at 24 hours per week (representing 60 per cent of the maximum weekly working hours used as reference period). The threshold changed in 2008 with Decision No. 1114 of 30

49 Decision of the Council of Ministers 77, dated 30 July 2008, section I(1)(a) and (b), section III(3)(a) and (b), section III(4)(a) and (b).

50 ILO, Part-time Work Convention, 1994 (No. 175), article 8(1)(a).

51 Convention No. 175, article. 8(2–3).

52 Labour Code, article 83(2) (as in force in 2001).

53 DCM 402/2001: "(1) Employees on constitutional mandate, appointed employees, employees on an indefinite or fixed term employment contract, for more than one month, who work full-time or part-time for more than 24 hours per week, who are mandatorily insured for temporary work disability, maternity, pension, work accidents and occupational diseases, unemployment and health insurance. (2) Employees on an indefinite or fixed-term employment contract, who work part-time for less than 24 hours per week, who are mandatorily insured at minimum level for maternity, pension, work accidents and occupational diseases, and health insurance."

July 2008, and was set at 87 hours monthly,[54] using as reference period the monthly working time instead of weekly working time. The new threshold of 87 hours per month represented again 50 per cent of the monthly working time of full-time employees, considering that the average working month in Albania is calculated to be 174 hours. The latest Decision No. 77 of 2015, which is still in force, kept the same threshold at 87 hours monthly, clarifying that full coverage is enjoyed by part-time employees working monthly for 87 hours or more, instead of more than 87 hours[55] filling in the previous legal gap for employees working exactly 87 hours per month.

▶ Table 2. Legal threshold and coverage of part-time employees in the social security legal framework over the years

		DCM 402/11.6.2001		DCM 167/29.3.2006		DCM 1114/30.7.2008		DCM 77/28.1.2015	
Legal hourly threshold		>24 hours per week	<24 hours per week	>24 hours per week	<24 hours per week	> 87 hours per month[56]	<87 hours per month	≥87 hours per month	<87 hours per month
Social security coverage	1. Sickness	■	□	■	□	■	□	■	□
	2. Maternity	■	■	■	■	■	■	■	■
	3. Pension	■	■	■	■	■	■	■	■
	4. Work accidents & occupational illness	■	■	■	■	■	■	■	■
	5. Unemployment	■	□	■	□	■	□	■	□
	6. Health insurance	■	■	■	■	■	■	■	■
Per cent[57]		50%[58]		60%[59]		50%[60]		50%	

If we consider the maximum weekly or monthly working time of full-time employees, we notice that the threshold has remained almost the same at 50 per cent of the maximum statutory working time[61] of full-time employees. On the other hand, the threshold has been set considering the maximum statutory working time (weekly or monthly), and it does not take into consideration the maximum working time

54 DCM 1114/2008: "(1) Employees on constitutional mandate, appointed employees, employees on an indefinite or fixed-term employment contract, for more than one month, who work full-time or part-time for more than 87 hours per month, who are mandatorily insured for sickness, maternity, pension, work accidents and occupational diseases, unemployment and health insurance. (2) Employees on an indefinite or fixed term employment contract, who work part time for less than 87 hours per month, who are mandatorily insured but not less than the minimum level for maternity, pension, work accidents and occupational diseases, and health insurance."

55 DCM 77/2015: "(1) Employees on constitutional mandate, appointed employees, employees on an indefinite or fixed-term employment contract, for more than one month, who work full-time or part-time for 87 hours per month and more, who are mandatorily insured, but no less than the minimum level for sickness, maternity, pension, work accidents and occupational diseases, unemployment and health insurance. (2) Employees on an indefinite or fixed term employment contract, who work part time for less than 87 hours per month, who are mandatorily insured but not less than the minimum level for maternity, pension, work accidents and occupational diseases, and health insurance."

56 The threshold changed, using as reference period the monthly working time, not to exclude from protection employees that in a given week might work less than 24 hours but on average over a one-month period work for more than 24 hours per week.

57 The threshold compared to the reference period (maximum weekly or monthly hours of work as defined by law (upper limit).

58 *Ibid.*

59 Maximum weekly working time reduced and set by law at 40 hours as of 2003 (Labour Code, article 83).

60 The working month in Albania is calculated in average to be 174 hours monthly.

of a comparable worker or, as expressed in the Albanian Labour Code, the employee working under the same conditions. For example, there are cases when full-time work for certain categories of employees is set by law or by collective contract to a lower level (i.e. teachers who work full-time for 30 hours/weekly).[62] In such case, the threshold is practically more than 65 per cent of the normal monthly working hours of employees working under the same conditions (approximately calculated at 130 hours).

The estimation based on LFS data shows a considerable share of part-time employment contracts (225,500 in 2018 or 41.2 per cent of total employees). However, due to lack of information on the monthly working time of part-time employees, it is not possible to identify with any precision the number of employees who are unable to meet the requirements for eligibility in relation to sickness and unemployment benefits. Relevant administrative authorities (Ministry of Finance and Economy, Social Security Institute) should keep accurate and up-to-date disaggregated data on the number of part-time employees and their real working conditions (hours of work as per threshold set). With this in mind, the threshold of 87 hours for determining social security coverage should arguably be reviewed periodically with a view to reduce it. This would prevent a large number of employees from being excluded from social security benefits (sickness and unemployment benefits). Consideration should also be given in the future to setting the threshold under the perspective of the comparable worker, in line with the principle of *pro rata temporis* as defined in article 14, paragraph 2 of the Labour Code.

Moreover, the regulation in force does not address clearly the cases where employees work cumulatively for 87 hours/month and more, but the working time is divided between more than one employer. DCM 77/2015, paragraph 15, letter (c), refers to part-time employees such as cleaning and maintenance workers, gardeners or other similar workers, who work for a reduced number of hours for various employers and whose respective incomes are below the minimum wage. It provides for the possibility to conclude an agreement between the various employers and the employee so that one of the employers is liable to declare and pay social security contributions. However, this agreement is not easily achievable in practice.

Voluntary transfer to and from part-time work and information

ILO Convention No. 175 and Recommendation No. 182 also include provisions addressing the concept of transfer from full-time to part-time work and vice versa. Convention No. 175 emphasises that transfers should be voluntary, while paragraph 18 of Recommendation No. 182 adds that employers, where appropriate, should give consideration to requests by workers for transfers from full-time to part-time work and from part-time to full-time work that becomes available in the establishment, and that employers should provide timely information to workers on the availability of full-time and part-time positions to facilitate such transfers. Furthermore, the relevant EU Directive in clause 5 calls for facilitation of transfers to part-time jobs and vice versa.

A precondition to part-time work in Albania is the consent of the employee to work part-time. The wording *"accepts"* is defined clearly in the legal definition provided for in article 14, paragraph 1 of the Labour Code. Therefore, a part-time employment relationship can be established only with the consent of an employee. The Labour Code, in 2015, introduced the obligation of employers to inform part-time employees of available full-time jobs – and vice versa – and ensure equal opportunities with other employees or other jobseekers to apply and be employed in such jobs. In this regard, the provision is a general one, laying out in a general declarative manner the obligation to inform, which provides some

61 With the exception of 2003–2008, when the reduction of the maximum weekly working time was not accompanied accordingly by a proportional reduction of the threshold and it was almost 60 per cent of the maximum weekly working time.

grounds for both employers and workers to consider the possibility of transitioning between full-time and part-time work and vice versa. In practice, however, this leads only to an obligation on the part of the employer to inform its staff of available jobs and ensure equal opportunities for part-time and full-time employees. This is not an obligation to ensure that the transition actually occurs. The law does not specify the conditions or any specific circumstances in which employers are required to consider a request or to allow a transfer from full-time to part-time work and *vice versa*.

As mentioned above, the legal definition itself refers to an act of acceptance on behalf of an employee. Thus, it should be a voluntary choice. The provision does not cover cases where the employer unilaterally introduces part-time work due to reduction in the amount of work in a difficult economic climate affecting all workers in the enterprise or a separate establishment; nor does it refer to cases when an employee, due to personal reasons (family, education, among others), wants to request and obtain a temporary or permanent transfer to part-time work. It only refers to part-time work established by common consent of the parties. The transfer from full-time to part-time work or vice versa is associated with changes to the essential elements of an employment contract (weekly working time, salary[63]), which cannot occur without the written agreement of both parties. Article 21, paragraph 1 of the Labour Code, provides for any employment contract and amendment thereof to be in writing upon the agreement of both parties. Furthermore, as an exception to the general obligation of obedience, under article 23, paragraph 2 of the Labour Code, the employee is not obliged to follow the orders and instructions of the employer if this would entail changes to the working conditions set in the employment contract. This rule is further reinforced in the next sentence stating that an amendment to an employment contract can be made only upon agreement of the parties. By interpretation of article 14 of the Labour Code and based on the principle of contractual freedom, an employee chooses to accept or not the form of employment, be it full-time or part-time. However, following establishment of the employment relationship, considering articles 21(1) and (3), and 23(2) of the Labour Code, the transition from a full-time to a part-time job and vice versa can be made only upon written agreement of the parties and it cannot be imposed unilaterally. If a change is made unilaterally and it is not accepted by an employee, it can be considered to be a dismissal in legal terms. Thus, the provisions concerning the termination of employment apply. According to this reasoning, the non-acceptance by an employee of a transfer request to a part-time position or vice versa does not itself constitute a valid reason for termination. However, the introduction of reduced working hours by an employer based on operational needs and the non-acceptance by a part-time employee might lead the employer to initiate a procedure of termination of the relationship due to operational needs.[64]

On the other hand, employees might request a change to their working conditions, including a change from a full-time to part-time job and vice versa. As examined, this change is subject to the mutual consent of the parties. The only exception relates to nursing mothers who decide to work after the 63rd day following childbirth and up to one year, who are entitled to choose between a paid two-hour daily break or a daily working time reduced by two hours and paid as full-time. The Labour Code does not seem to address other cases when employees may have an explicit right to make a request to transfer to part-time work for specific reasons (e.g. for childcare, sick family members and so forth), with the corresponding obligation on employers to consider such a request. This aspect should be addressed in the future by

62 For example, Order No. 343 of the Minister of Education on the Approval of Normative Provisions for the Pre-university Education System, dated 19 August 2013, Collective Agreement 2018–2021 concluded between FSASH/SPASH and the Ministry of Education, Sports and Youth.

63 Labour Code, article 21(3)(e) and (f).

64 Generally speaking, the operational needs in case law constitute a valid motive for employers to initiate a termination of an indefinite duration employment contract, provided that they observe specific procedures and notice period for the concerned employee under an indefinite duration employment contract.

completing the provision of article 14, paragraph 3 of the Labour Code and establishing a clear process to be followed by employers to give considerations to employees' requests to work part-time, as well as the reasons or grounds when such requests should be accepted or can be refused and other modalities as it might be the case. Furthermore, it is important to ensure adequate procedures of transitioning back from part-time into full-time employment after the specific reason has ceased to exist, so that those who embark upon their request to part-time employment do not get trapped in part-time arrangements which could harm their career prospects, earnings and social benefits in the long run.

Conclusions

Fixed-term and part-time employment in Albania has increased to a considerable extent over the years in the labour market. Both fixed-term and part-time employment contracts are regulated by labour law, which has evolved over the years, and legislative changes have been enacted several times, generally improving the legal protection of employees and providing for better protection and equal treatment for non-standard employees, such as employees under fixed-term and part-time contractual arrangements. However, this does not mean that improvements cannot be made so as to fill existing gaps and improve the practical implementation of labour law provisions.

The approach towards fixed-term contracts was quite liberal in the 1990s. However, after 2003, the Albanian legislature decided to curb this trend by introducing the principle of indefinite duration employment contracts and a legal requirement for concluding fixed-term contracts based on the existence of an objective reason. Several other legal safeguards have been included in the labour legislation in respect of fixed-term contracts. However, some aspects are insufficiently regulated or poorly applied in practice. The concept of "objective reason connected with the temporary nature of the work to be performed" is, for instance, too general. Its meaning and scope are quite often subject to very broad interpretation, even misinterpretation, compromising the main aim of preventing recourse to fixed-term contracts. Thus, there is a need to rethink a more detailed and prescriptive approach. Likewise, case law interpretation of the consequences associated with the lack of an objective reason also fails to be consistent. Future legal intervention should seek to restrict and reduce the resort to fixed-term employment by establishing clear conditions (i.e. a prescriptive list of objective reasons) under which an employer can hire a fixed-term employee accompanied by an explicit presumption that the fixed-term contract which does not meet the objective reason is deemed to be a contract of indefinite duration.

In addition, despite important progress made in extending legal coverage to part-time employees based on the principle of equality of rights, a coverage gap exists for some part-time employees who have limited access to social protection benefits because they do not meet the legal threshold requiring a minimum number of 87 working hours per month. They are, therefore, excluded from sickness and unemployment branches of social security. Such a threshold could be progressively lowered or even removed in order to ensure social security coverage for all part-time workers with a view that every hour worked is counted towards social insurance contributions and entitlements.

Bulgaria
General review of non-standard forms of employment in Bulgaria and the link to informality

Plamenka Markova

Introduction

This article briefly looks into the legal regulation of non-standard forms of work (NSFW) in Bulgaria together with the mainstream employment contract and practices of undeclared employment, as well as into the social protection of workers employed in non-standard forms of work (NSFW). While non-standard forms of work can lower entry barriers into the labour market and facilitate more adequate working arrangements in the context of the new knowledge-based economy, access to social security and protection for this group of workers in Bulgaria is uncertain and unclear.

At first glance, employment in Bulgaria seems rather typical: standard, open-ended employment contracts dominate the labour market, while part-time work, fixed-term or temporary agency work are of marginal significance. Bulgaria has a very low incidence of part-time employment. This indicates that a desire for a secure job is prevalent in the country, while part-time work represents an individual employment strategy for those with a disability or in retirement. Only 1.8 per cent[1] of those in employment worked part-time in 2017, 5.3 per cent worked on short-term contracts,[2] while temporary agency work engages around or below 1 per cent of the employed according to different sources.[3] At the same time, informal work flourishes in different forms.[4] The prevailing use of standard forms of employment does not mean that employers in Bulgaria avoid adopting flexible solutions. Flexibilization of employment has been taking place especially after the economic crises, starting in 1996–1997 and continuing in 2008–09. Employers are currently pressing for amendments to the Labour Code aiming at the flexibilization of employment protection legislation, specifically the rules for home work, distance work, the expansion of fixed-term contract duration to five years (instead of three) and diversification of part-time work to include other forms such as "on-call" and "zero-hour contracts" (with no guaranteed minimum hours). These reforms will be discussed in light of the new EU Directive on Transparent and Predictable Working Conditions.[5] This Directive creates new minimum standards to ensure that all workers, including those on atypical contracts, benefit from more predictability and clarity as regards their working conditions.

1 Eurostat, "Part-time Employment As a Percentage of the Total Employment, by Sex and Age (%)", 10 January 2019. https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsq_eppga&lang=en

2 Source: National Statistical Institute, "Labour Force Survey" (various years). https://www.nsi.bg/en/content/6471/labour-force-survey

3 European Parliament, "The Role and Activities of Employment Agencies: Study" (June 2013).

4 Leandro Medina and Friedrich Schneider, "Shadow Economies Around the World: What Did We Learn Over the Last 20 Years?", *IMF Working Paper 18/17* (2018), 62, 69.

5 EU Directive 2019/1152.

Definitions of NSFW and informal work used in the chapter

In order to discuss non-standard forms of work, some definitions must be clarified first. A variety of definitions have been developed by international organizations. In fact, in some cases, self-employment is classified as a form of non-standard work. For instance, according to the OECD,[6] non-standard employment includes self-employment (own-account workers); temporary or fixed-term contracts; and part-time work. Other definitions clearly distinguish between (a) **salaried employment**, comprising standard employment (i.e. full-time permanent contracts), and non-standard employment (e.g. part-time, temporary contracts, "zero-hour contracts" and so forth); and (b) **self-employment**.

According to the ILO,[7] non-standard work refers to "jobs that fall outside of the realm of standard work arrangements, including temporary or fixed-term contracts, temporary agency or dispatched work, dependent self-employment, as well as part-time work, including marginal part-time work, which is characterized by short, variable, and often unpredictable hours". The European Commission's definition of non-standard work refers to fixed-term contracts, temporary agency work, part-time work and independent contract work.[8] A recent study from both the ILO and the OECD defines "informal employment" as working arrangements that are *de facto* or *de jure* not subject to national labour legislation, income taxation or entitlement to social protection or certain other employment benefits (advance notice of dismissal, severance pay, paid annual or sick leave and so on).[9] This report also indicates that many informal workers are "own-account" workers (45 per cent), although another important group can be associated with the more regular status of employees (36 per cent). A large group (16 per cent) concerns family workers.

The "shadow economy" is conceptually different and somewhat broader than the informal economy. For example, the shadow economy also includes illegal activities not covered by the concept of informal economy. However, there is clearly a strong association. According to an IMF Working Paper, "the shadow economy is known by different names, such as the hidden economy, grey economy, black economy or lack economy, cash economy or informal economy."[10]

Indeed, the definitions of concepts used in this article are borrowed from ILO and EU instruments.

Legal framework of NSFW

Labour relations in Bulgaria are regulated by the Labour Code, in force since 1 January 1987. Since then, the Code has been amended and supplemented and sections have been repealed annually on multiple occasions. Labour law experts almost unanimously agree that, in its current form, the Labour Code is no longer adequate to the current state of play, in light of the changes in employment relations and the

6 OECD, *In It Together: Why less Inequality Benefits All* (Paris: OECD, 2015). http://www.oecd.org/social/in-it-together-why-less-inequality-benefits-all-9789264235120-en.htm

7 ILO, *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects* (Geneva: ILO, 2016). http://ilo.org/global/publications/books/WCMS_534326/lang--en/index.htm

8 European Commission, *Employment and Social Developments in Europe 2014* (Luxembourg: Publications Office of the EU, 2015).

9 ILO and OECD, *Tackling Vulnerability in the Informal Economy* (Paris: OECD Publishing, 2019), 26. http://www.oecd.org/fr/publications/tackling-vulnerability-in-the-informal-economy-939b7bcd-en.htm

10 Leandro Medina and Friedrich Schneider, "Shadow Economies around the World: What Did We Learn Over the Last 20 Years?", 4.

work environment resulting from digitalization. The main shortcomings of the Labour Code stem from its underlying philosophy and characteristics. In fact, the Code was tailored to the requirements of a planned economy dominated by a large number of state-owned elephantine enterprises. After 1989, the Bulgarian economy went through a period of radical changes relating mostly to the privatization of state-owned enterprises (SOE) and the emergence of new private companies.

Thus, the Labour Code gradually became obsolete through its inability to cover the wide range of different employment relationships engendered by the market economy. At the same time, according to data from the National Statistical Institute (NSI), more than 90 per cent of active companies in Bulgaria are microenterprises with a headcount of less than 10 employees.[11] Ensuring compliance with the requirements stipulated in the Labour Code represents a heavy burden on these companies, which is often overlooked. Moreover, the Labour Code precludes the adoption of regulations enabling flexible forms of employment. Bulgaria is at the very bottom of EU rankings in terms of flexible working arrangements. According to a Eurobarometer survey in Bulgaria, only 39 per cent of respondents have access to flexible forms of work, whereas in the European Union the corresponding figure is 65 per cent[12] on average. In connection with this, there has been a growing awareness of the need to develop and adopt a brand-new Labour Code adequate to contemporary realities. Proposals in this regard have been voiced by several employer organizations in Bulgaria.

The Labour Code provides for the conclusion of employment contracts under which the worker or employee consents to work for an employer. Basically, an employment contract is defined by the bond of subordination it establishes between a worker and another party (or an undertaking that belongs to someone else). The worker delivers his/her work in the form of labour to the other party. The other party is traditionally conceived as the owner of an undertaking or business unit that engages a group of workers in the production of goods or the delivery of services.

From this perspective, it is arguably relatively easy to define the employment relationship and distinguish a contract of service (the labour relationship) from a contract for (the provision of) services by identifying:

- subordination to a user undertaking;
- submission to orders in the performance of work;
- integration in a (collective) scheme of planning and execution designed by others;
- economically and socially the worker is dependent on the work done for and by an undertaking that belongs to someone else;
- financial dependency on a (single) employer.

The content of an employment contract is strictly stipulated in article 66 of the Labour Code. The employment contract contains the particulars of the parties and specifies the following: the place of work; occupation and description of the nature of work; date of contract signature and commencement date of employment; duration of employment under the contract; basic and extended annual paid leave and any additional paid leave periods; identical contract termination notice period for both parties to the employment contract; permanent basic and additional remuneration and the intervals at which such remuneration is paid; length of the working day or week. The written form is obligatory for the validity of the employment contract.

11 Luba Yaneva, "Are Small and Medium-sized Enterprises Recovering from the Economic Crisis?", *Statistics Magazine 2/2014* (2014).

12 EU Open Data Portal, "Flash Eurobarometer 470: Work-life balance" (June–July 2018). https://data.europa.eu/euodp/en/data/dataset/S2185_470_ENG

The employment contract may contain other clauses that differ from the described *essentialia negotii.* Notably, if there is a collective agreement concluded prior to the individual contract, the individual clauses of the latter should not be less favourable to the employee than those in the collective agreement, otherwise the individual clauses shall be considered void. Furthermore, the signature, amendment and termination of an employment contract must be notified to the National Revenue Agency within a certain time period. Under this type of contract, the maximum amount of social security and health insurance payments must be paid. An employment contract ensures maximum security and protection of the employee.

The Bulgarian Labour Code envisaged several distinct types of employment contracts. Over time, arrangements for more flexible employment relations have been introduced. The more important ones that are relevant to non-standard forms of work are the following:

- *fixed-term employment contracts*: employment contracts for a specific period that may not exceed three years (article 68 (1)1 of the LC); for temporarily unlimited activities and activities that are not seasonal or short-term, the employment contract may be concluded for at least one year (article 68 (4) of the LC); contracts regarding the attainment of qualification (article 229 of the LC); contracts regarding the upgrading of qualification or retraining (article 234 (3) of the LC). Fixed-term contracts of employment are regulated under article. 68 (1)(2–5) of the LC, which include contracts regarding the performance of a specific activity (the term is defined by the extent and the nature of the task); contracts for the temporary replacement of another employee; contracts for the performance of a mandate job (e.g. in a governmental body). The employee that concludes a fixed-term contract of employment acquires the same rights and is subject to the same obligations as the employee that concludes an unlimited employment contract;
- employment *contracts for additional work to be performed for the same employer*; Additional employment contracts are concluded in spite of the existence of a main employment contract. If not provided otherwise by law, the general rules regarding employment contracts apply. Article 113 of the LC regulates the duration of working time. This contract must contain the working time duration and working time allocation (days, weeks and so on). The job is performed outside the defined working time; the extra work must not be for the same employment function as the work for the main employment contract; the working time from the additional employment contract is not considered when calculating seniority;
- combining an external job and an employment *contract to work on certain days of the month.*

Although these types of contracts add a certain element of flexibility to employment relations, they are essentially modelled on the standard employment contract. Nevertheless, certain amendments to the Labour Code enacted in recent years that offer legislative solutions enabling flexible forms of work should be mentioned: *Work at Home* (article 107b–g); *Telework* (article 107h–o); *Contract with an Enterprise Providing Temporary Work* (article 107p–w); *Employment Contract for Work on Particular Days of the Month* (article 114); *Part-Time Work* (article 138, 138 a). Regulation of these contracts results from the transposition of EU Directives and implementation of ratified ILO Conventions.[13] The amendments in question were enacted in the period 2011–2012 and, according to labour law specialists, they represent a small step forward, despite being generally restrictive and limited in use. It would be useful to present some key highlights of section VIII (b) of the Labour Code – *Additional requirements for teleworking*, as the rules and requirements in question may be relevant also for the regulation of new forms of work.

13 Bulgaria has ratified the following conventions: Private Employment Agencies Convention, 1997 (No. 181); Home Work Convention, 1996 (No. 177). Bulgaria has not ratified the Termination of Employment Convention, 1982 (No. 158) and the Part-Time Work Convention, 1994 (No. 175).

Teleworking is a form of organizing work carried out under an employment contract, which previously was or could have been performed on the employer's premises, away from those premises through the use of information technology. Teleworking is voluntary and either party to the contract (i.e. the employer and the employee) may change the mode of work.

The Labour Code lays down detailed rules, including employers' obligations, as well as requirements for the respective workplace, the necessary equipment and its maintenance in good working order and a number of other requirements for the performance of work. The law further requires the employer to ensure compliance with all applicable health and safety requirements and broad supervision and control powers are vested in the General Labour Inspectorate in this regard.

The content of an individual teleworking employment contract is identical to that of a standard employment contract.[14] This applies to working hours, rest time and leave periods, remuneration and so on. In practice, the contracts in question do not provide greater flexibility in terms of the conditions of employment *per se*. They merely allow the worker to carry out their work away from the premises of the employer, i.e. at their home or another location of their choice. Teleworkers have the same individual and collective rights as their colleagues working at the employer's premises, including the right to trade union association, participation in the general assembly of the workers and employees of the enterprise, settlement of collective labour disputes, etc.

An interesting example of novel forms of employment introduced in the Labour Code are the so-called *short-term employment contracts for seasonal agricultural work*. The contracts in question, introduced in 2015, typically last one day. They must be declared to the Labour Inspection Agency and the necessary tax and social insurance contributions must be paid in advance. Workers are paid at the end of the working day against a receipt and a single worker may work under this type of contract for a maximum of 90 days per year. According to experts, short-term seasonal agricultural work contracts provide a form of employment similar to *voucher work*, but this comparison is not entirely accurate. The contracts in question are effectively a variant of the traditional employment contract, as they do not contain the name of the worker to be employed at the time of contract registration.

In addition to the mainstream employment contract within the meaning of the Labour Code, there are two other forms of contracts in Bulgaria that are similar in terms of their aims – the civil law contract and the copyright contract. A civil law contract is used when the parties wish to conclude a contract for the performance of a certain work or projects and consider the result to be of ultimate importance. With this type of contract, the employer wishes to obtain a certain result within a certain timeframe and the contractor wishes to perform a certain service against payment, i.e. the contract is result oriented. The civil law contract involves less formality as compared to a traditional employment contract. Furthermore, it does not require payment of full stamp duty on social and health insurance but provides for the coverage of a select number of risks. With a view of preventing non-compliance with the provisions laid down in the Labour Code, the competent control bodies have the possibility to declare a concluded civil law contract to be a standard employment contract. This typically happens when a civil law contract contains elements of the latter type of contract, such as a fixed workplace, work hours, entitlement to paid annual leave and so forth.

A "copyright contract" is a type of civil law contract, which lays down the rules and procedures for the use of protected copyright work product. The rules governing this type of relations are laid down in the Copyright and Similar Rights Act. Works subject to copyright include any work of art, literature and

14 EU Open Data Portal, "Flash Eurobarometer 470: Work-life balance," (June–July 2018). https://data.europa.eu/euodp/en/data/dataset/S2185_470_ENG

science that result from creative activity, expressed in any manner whatsoever and in any objective form. The remuneration received against granting the right to use such works is not considered income from employment and is therefore exempt from the payment of social security contributions pursuant to the Social Insurance Code.

In summary, these three types of contracts differ both in terms of content and requirements for the payment of social insurance contributions. In almost all cases, this is the main reason why civil law and copyright contracts are preferred as regards the type of contract to be concluded (see table 1). Furthermore, they offer more opportunities for flexible and untraditional forms of work.

▶ Table 1. Social and insurance contributions payable under different types of contracts

	Tax on the income of natural persons (%)	Social insurance contributions (%)
Employment contract	10	32.7
Civil law contract	10	27.8
Copyright/Royalty contract	10	None
Self-employed persons	10	31.3

Source: Social Insurance Code, January 2019.

Lastly, Bulgarian legislation also recognizes the status of the so-called self-employed individual defined in the Social Insurance Code. The Social Insurance Code lays down the social insurance obligations of parties not employed under mainstream employment contracts. The following categories of persons are considered self-employed within the meaning of the Social Insurance Code:

- persons exercising freelance professions and/or having another vocational occupation and holding a dedicated registration (notaries, lawyers, certified accountants, licenced evaluators, expert witnesses of the courts and prosecution service, insurance agents, etc.);
- persons engaged in a professional occupation at their own risk and account (scientists, artists, educators, architects, economists, engineers, journalists, translators and interpreters and other individuals practising a freelance occupation);
- owners and associates in commercial undertakings;
- farmers and tobacco growers.

In connection with this, minimum and maximum thresholds for the monthly income for the purposes of paying social contributions are determined annually with the adoption of the State Social Insurance Budget Act.

In conclusion, employment relations are governed by the provisions laid down in the Labour Code and the Social Insurance Code, applied in conjunction. Very often, the decision in relation to the form of employment is governed by considerations relating to the requirements for the payment of social insurance contributions. Finally, commercial undertakings or sole traders are issuing invoices for services provided or products sold with increasing frequency. In other words, employed individuals register a commercial undertaking (company) for the purpose of providing a specific service (accounting, translation and interpreting, software development and so forth).

Social insurance for NSFW

People in non-standard forms of work have always been in a more insecure and precarious situation regarding access to schemes and receipt of insurance-based benefits.[15] Historically, the Bulgarian social protection system has primarily been developed to protect people in standard employment. This is particularly the case for insurance-based schemes, i.e. those based on social contributions from the employee and the employer. The Bulgarian social insurance system favours stable careers rather than volatile incomes, characterized by periodic or seasonal highs and lows and periods of zero income. Volatility is much more typical for jobs performed by the self-employed, mainly in forestry, agriculture and fishing as well as in services,[16] which involve significant higher risks.

By contrast, benefits and services financed by taxes (e.g. family allowances, some forms of healthcare and long-term care) and certain means-tested benefits (e.g. social assistance and minimum income provisions for older people) are guaranteed in Bulgaria regardless of the employment status of an individual. Therefore, self-employed persons and all other categories of workers in non-standard forms of work are eligible for social benefits if they meet a means-test.

Gaps in social protection coverage affect both "statutory" access to social protection schemes and "effective" access to benefits (building up of entitlements) for people in non-standard forms of work and in self-employment. In its present role, social protection covers mainly the needs of salaried employees, in particular those in standard employment. People in NSFW usually have the same statutory access to most social benefit schemes as those with standard contracts, with the important exception of certain categories of workers such as seasonal workers in agriculture on short-term contracts, who are not insured against unemployment.

Unemployment benefits are payable to everyone who has paid social insurance contributions into the unemployment fund of the General State Insurance Fund for at least 12 months in the previous 18 months before becoming unemployed. Benefits are payable whether or not the insurance contributions have been paid or are due but have not actually been paid. The duration of unemployment benefit depends on the period of social insurance cover in years and varies from 4 to 12 months (article 54c of the Social Insurance Code). Moreover, the amount of the benefit is 60 per cent of the labour market contribution base, but is limited to a maximum of 100 per cent of the effective minimum wage when provision starts. In line with the flexicurity concept, the government argues that a good unemployment benefit system is necessary to offset negative income consequences during job transfers, but also that unemployment benefits may have a negative effect on the intensity of job search activities and may reduce financial incentives to accept work.

While temporary and part-time workers are equally eligible for contribution-based unemployment benefits as permanent and full-time workers, in practice, they are less likely to fulfil the eligibility criteria. In fact, it may be more challenging for temporary workers to meet the minimum period of contributions payment requirement, since their contracts may not last long enough. Adequacy of income replacement rates is more important for people who work part-time than the issue of eligibility, especially if they are single and childless.

However, some categories of workers, such as casual and seasonal workers as well as self-employed, do not have access to unemployment protection.

15 ILO, *Non-standard Employment around the World*.

16 National Statistical Institute, "Self-employed - Ad hoc module to the Labour Force Survey in 2017", 20 June 2018. https://www.nsi.bg/en/content/16297/self-employment-ad-hoc-module-labour-force-survey-2017

Health insurance. There are no specific regulations concerning healthcare contributions for NSFW contracts. Health insurance amounts to eight per cent of insurable income for everybody. Health insurance rules are universal and do not distinguish between different forms of work according to article 33 of the Health Insurance Act (HIA) of Bulgaria. If a person has not paid more than three contributions in the previous 36 months, he/she shall lose their health insurance rights. This rule, found under HIA, article 40, applies to every category of workers (salaried workers, self-employed, non-standard workers, including the unemployed). Rights are restored only if healthcare contributions due are paid in full. If, in the meantime, the person has incurred healthcare-related expenses, the money spent is not refundable.

Sickness and maternity benefits are paid from a common fund, so a person is either insured for both or for neither of these. For the self-employed, insurance for sickness and maternity is optional; it is mandatory for all other categories of employed persons. Eligibility conditions and the rules for calculating the amount of the benefit are the same for all categories of employed persons.

The rules in the Social Insurance Code concerning maternity and paternity cash benefits are the same for all insured persons. However, the self-employed can choose not to pay. In order to qualify for maternity or paternity benefits, a person must have paid contributions for at least 12 months, which do not need to be consecutive or within any fixed period of time. This means that access to maternity or paternity benefits is relatively easy, even for persons working on part-time or fixed-term contracts. Maternity benefits (for 45 days before birth and up to 1 year after) are equal to 90 per cent of the average daily earnings or the average daily insurance income for the 18 months preceding maternity leave (Social Insurance Code, article 48). The benefits for parental leave for taking care of a child aged between one and two years are determined by the Budget of State Public Insurance Act. For example, the amount for 2020 is BGN 380, compared to minimum wage for 2020, which is BGN 610. This means that maternity and paternity benefits during the first year are quite generous and very advantageous for high-income groups. Many of the people in NSFW do not belong to such groups. During the second year, maternity and paternity benefits are attractive for low-income groups who are not in standard employment and have low incomes.

Old-age and veterans' pensions. There are no specific rules concerning the allocation of old-age and survivors' pensions to NSFW persons in Bulgaria. The formula for the calculation of the amount of pension is the same for all. The pension formula takes into account the whole duration of service and the insurable income in each month. Thus, it strongly favours unbroken careers, working to the disadvantage of many categories of NSFW. Non-standard workers and the self-employed often encounter difficulties in fulfilling the eligibility conditions for receiving benefits from insurance-based schemes (e.g. interrupted contribution periods). In this respect, the criteria for both contributions/eligibility and for the calculation of the level and duration of benefits could be better tailored to the situation of non-standard workers and the self-employed. If this becomes the case, gaps could be significantly reduced. In the case of the self-employed, issues in building up entitlements are often related to the calculation of the income assessment base upon which social contributions are paid.

The only attempt to extend access to social security to non-standard workers was carried out in 2015, when short-term employment contracts were introduced in agriculture by article 114 of the Labour Code. This was an attempt to improve job security and guarantee the payment of social security contributions to short-term seasonal workers. Agricultural workers on daily contracts are employees rather than self-insured, according to the Ordinance on the Terms and Conditions for the Provision, Registration and Reporting of employment contracts under the Labour Code, article 114, issued by the Minister of Labour in 2015. However, if a person relies on this type of seasonal employment, they would actually end up without any health insurance under HIA, article 40, and would most likely qualify only for social pension at pensionable age. Therefore, seasonal employment in agriculture must be combined either with some form of self-employment during the rest of the year or with employment in another sector.

Non-standard workers and the self-employed run a comparatively high risk of poverty in Bulgaria. Insufficient access to social protection affects women and young people in particular, as they are over-represented in non-standard forms of work. It may also endanger intergenerational fairness and fuel the risk of social polarization between different categories of employed people. Thus, lack of access undermines the overall adequacy and sustainability of the social protection system, as the contribution base is thereby eroded.

Labour market impact of insufficient access

Lack of or limited access to social protection also distorts the economic and social bases for accepting non-standard employment or engaging in self-employed activity, sometimes in combination with informal work. Free-riding and not contributing to social protection – for example because certain forms of work are exempt from contributions – may result in a distorted playing field between producers that must factor full social protection costs and those who manage to avoid them. Deficiencies in access to and transferability of employment-related social protection discourage shifts from inactivity to work as well as changes between employment and self-employment. Deficiencies in access to social protection and employment services also increase the type of labour market segmentation, which is generally associated with higher levels of unemployment and lower quality of skills matching. In a wider sense, disparities in the rights and obligations to have social protection coverage also risk eroding the economic basis for standard employment, which has to compete with jobs that are exempt from the cost of social contributions. With a growing number of people in non-standard work and new forms of self-employment, and with more frequent and diverse transitions between salaried employment and self-employment, the link which often exists between access to social protection and the labour law status of people in employment is becoming increasingly problematic. Closing the gap in social protection is not just about fairness and better protection; it is also about enabling people to avail themselves of all employment opportunities in increasingly diverse and fast-changing labour markets.

Therefore, statutory and effective access to social protection is an important vehicle for people's ability to take non-standard work and to move between different forms of employment.

Informal employment in Bulgaria

The informal employment question is, first of all, a major challenge for economies and labour markets around the world. The question of informality is complex and covers a wide variety of phenomena. Informal employment is often a subject of analysis in policy, labour market and economic debate. However, a labour law approach towards informality gives an additional and useful perspective. It shows that informality on the labour market is a governance issue that is not only related to the enforcement of laws but also to the design of labour law and social protection systems. More broadly, an important link exists with the debate on new forms of work. Informal work and new forms of work are both connected to a broader reflection and the need of defining or redefining labour law in light of the changing world of work. Informal work is also a local problem as the local context and circumstances play an important role.

Flexibilization of employment has been taking place especially after the economic crises starting in 1996–1997 and continuing in 2008–09, in different forms compared to the well-documented one in Western Europe or North America. The persistence of the informal economy and informal practices – e.g. the rise of "envelope wages": in 2013, 13.8–21 per cent of the employed received envelope wages[17] – is the context

17 Milen Kolev, "Measuring and Tackling the Undeclared Economy in Bulgaria", Power Point presentation at a conference on "Informal economy and undeclared work in Europe, in States and States of Informality in Europe: Current and Future Perspectives" (Sofia: Marie Curie International Conference, 4 September 2014). https://www.csd.bg/artShow.php?id=1704

that allows flexibility to develop through hybridization. While the informal economy flourished in the first years of the post-communist transition and restructuring and although it was certainly present to some extent even within the highly regulated economy of state socialism, it persists in Bulgaria. The economic crisis forced a significant part of the population, those who were unemployed and with low or short-term unemployment benefits, to adopt an individual or family survival strategy towards alternative forms of employment in the informal sector. For a long time, the informalization of work was seen as simply "work without a contract".

However, informal work, full or partial, also occurs in formal settings and in many structured and strongly regulated branches of economic activity. According to both the ILO and the OECD, "the substantial share of informal employment in large formal enterprises may result from lack of recognition of the employment relationship or from contracts that provide no social protection and other benefits." Conventionally, formal employment is considered wholly separate from informal employment. However, formal employees working for formal employers are often paid two wages in Bulgaria: an official declared wage and an additional unofficial undeclared ("*envelope wage*"). Hence, employment relationships are sometimes concurrently both formal and informal. Different varieties exist of this "quasi-formal employment", ranging from instances where envelope wages are paid as part of the employee's regular salary to situations where envelope wages are paid for extra work or overtime.[18] Similar diversity exists when one examines undeclared employment, which is paid work that is *unregistered by or hidden from* the state for tax, social security and labour law purposes. One form of undeclared employment is wholly informal waged employment, defined as waged work unregistered by or hidden from the state. This may be temporary or permanent, full-time or part-time and relatively low- or high-paid. Other forms involve informal self-employment, ranging from "false self-employment" for one employer to various forms of profit-motivated self-employment, whereby those who are formally self-employed conduct various portions of their trade "off-the-books", or they work wholly clandestinely. In Bulgaria, underreporting of salaries is more common than working without a contract.

There is no common definition of undeclared work (UDW) adopted and applied nationally and no definition is found in law, and the responsible authorities have different understandings of what encompasses UDW. For instance, the National Revenue Agency (NRA) at the Ministry of Finance (MF) considers UDW as working without a labour contract, with a contract with a lower reported wage than the actual wage; recruitment under, or at the minimum insurance threshold for the respective job; or declaring labour contracts as part-time work instead of real full-time employment. For the General Labour Inspectorate Executive Agency (GLI EA) at the Ministry of Labour and Social Policy (MLSP), UDW is an employment relationship without a written labour contract; labour contracts not registered in the NRA; undeclared work based on false calculation of working time that does not account for night, holiday and extra hours work; "envelope wages".

Non-standard forms of work, particularly when they are not voluntary, can increase workers' insecurity in different areas: employment security, earnings, hours of work, occupational health and safety, training, social security, representation and other fundamental rights. There are important overlaps between NSFW – where many non-standard forms of work do not provide legal protection neither in law nor in practice – and informality. The notion of an "informal economy" evokes for most observers images of workers who experience, for example, poverty, exploitation, precariousness, vulnerability and discrimination. It is generally agreed that a huge number of individuals are affected by these difficulties. The real issue is that workers find themselves in precarious situations and lack proper protection, rather than the fact that they work formally or informally, as this does not have a causal effect on their precarious

18 Rositsa Dzhekova and Colin Williams, "Tackling the Undeclared Economy in Bulgaria. A Baseline Assessment", *GREY Working Paper*, No. 1 (2014).

status. Problematically, precarious work can be found in situations of both formality and informality. Like informality, precariousness can be found in both standard and non-standard work. However, there are important distinctions to be made between NSFW and precarious work. A defining characteristic of precariousness is that the worker bears the risks associated with the job,[19] rather than the business that is hiring the worker. Non-standard work refers to the contractual form, whereas precariousness refers to the attributes of the work.

Explanations for the undeclared economy have largely focused on country-level variables.[20] Three major competing theoretical explanations exist. First, the "modernization" theory explains the undeclared economy in terms of the lack of economic development and modernization of state bureaucracies.[21] Second, the "neo-liberal" theory explains the undeclared economy as a result of high taxes and excessive state interference in the workings of the free market.[22] Third, the "political economy" theory explains this sphere as resulting from inadequate state intervention and a lack of safeguards for workers. The problem with all these theories, however, is that they do not explain why some people within a country participate in the undeclared economy and others do not.

While in the 1990s corporate and personal taxes were relatively high, Bulgaria introduced a flat tax in 2008 – currently one of the lowest in Europe (10 per cent). However, waged informalization was, at the time, mainly used to avoid payment of social security contributions, something that in the short run is advantageous to both employers and employees. However, this type of waged informalization represents only part of work practices and organization. Waged informalization is accompanied by other elements, such as forced flexibility and work organization, embedded in the employment system in a hybrid way. The question is: why? The strategies used by employers in the context of crisis and uncertainty are to transfer risks to employees through flexible arrangements. In addition, there is a joint interest of employers and employees in escaping the social security burden. Research in Bulgaria has focused on undeclared work, although other varieties of informal work are also significant. Briefly, drivers of undeclared work and barriers to formalization are connected with:

- *labour supply*: lack of formal jobs, lack of other income, economic pressure, social security burden for low earners, social acceptance, risk perception;
- *businesses*: cost of compliance, inadequacies of existing regulative framework, social security burden, corruption and unpredictability, unfair competition and uneven treatment by the state;
- *socio-cultural factors*: low tax morale, low trust in government, low legitimacy of social security system, low quality of public services.

An undeclared economy arises when there is a lack of compliance with formal rules. This has direct implications on how the undeclared economy must be tackled, by using either disincentives (sticks) to dissuade citizens from engaging in socially legitimate but illegal activities, or incentives (carrots) to encourage participation in legal activities. Conventionally, the Bulgarian government has used disincentives to tackle the undeclared economy, mirroring other governments in Southeastern Europe. Governments have sought to make the cost of being caught and punished greater than the pay-off from participating

19 A precarious job is defined: "by uncertainty as to the duration of employment, multiple possible employers or a disguised or ambiguous employment relationship, a lack of access to social protection and benefits usually associated with employment, low pay, and substantial legal and practical obstacles to joining a trade union and bargaining collectively" in ILO, "From Precarious Work to Decent Work", ACTRAV Symposium on Precarious Work (Geneva: ILO, 2012), 27.

20 Colin Williams, Josip Franic and Rositsa Dzhekova, "Explaining the Undeclared Economy in Bulgaria: An Institutional Asymmetry Perspective", *South East European Journal of Economics and Business*, volume 9, issue 2 (2014), 33–45.

21 ILO, *Women and Men in the Informal Economy: A Statistical Picture* (Geneva: ILO, 2013).

22 Supported by supranational agencies such as the World Bank and the International Monetary Fund. This approach has been widely followed by the Bulgarian government.

in the undeclared economy. First, penalties and sanctions have been increased; second, the likelihood of detection has been improved such as by increasing workplace inspections and by improving data sharing and matching to identify individuals engaged in undeclared employment.[23] In Bulgaria, the main preventative measures used in deterring entry are the following:

- Act on Limiting Administrative Regulation and Administrative Control on Economic Activity (2003);
- mandatory registration of labour contracts (2002);
- minimum social insurance thresholds (2003);
- restricting cash transactions above BGN 15,000 (2011);
- flat income tax on personal income and corporate profits (2008).

In the period between 2005 and 2009, for example, a review of measures to combat undeclared work in Bulgaria reveals that, out of the 222 measures, the majority were focused on deterrence, using stricter requirements, tougher sanctions and improved detection.[24] Indeed, amendments to the Labour Code introduced in 2006 and 2008 extended the powers of control and introduced harsher penalties and fines. In 2015, the government adopted a National Strategy on increasing the collection of revenues, tackling the informal economy and reducing expenditures for the enforcement of legislation (2015–2017).

Opportunistic behaviour is obviously connected with informal employment. This is why the literature has been focusing on economic actor approaches, but also on social actor approaches. The rational economic actor approach explains participation in the informal economy as a pay-off (the benefits of informal work are weighed against the costs or risks of getting caught or punished). This analysis is complemented with a social actor approach, which relates to tax morale and motivation to pay taxes. This may be connected with various personal and contextual circumstances.[25]

The link between non-standard and informal employment

Seen from a labour law perspective, the relationship between informal employment and the question of "new forms of work", including NSFW, becomes apparent. These phenomena share a similar discourse and a comparable pattern of analysis. Workers in various new forms of work, deviating from the traditional standard employment, suffer from lack of protection. Overall, in these cases, the application of labour legislation or social benefits is problematic.

This comes close to how the ILO's Resolution concerning decent work and the informal economy, adopted in 2002 defines the issue: "In many countries, both developing and industrialized, there are linkages between changes in the organization of work and the growth of the informal economy. Workers and economic units are increasingly engaged in flexible work arrangements, including outsourcing and subcontracting; some are found at the periphery of the core enterprise or at the lowest end of the production chain, and have decent work deficits."[26]

23 Dzhekova and Williams, "Tackling the Undeclared Economy in Bulgaria. A Baseline Assessment"; Centre for the Study of Democracy, "The Hidden Economy in Bulgaria: 2011–2012", *Policy Brief No. 37* (Sofia: 2013).

24 Centre for the Study of Democracy, "Policies to Counter the Effects of the Economic Crisis: Hidden Economy Dynamics", *Policy Brief No. 20* (Sofia: 2009).

25 Colin Williams and Aysegui Kayaoglu, "Tackling the Informal Economy in the European Union: A Social Actor Approach", *UTMS Journal of Economics* 7(2) (2016), 135, 133–147.

26 ILO, 2002 Resolution and Conclusions Concerning Decent Work and the Informal Economy (Geneva: 90th session, 2002), paragraph 8.

Non-standard forms of work affected are by informality to a greater degree compared to standard forms of work.[927] However, NSFW also shows a degree of overlap. Non-standard work arrangements themselves include a wide range of variations, that go from regular employment contracts to forms of work outside normal working hours (e.g. shifts, weekends, part-time) or normal workplaces (e.g. home-based or outwork). This can also be associated with informal work.[28]

Conclusion: Governance of labour law

It is clear that informal employment is a governance issue and a task for labour law. Labour law modernization has been on the agenda for a long time. This is due to changing circumstances and the rapid evolutions in the world of work. Beyond standard forms of work, we have witnessed flexible and non-standard forms of work, and the growing number of "new forms of work". Informal work seems to arise at the far end of this continuum, going from the standard to the outer limits of regulation. Very often labour laws have not been applied to new forms of work due to the lack of "fit" between these new types of employment and the traditional rules of labour law that were designed for standard forms of employment. This is something that should be considered when designing policies against informal work.

In terms of policy, strategies such as reinforcing labour inspectorates and enforcement strategies and increasing information are certainly advisable. In addition, the design of labour law is an issue, including ensuring that employment regulations can be applied to situations where, otherwise, the rules do not fit with the new realities. This is clearly demonstrated in the case of the gig economy, where classic concepts of labour law, such as the worker notion, are being challenged. Labour law, thus, needs to adapt and a one-size-fits-all approach is questionable.

In order to close the gap between formality and informality, ILO Recommendation 204[29] suggests broadening protection floors. Indeed, a broad floor of rights should remain an important policy goal. ILO Recommendation 204, however, recommends "diversity with tailored approaches and the establishment of an appropriate legislative and regulatory framework". In Europe, experiences may be relied upon from different sectoral, regional or country perspectives. A comparative legal approach would be useful. Based on the EU's Social Pillar and experience with the new forms of work debate, informal employment may receive multiple governance ideas from the growing experience of contemporary labour law debate.

27 ILO, "Informality and non-standard forms of employment", Prepared for the G20 Employment Working Group Meeting (Buenos Aires: 20–22 February 2018).

28 Danielle Venn, "Measuring Informal Employment in OECD Countries" (WIEGO, 2009). https://www.wiego.org/publications/measuring-informal-employment-oecd-countries

29 ILO, Recommendation No. 204 Concerning the Transition from the Informal to the Formal Economy.

Hungary
Non-standard forms of work in Hungary – Selected issues

Attila Kun

Introduction

This chapter describes and analyses some selected aspects of the Hungarian infrastructure of non-standard forms of work. Section one presents non-standard forms of employment in the Labour Code of Hungary with a focus on the "truly" new forms. Section two examines the phenomenon of the "standard as the new non-standard", while section three investigates non-standard forms of employment "in the grey zone": disguised employment, sham civil law contracts, not to mention economically dependent self-employed persons. Section four introduces some unique Hungarian non-standard forms of employment on the periphery of labour law as tools of state employment policy like simplified employment; cooperatives; public work programmes and household work.

Hungary's latest Labour Code, Act I of 2012 (hereinafter, LC), entered into force on 1 July 2012. The Act mostly focuses on traditional employment and full-time contracts of an indefinite duration. The LC includes a brief statutory definition of an employment relationship, an employer and an employee. Accordingly, "an employment relationship is deemed established by entering into an employment contract. Under an employment contract: (a) the employee is required to work as instructed by the employer; (b) the employer is required to provide work for the employee and to pay wages" (LC 42). "'Employee' means any natural person who works under an employment contract" (LC 34 (1)). "'Employer' means any person having the capacity to perform legal acts who is party to employment contracts with employees" (LC 33). The LC's statutory definition of an employment relationship is broad, vague and also misleading, as the scope of employment relationships falling within its remit is relatively narrow as discussed in further detail in the section on atypical employment relationships. Furthermore, the most popular non-standard forms of work (see section four) are all – at least to some extent – "outsourced" from the scope of labour law, even though they easily could fit into a broad statutory definition (if and when taken seriously).

The notion of an employee covers both typical and atypical workers. In terms of legal policy, the official ministerial reasoning on the LC (2012) stated the following:

> One of the fundamental tools for creating flexibility in employment is the regulation of the so-called atypical forms of employment. In this respect, the Proposal sets out to provide wider scope for the agreements of the parties and only intervenes in the shaping of the forms of employment by the parties inasmuch as necessary to enforce the best interests of employees as a guarantee and to protect important public interests.

The LC does not use the notion of "atypical" because, even within atypical forms of employment, specific forms of work performance and employment have emerged. Therefore, the LC emphasises that an employment relationship is not a homogeneous concept and contains specific rules relating to individual, specific types of employment.

Hungarian labour law is based on a classical "binary divide" between subordinate and independent workers (i.e. employees and self-employed). While the notion of an employee has a relatively clear definition, Hungarian labour law has no clear, established definition of self-employment. In practice, self-employed persons are independent contractors who work under a civil law contract (regulated by the Civil Code[1]). In the Hungarian understanding, the notion of self-employment is an abstract phrase, which has several technical, functional interpretations in various fields of law (e.g. social security, taxation, anti-discrimination and so on). In sum, no clear-cut category of self-employed workers exists in Hungary. It is worthwhile adding that the "gig economy" is immature in Hungary, and platform work, as such, is neither defined nor regulated. Moreover, platform work (as a phenomenon) is undeveloped, nearly invisible and marginal; it is not perceived (yet) as a separate regulatory/employment field, and it also lacks specific policy attention.[2] Platform work is not discussed as an issue. However, given the lack of a "critical mass" about the phenomenon, a lack of specific attention cannot be evaluated as a failure. The current legal regulation does not deal with platform work's expected challenges.

Non-standard forms of employment in the Labour Code: A limited focus on the 'very' atypical

The LC is based on traditional employment and full-time contracts of indefinite duration. Chapter XV of the LC deals with "Special Provisions Relating to Employment Relationships According to Type". The legislature's aim is to offer a relatively comprehensive legislation on so-called atypical forms of employment in this chapter (plus chapter XVI regulates temporary agency work). The forms of employment below hold one common feature: all of them are based on an employment relationship.[3] Obviously, other forms of employment can and do exist on the labour market, but in the absence of regulation, it is very difficult to ascertain them.

The basic policy objectives backing the regulation of atypical employment relationships are clear from background documents, early drafts and ministerial reasoning of the new LC. In this context – in line with Gyulavári and Kártyás[4] – it is useful to cite the Hungarian Work Plan (which was a consultation document published by the Government in 2011 to lay down the framework for the revision of labour market regulation). The main aim of the plan was to remedy – at that time – the very low employment rate in Hungary. It was the operational programme for the prime minister's ambitions to create "one million new jobs in the next ten years" and to build a labour market in Hungary that can be "the most flexible in the world".[5] The Plan set out three fundamental observations on atypical employment. First, it acknowledged that flexible forms of work contribute to the general flexibility and competitiveness of the labour market and can also assist certain disadvantaged jobseekers in finding employment. Second, the Plan envisaged a regulatory method for atypical employment, according to which the parties of an employment relationship should be allowed to freely design most of the details of the atypical employment relationship instead of providing for a detailed regulation of this form of work in labour law. The lack of meticulous regulation of some new atypical forms of employment (on-call, job share and employee share contracts)

1 Act V of 2013.

2 See, for further details, Tibor T. Meszmann, "*Industrial Relations and Social Dialogue in the Age of Collaborative Economy* (IRSDACE), National Report Hungary", CELSI Research Report 27 (2018). https://celsi.sk/media/research_reports/RR_27.pdf

3 György Kiss, "New Forms of Employment in Hungary", in *New Forms of Employment in Europe,* ed. Roger Blanpain, Frank Hendrickx, Bernd Waas (Alphen aan den Rijn: Kluwer Law International, 2016), 234.

4 Tamás Gyulavári and Gábor Kártyás, *The Hungarian Flexicurity Pathway? New Labour Code after Twenty Years in the Market Economy* (Budapest: Pázmány Press, 2015), 86–87.

5 Prime Minister's speech as cited by Tamás Gyulavári and Gábor Kártyás, 2015, 47.

has both advantages and disadvantages. On the one hand, the parties are free to design the contract in harmony with their own needs. On the other hand, often ambiguous regulation can create uncertainties and requires a lot of expertise, creativity and awareness. Thirdly, the Plan also stated that EU labour law (directives dealing with atypical employment) should be implemented as flexibly as possible, making use of all the possible derogations legally available.

The following atypical forms of employment are covered in chapter XV of the Labour Code:

- fixed-term employment relationships;
- on-call work;
- job share;
- employee share;
- teleworking;
- outworkers;
- simplified employment and occasional work relationships;
- employment relationships with public employers;
- executive employees;
- disabled workers.

Out of this list, only three are really novel: on-call, job shares and employee shares, on which this chapter primarily focuses.

On-call

Section 193 of the LC deals with "on-call" work as a specific form of part-time employment. On-call work primarily targets people who are unable or temporarily do not want to work regularly. Such employees can be employed in jobs for up to six hours a day, and they shall work at times deemed necessary to best accommodate the function of their jobs. In other words: instead of a fixed rota, the obligation of the employee to perform work is adjusted to the deadlines attached to the duties. In this case, the duration of the working time reference period may not exceed four months. An employer is expected to inform the employee of the time of working at least three days in advance (in contrast to the general rule, according to which the prior notification period is seven days/96 hours).

On-call work is comparable but not identical with "zero-hour contracts". While in zero-hour contracts (as a form of casual work) the employer is not obliged to provide the employee with regular work, in the Hungarian version of on-call work, the employer is obliged to provide the employee with regular work within the agreed part-time framework (via a maximum four-month regulated reference period).

Job shares

Section 194 of the LC regulates another specific form of part-time employment: job shares. Under such a scheme, an employer may conclude one employment contract with several employees for carrying out the functions of a single job. Where any one of the employees to the contract is unavailable, another contracted employee shall fill in and perform the functions of the job as required. Accordingly, the concerned employees undertake the obligation to duly perform the tasks according to their own schedule.

The scheduling of work shall be governed by the provisions on flexible working arrangements (it is up to employees). Wages shall be distributed among the employees equally, unless there is an agreement to provide otherwise. Such an employment relationship shall cease to exist when the number of employees is reduced to one, because the employment contract will lose its original rationale. In this case, the employer shall be liable to pay the employee affected absentee pay covering a period that would otherwise be due in the event of dismissal by the employer; furthermore, the rules on severance pay also apply.

Employee shares

Section 195 of the LC deals with employee sharing. It means that several employers may conclude one employment contract with one employee for carrying out the functions of a job. Employee sharing might have different varieties, such as when the employee fulfils his duties for multiple employers simultaneously or when the duties are fulfilled consecutively.

As a guarantee, such an employment contract shall clearly indicate the employer designated to pay the employee's wages (this is independent from the method of sharing costs agreed upon by the employers among themselves). The shared employee will be subject to the collective agreement that is in operation in the company paying the wages (unless agreed otherwise).

The liability of employers in respect of the employee's labour-related claims shall be collective (joint and several). Unless otherwise agreed, the employment relationship may be terminated by either of the employers or by the employee. The employment relationship shall cease to exist when the number of employers is reduced to one.

As Kártyás describes it, employee sharing can be useful especially in three scenarios. First, in cases where the work is physically performed in one place but for several organizations (for example, a receptionist in an office tower where over a dozen employers are located). Second, in the case of a group of companies connected by ownership or by close business relationships that want to exchange its workforce for various reasons (for instance, unexpected need or surplus of personnel, or a temporary need for specialists in one of the organizations). Third, in the case of a group of micro-enterprises, each of which are unable to afford to employ a part- or full-time worker but able to share a part-time or full-time employee who works for several of them.[6]

Some new forms of atypical employment are hardly measurable in Hungary (e.g. job share, on-call work and employee shares). Kártyás notes, "employee sharing is almost invisible in the Hungarian labour market".[7]

Making the standard non-standard?

In addition to the listed atypical forms of employment, it is important to note that the default "standard" Hungarian labour law offers plenty of possibilities to alter the structure and content of a seemingly standard employment relationship in a way which includes a huge array of flexibility and atypicality. Thus, the formally "typical" easily can be turned into materially "atypical" via flexible contractual arrangements and work organization.

6 Gábor Kártyás, "New Forms of Employment: Employee Sharing, Hungary", Case Study 15: Policy analysis, 2016b, 2–3.

7 Gábor Kártyás, "New Forms of Employment: Employee Sharing, Hungary", 12.

In general, labour law is not seen in Hungary as "social law" but rather as one instrument of economic and employment policy. The official reasoning of the draft LC contained the following formulations of such policy objectives: "reducing the regulative functions of state regulation", "implementation of flexible regulations adjusted to the needs of the local labour market", and so forth. One might have the impression that unrestrained faith in the omnipotence of the market and the contract (as a regulatory tool) overshadows the state's role as the guardian of decent working conditions.

On a collective level, the general nature of the rules of law in the new Code is that the collective agreement may depart from the provisions of the law without restriction, that is, even to the employee's detriment, which means that the law, in contrast to the collective agreement, is dispositive (i.e. absolute dispositive) in its nature. In other words, this is the fully dispositive character of the Code, as a main rule; the Act lists only the cases in which a deviation is not allowed or only allowed *in melius*. This brand-new regulatory concept significantly enlarges the role and influence of employers (employer interest representations) and trade unions on the labour market, while it simultaneously increases their responsibility and reduces the regulative functions of the state. As a consequence, in practical terms, parties to a collective agreement can almost fully (re)write their "own labour code", with plenty of deviations and specialities.

On the level of individual agreements, in general, there is an increased possibility in the new Labour Code for "*in peius*" individual contractual derogations. However, the main rule is maintained that employment contracts may only depart from the "rules relating to employment"[8] in favour of the employee, on a general basis.[9] There are some exceptions to this main rule in the new Code, as the new Code strives to enhance the regulatory margin of the parties' agreements (in line with the civil law origins of labour law). As such, the Code offers some exceptional possibilities for the parties to derogate – by way of individual agreement – from the "rules relating to employment", also to the detriment of employees. Taking into account the typically unequal position of the parties, these agreements can be risky and abusive for employees. For instance, while it is a basic pillar of labour law that employers shall provide the necessary working conditions, the text of the LC contains a remarkable exception: "unless otherwise agreed by the parties" (LC 51(1)). Derogations like this might completely alter the character of the seemingly standard employment relationship.

The standard employment relationship might become somewhat further flexibilized via the new rules on working time adopted in December 2018: the Parliament passed the Overtime Act, effective as of 1 January 2019. This new amendment to the LC raises the possible overtime hours, based on individual agreements with employees, whereby agreement overrides even collective agreements made with trade unions. This is called "voluntary overtime". In a given calendar year, 250 hours of overtime work can be ordered (as a default rule). However, in addition, a maximum of 150 hours of overtime work can be ordered in a given calendar year subject to agreement between employee and employer in writing (voluntary overtime). The employee may withdraw from the agreement at the end of the given calendar year (LC 109 (1)–(2)). The amount of overtime that may be ordered based on collective agreement is limited at 300 hours in a given year. In addition to the above, a maximum of 100 hours of overtime work can be ordered in a given calendar year subject to agreement between employer and employee in writing (voluntary overtime). It must be noted that one of the most serious impacts of the new regulation is curbing trade union rights by introducing individual consent/agreement for the plus 150/100 hours (instead of

8 For the purposes of the Labour Code, "employment regulations" shall mean legislation, collective agreements and works agreements, and the binding decisions of the conciliation committee (LC 13).

9 See LC 43(1): unless otherwise provided for by law, the employment contract may derogate from the provisions of Part Two and from employment regulations to the benefit of the employee.

being conditioned on a collective agreement). The employee may withdraw from the agreement at the end of the given calendar year (LC 135(3)). It must be noted that – as a guarantee – the employee's withdrawal from such "voluntary overtime" agreements (up to 400 hours) may not in itself serve as grounds for termination (LC 66(3)b). Critics of the new provision say that it makes employees vulnerable to the whims of employers, as they are not necessarily in the position to say no to a request of some "voluntary overtime". The new legislation leaves the 48 hours/week work limit unchanged but raises the maximum of the working time overtime banking period to three years (from one year): where justified by objective or technical reasons or reasons related to work organization, the maximum duration of working time banking fixed in the collective agreement can be 36 months (LC 94(3)). It must be mentioned that the opposition consistently refers to the new law as the "Slave Law". The modification faced intense criticism, sparking the largest street protests under the current government. The vice chairman of the Vasas ironworkers' union told Reuters: "This government just makes laws with scant consultation of those affected."[10]

In general, as a union economist (quoted by Kártyás) noted: "The new labour regulation makes the typical employment flexible enough that employers do not need to turn to the new forms."[11]

Non-standard forms of employment 'in the grey zone'

Disguised employment: A 'getaway from labour law' (bogus contracts) and legal and case law tests for determining the existence of employment relationships

In Hungary, employees are covered and protected by the provisions of the LC, while self-employed persons do not have "labour rights"; they are only covered by the Civil Code (CC). Circumventing the contribution (and tax) burden entailed by a traditional employment relationship and bypassing labour laws are the main drivers for "sham" ("bogus") civil law contracts (as a "getaway" from labour law). In general, according to the LC, artificial agreements shall be null and void, and if such agreement is intended to disguise another agreement, it shall be judged on the basis of the disguised agreement (LC 27(2)).

Albert and Gal take note of the following:

> Bogus employment emerged after the end of communism as a way of saving costs: workers are subcontracted via small companies or individual entrepreneurs submit invoices rather than receiving a wage. The term "forced entrepreneurs" or "entrepreneurs out of necessity" (*kényszervállalkozók*) illustrates that well. It has been quite widespread to have a job as an "ordinary" employee, and also to earn income as a kind of entrepreneur, even from the same employer. That is definitely bogus employment, in the sense that it happens in order to reduce taxes and social security contributions. Such arrangements are frequent and well known, but their exact extent is subject to scholarly debate.[12]

10 Marton Dunai and Bernadett Szabo, "Hungarians Protest against 'Slave Law' Overtime Law", Reuters, 8 December 2018. https://www.reuters.com/article/us-hungary-protest/hungarians-protest-against-slave-law-overtime-rules-idUSKBN1O70FM

11 Gábor Kártyás, "New Forms of Employment: Employee Sharing, Hungary", 14.

12 Fruzsina Albert and Robert I. Gal, "ESPN Thematic Report on Access to Social Protection of People Working as Self-employed or on Non-standard Contracts Hungary 2017" (Brussels: Directorate-General for Employment, Social Affairs and Inclusion, 2017), 5.

Hungarian labour law (as part of private law) is based on the freedom of contract, whereby the parties basically can choose the type of contract (under the LC or the CC) aimed at the performance of work for other persons. Nevertheless, the parties must take the criteria of the employment relationship into due consideration; for this reason, an indirect coercion (as Kiss calls it) prevails for choosing the type of contract in this context.[13] In other words: if work is performed in line with the essence of labour law provisions and has the attributes of an employment relationship, the parties are obliged to conclude an employment contract and the rules of the LC must be applied.

In principle, in case of an improper "classification" of the work-related legal relationship, three main public bodies might play an important role (in general): labour courts, labour inspectorates and tax authorities. First, Hungarian labour courts have issued many controversial rulings on the given topic, but generally speaking they are ready to re-designate civil contracts as employment contracts when all circumstances of the given case indicate the substance of an employment relationship. However, sometimes the idea of a "freedom of contract" represses the protection of workers. Case law practice in this regard goes back a number of decades. Second, regarding labour inspectorates, already an early version of the Labour Inspection Act (Act LXXV of 1996) gave labour inspectors the power to re-designate (reclassify) civil law relationships as standard employment relationships. In line with this power, labour inspectors can fine employers that employ workers on the basis of sham contracts (such decisions may be challenged before a court). Third, the tax administration (in Hungarian: NAV) also has the right to review employment-related contracts in the course of its investigations, but only for taxation-related purposes (i.e. the tax authority is not entitled to decide whether an apparent civil law contract is in fact an employment contract, but it can impose fines and/or retrospective tax and/or contribution refunds).

As mentioned in the introduction, the LC includes a brief statutory definition of an employment relationship (and also of employer and employee). Accordingly, "an employment relationship is deemed established by entering into an employment contract. Under an employment contract: a) the employee is required to work as instructed by the employer; b) the employer is required to provide work for the employee and to pay wages" (LC 42). The elaboration of a more nuanced and sophisticated definition of the employee is the task of judicial practice. There is no single, mandatory test. There is a tradition of differentiating between primary and secondary evaluation criteria of an employment relationship. The system of primary and secondary criteria was introduced by government decree in 2005, which was a non-binding policy document ("guidelines") issued by the ministries of employment and finance to introduce a uniform interpretation by labour and tax inspectors: Joint Decree of the Ministry of Employment and the Ministry of Finance No. 7001/2005 on the evaluation of legal employment relationships. This decree was used by tax and labour authorities as well as by labour courts. The decree was repealed on 1 January 2011 (by Act No. 130 of 2010). Even though these "guidelines" are not formally in force anymore, judicial practice still relies on them. This set of guidelines never has been a legally binding formal legal source in itself. It is rather a form of "soft law". The "guidelines" were trying to accurately define the inherent attributes (or tests) of a dependent, traditional employment relationship. By doing so, they were also facilitating a more accurate and thorough legal practice concerning the differentiation among the various types of contracts eventually underlying a work-related relationship. This catalogue of criteria is of great assistance and importance for the users of law as it lists clear-cut decisive factors in one single document that can be used to make authority supervisions more efficient. The "guidelines" define a list of primary and secondary criteria based on formerly published decisions of the Supreme Court of Hungary.

13 György Kiss, "New Forms of Employment in Hungary", 241.

Under the "guidelines",[14] the four primary attributes of a dependent employment relationship are the following:

- the nature of the performed work activity is defined as a relatively broad "job profile" ("scope of activity") in a labour contract (while in civil contracts the tasks are defined by concrete, single tasks). One of the major attributes of an employment relationship is the regularity of the work activity or the relative continuity of the "job profile";
- dependent employees shall fulfil all work duties in person, i.e. they are not entitled to sub-delegate their tasks or to utilize subcontractors;
- mutuality of obligations: in dependent employment relationships the so-called "duty to employ" is imposed on employers, while – at the same time – employees are bound by the "duty of obedience" (and by the obligation of availability to perform work). Correspondingly, employers shall employ their employees in accordance with the rules and regulations pertaining to contracts of employment, labour relations and the provisions of other legal regulations. Employers also take the risk that employees may not always have work to do. Dependent employees shall appear at the place and time specified, in a condition fit for work and spend the working hours performing work or be at the employer's disposal for the purpose of performing work during this time. Such obligations are not present in civil law contracts;
- dependent employees shall perform their work in accordance with the employer's unilateral instructions ("subordination", "hierarchy", "dependency", integration into the employers' organizational structure and so forth);

According to the "guidelines", the secondary attributes of a dependent employment relationship are the following:

- under a labour contract, employers shall organize work so as to allow the employees to exercise the rights and fulfil the obligations originating from their employment relationship. Employers are also obliged to give the information and guidance necessary for the performance of work. Employers also can command and control the activity of their employees in the utmost detail. In sum: strong personal subordination, substantiated by the broad direction, instruction and control of an employer, are attributes of an employment relationship;
- in cases of dependent labour contracts, employers have the right to organize the working time for their employees (of course, this power is limited by statutory measures to a great extent). As opposed to dependent workers, independent contractors perform their work according to their own schedules (or they are working to deadlines);
- the place of work is an obligatory element of a written contract of employment, and it has to be specified (moreover, the place of work has many legal consequences, e.g. in relation to workers' council rights, travel-cost compensation and so on). Notwithstanding, the place of work of independent contractors is irrelevant from a legal point of view;
- in dependent employment relationships employers shall pay employees' wages regularly in accordance with provisions pertaining to labour relations and as stipulated in the respective employment contracts. According to civil contracts, one-time (non-recurrent) fees are more typical. Taxation of wages and contractual fees also differ;

14 In detail: Attila Kun, "The Boundaries between Dependent Employment and Independent Contractual Arrangements: The Hungarian Pathway for Dermarcation", in *Political Science and Jurisprudence: Problems of Teaching and Research (After Bordeaux-2*), ed. Y. A. Salomatin (Penza, Russia: Penza IPC PSU, 2007), 68–76.

- employers shall reimburse employees for all necessary and substantiated costs incurred in the course of fulfilling their work-related obligations, as well as for all other required expenses incurred in the employer's interests, if the employer has approved them in advance. Moreover, in an employment relationship, the tools for work (and infrastructure, among others) must be provided for by the employers, while independent contractors typically work with their own tools;
- employers shall ensure proper conditions for occupational safety and health in observation of the provisions pertaining thereto. However, independent contractors have to secure their own safety and health by themselves;
- traditional employment contracts shall be concluded in writing, which shall be provided for by the employer. This formal obligation generally does not exist concerning civil law contracts.

The primary criteria sometimes can be decisive factors in themselves, separately. However, secondary criteria are unsuitable for demarcation in themselves; they always have to be complemented by other criteria. Generally speaking, there is no single criterion which could be considered as the crucial one. In other words, none of the tests is likely to be decisive on its own. The relevant authorities always have to test and establish on a case-by-case basis if the specific "mix" of criteria in an individual case is indicating the status of a dependent employee or not. Always the overall picture and the substance of a contract need to be taken into account. The applicability of labour law thus depends on the actual substance of the contract, not on its formal label/title. According to previous case law, primary and secondary criteria must be jointly evaluated and assessed with due consideration of the conditions and circumstances of the given case to determine whether the working relationship is characterized by the necessary degree of personal subordination required for an employment relationship.

As of 1 January 2019, the Labour Inspection Act (Act LXXV of 1996) contains some new provisions (with the aim of codifying case law and making the assessment more consistent): when assessing a legal relationship, it should be taken into account that "the choice of the type of contract on which the work is based may not have the effect of restricting or impairing the application of provisions to protect the legitimate interests of the worker; and the contract may not be pulled out from the rules of the labour law by the will of the parties if its actual content is the subject of an employment relationship".

Economically dependent self-employed persons

As mentioned earlier, the Hungarian structure of working relationships is been based on a binary system of employment contracts and civil law contracts (see: the Labour Code and the Civil Code); there is no "third category". However, it must be noted that the first draft of the new LC (July 2011) attempted to extend the scope of the LC to other forms of employment (in the event of the existence of certain preconditions). The proposal foresaw a category of "person similar in their status to an employee" recognized in an increasing number of countries (i.e. economically dependent workers). Workers in this category depend economically on the users of their services in the same way as employees and have similar needs for social protection. For that reason, the proposal suggested extending the application of a few basic rules of the LC (on minimum wage, holidays, notice of termination of employment, severance pay and liability for damages) to other forms of employment, such as civil (commercial) law relationships aimed at employment (a "person similar to an employee"), which in principle do not fall under the scope of the LC. This planned legislative solution intended to promote the social security of workers, regardless of the nature of the legal relationship within the boundaries of which work is performed. By virtue of this solution, the proposal expected to reduce the evasion of labour law rules and efforts made to seek release from the effect of labour law, and thereby it aimed to contribute to the legalization of employment. This new legal category and concept would have been a groundbreaking development in Hungarian

employment contract law, but finally it was left out from the final text of the Code, mainly because of political debates and because of its rejection by social partners.

The original text of the proposal was as follows:

3. § (1) The provisions of the present Act relating to leave, notice period, severance pay and liability for damages as well as the provisions relating to the mandatory minimum wage shall duly apply to the persons defined in subsection (2) (hereinafter, referred to as "person with a status similar to [an] employee").

(2) With regard to the totality of the circumstances of the case, a person who does not work for another person on the basis of an employment contract shall be regarded as a person with a status similar to that of [an] employee (worker) if
   a) he works for another person in person, against a consideration, regularly and on a long-term basis, and
   b) against the background of the fulfilment of the given contract, he cannot be expected to engage in any other regular, gainful activity.

(3) For the purposes of subsection (2),
   a) work performed on behalf of a business organization owned in majority by the person concerned or his relative shall qualify as work performed in person;
   b) the relatives of the recipient of the service/work and those engaged in a regular business relationship with the recipient of the service/work as well as those qualifying as associated businesses under the rules of taxation shall be regarded as a single person or entity.

(4) The provisions of subsections (1) to (3) are not applicable if the regular monthly income derived from this contract exceeds five times the mandatory minimum wage in force at the time of the fulfilment of the contract.

According to ministerial reasoning about the draft law, the proposal defined the criteria of a person similar in their status to an employee on the basis of relevant international regulations and applications of law. This status could have been only determined with a view to the totality of the circumstances. Gyulavári concluded that the requirements of the proposal were too rigorous and would have been difficult to comply with. He added that, in his opinion, not many people would choose to work as employee-like persons, and the definition would become a moot point very quickly. He also noted that the applicable labour law provisions were planned to be too weak.[15]

The proposal is not on the agenda anymore. Many legal experts in labour law believe that making new legislation in the field of classification by no means would be appropriate to manage arising problems. For instance, a third category of workers (for example, in line with the proposal presented above) probably would not clarify the status of workers and only create more space for abuse.

15 Tamás Gyulavár, "Civil Law Contracts in Hungary, Keynote Paper", in *Seminar Report, 7th Annual Legal Seminar European Labour Law Network* (ELLN), November 2014, The Hague, 93–104.

Unique non-standard forms of employment 'on the cusp' of labour law as tools of employment policy

Simplified employment and occasional work relationships (SE)

Although the construction of simplified employment and occasional work relationships (hereinafter, SE) is regulated partly by Chapter XV of the LC (as a specific form of employment contract), it has a dual nature: Act LXXV of 2010 on Simplified Employment regulates this form of work and its administrative, public law aspects, while the LC (Title 89, among the various forms of "atypical" employment) regulates the labour law side (§§ 200–203). Although SE is formally an employment relationship, more precisely an atypical one, it is probably the most atypical one, being relatively far from the protective level of a standard employment relationship. In fact, the SE system is a kind of "budget" or "second-class" employment relationship, partially "outsourced" from the scope of standard labour law (the LC defines applicable and non-applicable labour law rules).

The SE system provides a cheap, administratively less burdensome and flexible – but also less protective – way of occasional employment. It is a form of casual work or marginal part-time employment. Officially, it is intended to tackle undeclared work, and it may also be a "stepping stone" to the labour market. According to Kiss, simplified employment and occasional work relationships are based on social considerations; they are a support measure for small businesses to establish employment relationships, in particular with home workers.[16] In practice, SE is quite widespread,[17] thus one may suspect that it also is used by employers to substitute standard employment with SE (and save contributions/taxes).[18] Kártyás also reports that "employers might use SE to replace fixed-term contracts under the LC and save social security contributions."[19]

SE comprises two types of temporary work: casual work (which is possible in all sectors, for all employers[20]) and seasonal work (only in some specific sectors: agriculture, tourism, extras for film production). Casual work, in the form of simplified employment, has a temporal limitation: it can be used for a maximum of five consecutive days for a maximum of 15 days a month and 90 days a year. The time limits are related to one employer–employee relationship; hence, it is possible that a worker works in SE all year long. Besides the temporal limit, the number of casual workers employed on a given day is also limited by law ("headcount limit"): the maximum number of casual workers a company can employ on a given day depends on the average number of full-time employees it had in the previous six months.

From a labour law point of view, as a main rule, the general rules of the LC are applicable to SE, unless the Act on SE or the separate title of the LC governs otherwise. In sum, the applicable labour law rules are more flexible than the general provisions of the LC, as illustrated below.

16 György Kiss, "New Forms of Employment in Hungary", 233–241.

17 Its predecessor (1997), the casual employee's booklet (*alkalmi munkavállalói könyv, AM-könyv*), was also very popular but gave rise to a lot of abuse and manipulation in practice. Authorities have found that in many cases the casual employee's booklet was used to employ the worker permanently but under more flexible rules. Gábor Kártyás, "New Forms of Employment: Casual Work, Hungary", Eurofound Case Study 58: Policy analysis, 2016a, 2.

18 *Cf.* Tamás Gyulavári, "Az alkalmi munka a magyar jogban", in *Quid Juris?: Ünnepi kötet a Munkaügyi Bírák Országos Egyesülete megalakulásának 20. Évfordulójára*, ed. Zoltán Bankó, Gyula Berke and Erika Molnár Tálné (Pécs and Budapest: Pécsi Tudományegyetem Állam- és Jogtudományi Kar, Kúria, Munkaügyi Bírák Országos Egyesülete, 2018), 123–136.

19 Gábor Kártyás, "New Forms of Employment: Casual Work, Hungary", 12 . See also in this regard: Tibor T. Meszmann, "*Industrial Relations and Social Dialogue in the Age of Collaborative Economy",* 15.

20 Which is a very broad, soft rule, according to Tamás Gyulavári, 2018, 131.

Administrative costs are reduced as either no written employment contract is needed or a pre-set, uniform template can be used. Declaration of employment may be fulfilled via an online application or by telephone.

Casual workers can never have a long enough contract period to gain eligibility for paid annual leave.

Scheduling of working time is very flexible. For example, an employer is not obliged to give their employee advance notice on the working calendar; working time can be scheduled unequally without taking into account the so-called reference periods; the employee can be employed on Sundays and on public holidays as well as on normal working days. Such an employee neither is entitled to the statutory Sunday wage supplement nor entitled to sick leave, maternity leave, parental leave or other statutory leaves with pay.

Most strikingly, SE entails lower, more flexible minimum wages (as of 2013): employers have to pay only at least 85 per cent of the general national minimum wage and 87 per cent of the national minimum wage for employees with secondary level qualifications (guaranteed wage minimum). Practically speaking, this might be one of the biggest enticements of the whole SE system for employers (in light of this, Gyulavári heavily criticizes this regulatory solution and states that this differentiation can have no rational explanation[21]).

Other rules of the LC are generally applicable to SE (for example, there is no difference with respect to the rules of termination of the employment relationship; however, the temporary nature of SE means practical exclusion from severance pay and so forth). The extremely temporary nature of SE practically hinders some other entitlements (such as access to training, bonuses and collective rights).

SE enjoys a preferential regime of common charges, which is very easy to calculate and administer: employers must pay a flat-rate daily contribution (covering all common charges attached to employment), depending on the category of SE. The flat-rate daily contribution rate is irrespective of hours worked. As a consequence, the employee is not considered to be fully insured according to social insurance legislation; however, they gain entitlements to pension, accident-related healthcare and unemployment insurance (general healthcare in not covered).

It must be noted that any employment contract for SE shall be considered null and void if the parties are engaged under an employment relationship at the time it was concluded. Furthermore, an existing employment contract may not be modified by the parties to conclude SE.

According to an empirical study, authorities often find that SE is also often a field of "semi-undeclared work", as employees' declared earnings are often supplemented by the employer in cash (a grave violation of tax rules), and other forms of malpractice also have been found during inspections. In sum, SE "generally means poor working conditions".[22]

The volume of SE shows a dynamically growing trend. While in 2010 the monthly average number of SE workers was 92,156, by 2015 it rose to 214,180 and 270,676 in 2018.[23] These data shows that employers – in times of increasing labour shortages and steadily growing wages – increasingly are looking for the cheapest and most flexible forms of employment. This data also makes an observer wonder whether SE

21 Tamás Gyulavári, "Az alkalmi munka a magyar jogban", 134–135.

22 Gábor Kártyás, "New Forms of Employment: Casual Work, Hungary", 12.

23 Data of the Ministry of Finance, based on interviews.

is not frequently a vehicle to disguise standard employment. According to Gyulavári, the volume of SE has become simply too big.[24]

Cooperatives: Students (SC) and pensioners[25]

Act X of 2006 on Cooperatives regulates unique non-standard forms of work via cooperatives. The Act on Cooperative regulates four specific types of cooperatives: school cooperatives (SCs), social cooperatives, agro-economic cooperatives and general interest associations of pensioners (i.e. pensioners' cooperatives). Via these cooperatives, the legislature created specific frameworks of work for certain well-defined groups of workers (students, the "needy", people working in agriculture and old-age pensioners), in which employment entails substantially lower costs, and, at the same time, as a "price" of cheap and flexible employment, these workers are excluded from the standard protections of labour law and are placed in a significantly less favourable, more flexible legal position.[26] Two out of these four forms of cooperatives – school cooperatives and pensioners' cooperatives – give rise to a specific triangular form of work, which bears a strong resemblance to the structure of temporary agency work.

The cooperative undertakes sub-tasks according to the needs of its market-based partners (principals/customers) and performs them with its members (students, pensioners) under its own control but also under the professional supervision of the partner, mostly at the partner's premises.

In the following, we mostly deal with SCs, but it must be noted that – as of 2017 – the relatively new construction of general interest associations of pensioners (i.e. pensioners' cooperatives; in Hungarian: KNYSZ) follows the same regulatory model. General interest associations of pensioners are established with the objective to provide employment for active elderly persons, to reactivate them on the labour market and to advance their economic and social status. Other objectives of a pensioners' association include providing a way to transfer the wealth of knowledge and experience its members have gathered over the years to the generations to come. In achieving their objectives, pensioners' associations serve the public interest as well.[27]

SCs fulfil a significant role on the labour market, and they have a dominant and unique market-share in the field of youth employment. Work via a school cooperative is "cheap" for users (SCs enjoy "full immunity" from social security contributions, and no social contribution tax is to be paid[28]) and flexible, because such a form of work is not an employment relationship under the LC. Between 2011 and 2016 the regulation of the employment relationship between SCs and their members could be found in the LC; however, since September 2016 these rules were transferred to Act X of 2006 on Cooperatives.

24 Tamás Gyulavári, "Az alkalmi munka a magyar jogban", 127.

25 For further details, see: Attila Kun, "School Cooperatives: A 'Hungaricum' in Labour Law in the Field of Youth Employment", in *Empleo juvenil: Un reto para Europa (Youth employment: A challenge for Europe),* ed. Roberto, Fernández Fernández and Álvarez Cuesta Henar (Cizur Menor, Spain: Sociedad Aranzadi, 2016), 71–91.

26 Péter Sipka and Leó Márton Zaccaria, "A szövetkezeti tagi munkaviszony jogi kockázatai, különös tekintettel az alapvető munkavállalói jogokra, Munkajog", *HVG* orac, 2017/1 (23–30 December 2017), 23–24.

27 See, for further details, József Hajdú, "A közérdekű nyugdíjas szövetkezetekről: pro *és* kontra", *Acta Universitatis Szegediensis: Acta Juridica et Politica* 81 (2018), 393–397.

28 To be precise, SCs are granted full immunity from social security contribution (social contribution tax: SZOCHO) when employing full-time students. This exception created for SC members can be explained by the fact that full-time students have automatic (so-called "solidarity-based", state-financed) eligibility for social insurance (health services). In other words: full-time students have a status in social security because of their position as students, not because of their employment. See: Act LXXX of 1997 on the Eligibility for Social Security Benefits and Private Pensions and the Funding for These Services.

Thus, members of SCs are not to be considered employees any longer. However, according to Kiss[29] and others,[30] it is questionable that this solution complies with EU-law requirements (bearing in mind the CJEU's[31] interpretation of the notion of employee). In sum, working as a member of a SC entails a lower level of labour law protection. The member of an SC has a legal relationship with the cooperative, but work usually occurs in the organization of a third party ("customer"), with whom the SC concludes a civil law contract for the completion of an agreed task. The SC only organizes the work and provides the necessary workforce.[32]

As their mandate, SCs – as specific forms of cooperatives – are set up to provide students attending pedagogical and educational institutions and students engaged under student relationships with higher education institutions with the opportunity to perform work and to facilitate their practical training. The economic cooperation between the SC and its members (students) and the mode of personal involvement shall be laid down – within the framework of the statutes – in a membership agreement. A membership agreement shall provide for specific responsibilities within the scope of personal involvement of SC members. Importantly, students of SC groups receiving full-time education may fulfil the requirement of personal involvement also within the framework of the provision of services by the SC to a third party ("external service"). The legal relationship for the provision of external service is not an employment relationship but a unique relationship entered into on the basis of a membership agreement relating to external services between the SC and its students receiving full-time education, whereby students of the SC groups receiving full-time education provide a personal service, and for which the relevant provisions of the Civil Code relating to personal service contracts and the provisions of the Labour Code indicated in the Act on Cooperatives shall apply. Accordingly, this is a hybrid, *sui generis* legal relationship, being a mixture of civil law, labour law and the law on cooperatives. The legal status of the student is based on a so-called personal service contract which is regulated in the CC. For this reason, the student cannot be regarded as an employee. However, some rules of the LC still apply.

Working via SC is truly a hybrid, *sui generis* legal relationship.[33] First, it is not inherently part of labour law: not only because it is unregulated by the LC since 2016 but also because the student has no labour law-like obligation to perform work and to be at the employer's disposal, and the SC has also no obligation to provide work continually. In other words, neither the SC has the "duty to employ" and the obligation to guarantee a set of quantity of work, nor is the student obliged to accept all individual tasks offered by the SC (students are only paid for jobs taken). This is a sort of "pay-as-you-go" structure of employment. Second, it is also not a genuine civil law contract since, in the performance of external service, the recipient of the external service has the right to give instructions directly to the students. This right is very much of a labour law-like nature as it covers, in particular, the method, time and scheduling of the performance of the work. In terms of legal theory, it is doubtful how – and to what extent – an employer-like status can be created by way of a simple civil law contract. Furthermore, the civil law nature of the construction also is confuted by the fact that students do not accomplish any genuine entrepreneurial activities; they typically perform micro, fractional tasks (in a well-organized framework). Third, working via SC is also not a genuine business law-related activity, as SCs – formally – operate as cooperatives (in

29 György Kiss, "Employment Relationship between School Cooperatives and their Members: The Stepchild of Employment", *US–China Law Review* 499, No. 14 (2017).

30 Péter Sipka and Leó Márton Zaccaria, "A szövetkezeti tagi munkaviszony jogi kockázatai, különös tekintettel az alapvető munkavállalói jogokra, Munkajog", 28.

31 Court of Justice of the European Union. For instance: C-270/13. 26–41.

32 For further details see: Tamás Gyulavári and Gábor Kártyás, *The Hungarian Flexicurity Pathway? New Labour Code after Twenty Years in the Market Economy*, 152–157.

33 *Cf.* Balázs Simon, "Az iskolaszövetkezet és a szolgáltatás fogadója közötti viszony", in *Visegrád 15.0: A XV. Magyar Munkajogi Konferencia szerkesztett előadásai*, ed. Lajos Pál and Zoltán Petrovics (Budapest: Wolters Kluwer, 2018), 203.

principle: "one member, one vote"[34]). Fourth, SCs also are not genuine non-profit organizations as they execute business services for external contractors and they generate profit. Fifth, this form of work is also not a genuine cooperative-like activity, for several reasons. For instance, SCs do not aim to have their own activities but rather services (they carry out various services for external contractors for a fee[35]); apart from the opportunity to work, SCs do not really offer extra, tailormade services for their members (such as training, social services and so forth); and SCs do not handle common assets of the members and so forth.

Work via SCs entails a "double" contractual structure.[36] First, the prior "framework" agreement shall indicate (usually when joining the SC as a member) the following: a description of the responsibilities undertaken by a member; the minimum amount of remuneration and other related benefits due to a member for specific work performed for the recipient of the external service; and the means of communication between the SC and its members for any period when no work is performed. Second, in case of a concrete "assignment", the actual provision of external service within the scope of personal involvement may be taken up on condition that the SC and the given member agrees in writing about the concrete conditions of work (the person of the service recipient; the work to be performed specifically; the amount of remuneration and other related benefits and the time of payment thereof; the place where work is to be performed; the duration of work).

As mentioned before, the provisions of the LC apply only partially (as indicated in the Act on Cooperatives) and/or in a modified way to the SC sector. The issue of annual paid leave is emblematic in this context: the provisions of the LC on holidays shall apply to SC members providing personal involvement, other than students receiving full-time education and other students, with the derogation that time spent in the provision of external service shall be recognized as time spent at work, where one day of paid holiday shall be given for each thirteen days at work. As such, student members who receive full-time education are not entitled to holiday leave (only other members of the SC, who are very few in practice). Some basic working-time regulations (breaks, daily rest periods), specific protective rules for young workers[37] and a statutory set of minimum wage rules apply to the SC sector, but many protective labour law rules do not (for example, limits on rota scheduling; statutory wage supplements; rules on the termination of the employment relationship; labour law-based limitations on the employee's liability for damages; objective, labour law-based liability of the employer for damages[38]; and rules of TAW, such as the maximum duration of an assignment, equal treatment and so on). Furthermore, SC members' actual contractual freedom might be limited, as, for example, the statute of the SC can determine many aspects of working conditions.

There are many positive features of the activities of SCs. First and foremost, SCs fill a unique gap on the labour market. On the one hand, they offer cost-effective, prompt, flexible and customized solution for firms. On the other hand, they support students to find secure, official, temporary jobs in their leisure time, and they promote the idea of self-care, the acquisition of work experience, among others. Furthermore, such a form of work can help to reduce the rate of undeclared work.

34 However, as civil law is basically dispositive, this principle might be altered in the statute of SCs. Act V of 2013 on the Civil Code contains the basic provisions on cooperative societies.

35 As such, the students' "salary" paid by the user can be actually considered as a cost.

36 Under the previous regulation (between 2011 and 2016) this contract was qualified as an (atypical) *contract of employment*. Since 2016, it is no longer regarded as a contract of employment.

37 "Young worker" means any employee under the age of eighteen. LC 294 (1) a).

38 Even though civil law's rules of liability apply, there is a guarantee that for any damage sustained by the member involved in the provision of external service, or for any violation of their rights relating to personality committed during work performed for the service recipient; the school cooperative and the service recipient shall be jointly and severely liable.

SCs effectively try to match specific labour market supply and demand. While "regular" employees usually prefer some kind of security (employment security, income security, working time security, social security and so forth), full-time students' work-related preferences often coincide with employers' utmost need for flexibility. Students need and favour occasional, sporadic work for short periods, at weekends, during holidays and so on. Furthermore, they are often not as heavily dependent on their income as regular employees (given that they usually have other sources of income such as scholarships, family support and so on; they mostly are motivated to earn extra money; and they prefer flexible working hours to fit their studies). Full-time students' (attending colleges and universities) main "job" is to study; paid employment is normally just a side-activity for them which might be very irregular. In other words: it seems that precariousness (a condition of existence without predictability or security) is not only the overall pressure of contemporary labour markets but a kind of "typical" way of existence for students. This factual situation creates huge opportunities for employers and legislatures alike when employing students and regulating students' atypical employment.[39]

There are many, apparently positive guarantees in the regulation. For example, in principle, the activities of SCs shall be consistent with the educational and training objectives of the educational institutions, and a pedagogical and educational institution or a higher education institution must participate in the foundation and operation of SCs as a member. Furthermore: at least 90 per cent of an SC's membership shall be made up of natural persons attending an educational institution. An SC may not be transformed into a business association. SCs are allowed to merge with other SCs only. The SC shall distribute at least 85 per cent of its annual net turnover among the members in proportion to their personal involvement. The SC shall place at least ten per cent of its taxed profit into a fellowship fund for the purpose of education and training.

Apart from the positive aspects of SC-based work, a number of concerns might be raised about the actual regulation and factual operation of SCs, especially from a labour law point of view (and from the perspective of "fairness").

First, SCs are, in fact, TAW-type "players" on the labour market (focusing exclusively on students), but, legally speaking, they do not qualify as TAWs and the whole construction is partially "outsourced" from the scope of labour law (i.e. the LC). The legislature shaped the work-related relationships between SCs and their members so that they shall not qualify as a special type of TAW, but they are to be considered *sui generis* employment. However, the only real difference, as opposed to TAW, is that the parties of the legal relationship are specified: the worker can only be a full-time (secondary school or university) student and the "agency" can only be an SC. Apart from that, in practice, SCs function like special temping agencies. After all, the practical difference between TAW and SC-work is vague.[40] This approach is, at the very least, ambiguous according to many experts (especially from the perspective of compliance with EU law).[41] Ideally speaking, this would be a collaborative form of employment; however, in reality it is not that different from the business model of agency work. The definition of "assignment" contained in Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work also perfectly fits for the position of students employed via SCs, even if they are not formally labelled as agency workers. Thus, the harsh distinction made between the two legal categories (TAW and SC employment) and the Hungarian way of extraction of SCs from the scope of Directive 2008/104/EC seems to be artificial and unreasonable.

39 For further details, see: Attila Kun, "School Cooperatives: A 'Hungaricum' in Labour Law in the Field of Youth Employment".

40 The issue was also raised by the European Commission, which carried out an investigation in this regard. Noted by György Kiss, "Employment Relationship between School Cooperatives and their Members: The Stepchild of Employment", 509. The situation was settled by diplomatic means and by changing the legal regulation of SCs in 2016. See: Balázs Simon, "Az iskolaszövetkezet és a szolgáltatás fogadója közötti viszony", 208.

41 György Kiss, "New Forms of Employment in Hungary", 234.

Second, SCs enjoy preferential tax treatment (i.e.: SCs can employ students in a much "cheaper" and competitive way than any other kind of employers); however, they rarely exercise extra "social", cooperative-type functions towards their members, apart from organizing employment. In light of this, it is debatable, to what extent an SC – as a specific legal form – deserves such a preferential, exclusive treatment in labour, social security and tax law. However, the extensive lobby activity of the SC sector seems to be successful. Ideally, the maintenance of SCs' current privileged status would be justly reasonable only under improved and additional requirements of professionalism (e.g. study-related employment possibilities for students, enhanced pedagogical function, "extra" social services for students and so on). In this context, it is also often argued – but never precisely justified – that subsidized SC employment might supplant the labour market, especially towards low-skilled workers, career-starters or even towards new forms of work (such as platform work[42]).

Third, this form of employment is probably the most flexible type of employment within Hungarian labour law.[43] SCs are full and exclusive beneficiaries of a highly advantageous labour, social and tax law architecture. It is doubtful, to what extent such flexible rules take into account students' potentially immense vulnerability[44] at work.

Fourth, in practice, the relationship between SCs and pedagogical and educational institutions and higher education institutions is often quite superficial and loose. On the whole, it is open to discussion to what extent are the genuine, general "cooperative" ideas realized in the practice of SCs. SCs are both economic "players" and social "entrepreneurs". In other words, a cooperative's main objective is to satisfy their members' economic and other societal needs. In general, the economic mandate of SCs seems to be fulfilled perfectly, while the social side of their activities suffers from deficits, as everyday experience show. As Sipka and Zaccaria note, the (re)integration of designated social groups into the labour market must not be confined to providing a job itself.[45] However, SCs rarely do more.

Fifth, an earlier targeted empirical study[46] found that the factual labour market function of SCs is not as obviously positive as one might expect in the light of extraordinary state support. In principle, students might be employed for almost all kinds of tasks, from simple manual/unskilled work to the most advanced professional tasks (such as translation, IT work, office administration, sales and so on). However, SCs mainly offer students non-professional, non-targeted, low-quality jobs, typically with no (or little) relation and relevance to their ongoing studies or potential career prospects (e.g. semi-skilled physical jobs, distribution, data recording, promotion, agricultural work and so on). The jobs organized by SCs usually have no real reference value for their further careers, and they mostly have low prestige. According to the empirical research findings, such a form of student employment has no significant added value in terms of targeted socialization for work; it only provides some general work experience and socialization in the "work ethic", if any. For the sake of objectivity, policymakers must not assume that – as about 55 per cent of all students do not have any work experience upon completion of their studies[47] – any kind of

42 Platform work might be a competitor for the SC sector in the future, because platforms could directly match supply and demand, so that students might have the chance to organize their occasional employment more independently and without any intermediary (the SC), and possibly for higher remuneration.

43 Gabor C. Hoffmann, "Working with Students in Hungary – The Most Flexible Type of Employment to Date", 2013, http://www.eu-group.com/blog/working-with-students-in-hungary-the-most-flexible-type-of-employment-to-date/

44 Since students often are unexperienced on the labour market and have very little work experience, they often need extra supervision and so on.

45 Péter Sipka and Leó Márton Zaccaria, "A szövetkezeti tagi munkaviszony jogi kockázatai, különös tekintettel az alapvető munkavállalói jogokra, Munkajog", 30.

46 Gábor Kártyás, Rita Répáczki and Gábor Takács, *A munkaerő-kölcsönzés* és *az iskolaszövetkezeti munka szerepe a fiatalok foglalkoztatásában* (Budapest: Kutatási Zárótanulmány, Közösen a Jövő Munkahelyeiért Alapítvány, 2012).

47 http://tamop248.hu/nmh/kisceg/iskolaszovetkezet.pdf

work experience offered by SCs, even if is neither targeted nor matched to their ongoing studies, might be useful on the real labour market to some extent. It is also supported by empirical research findings that, when one compares the various legal forms of employment available for students,[48] it is obvious that – although one of the most common – SC work helps the least amount of young people to work in their profession during their studies, to find permanent work after completion of studies (especially in their learned profession) and to guarantee a more favourable labour market position.[49]

In sum, SCs are regulated in quite a controversial manner in Hungarian law and they seem to be heavily and disproportionally over-supported by public policy as opposed to their factual activity and effectiveness. The SC sector seems to operate as a kind of state-funded "business", and it is not fully evident what are the extra services (in terms of social and employment policy) carried out by SCs in exchange for such exceptional state support. Kiss argues that the whole employment policy applicable to cooperatives should be changed in Hungary.[50] However, this is not very realistic in the short term, as this type of employment has taken root in the Hungarian labour market, despite the controversy. It is remarkable that, according to the ILO's definition, disguised employment can involve, among others, "masking the identity of the employer by hiring the workers through a third party, or by engaging the worker in a civil, commercial or cooperative contract instead of an employment contract".[51] In our case, the emphasis lies on the notion of the cooperative. It seems that the case of the SC sector in Hungary is a prime example of this malpractice.

According to estimates, in 2016 about 186,293 students and in 2017 about 165,885 students worked via school cooperatives, and about 10,000 "users" (companies) made use of the services of SCs.[52] These figures are substantial and show the extraordinary popularity of students' employment via SCs. One may assume that this form of employment is one of the cheapest and most flexible pools of workforce for companies.

Public works (PW) programme

In 2010, the government introduced a gigantic public works (PW) programme (National Public Work Scheme) to those Hungarians who have few chances to secure a job on the primary labour market. The aim is to activate and thus break their dependency on benefits.[53] The most important goal of PW is to help long-term unemployed individuals to become active again and to prevent jobseekers who recently lost their jobs from being separated from the world of work. This programme appears to be the central and overriding element of the government's employment policy. Social benefit was linked to compulsory public work, while various benefits and pension-type supports (early or disability pensions) either have been abolished or severely curtailed, with former beneficiaries being channelled into the PW. All in all, anti-poverty programmes have been replaced by workfare measures.

48 For example: regular employment, atypical employment, work via a temporary work agency, private law contracts, apprenticeship and so on.

49 Gábor Kártyás, Rita Répáczki and Gábor Takács, *A munkaerő-kölcsönzés* és *az iskolaszövetkezeti munka szerepe a fiatalok foglalkoztatásában,* 135.

50 György Kiss, "Employment Relationship between School Cooperatives and their Members: The Stepchild of Employment", 514.

51 ILO, *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects* (Geneva: International Labour Organization, 2016).

52 Data (estimation) of DiákÉSZ, based on interviews.

53 For a comprehensive and comparative analysis, see: *The Hungarian Labour Market 2015. In Focus: Public Works*, ed. Károly Fazekas and Júlia Varga (Budapest: Institute of Economics, Centre for Economic and Regional Studies, Hungarian Academy of Sciences, 2015).

From a labour law point of view, PW (Act CVI of 2011) is not only a form of active labour market policies but a special – non-standard – form of employment, as it is fairly different from "standard" employment on the primary labour market. The rules of the LC apply to PW employment relationships but with derogations provided for in Act CVI of 2011. Public employment relationships only can be established for a definite period of time. The income collected under the PW scheme is higher than the amount of the social benefit but lower than the general statutory minimum wage on the primary labour market (in 2019, the PW-related income is about 55 per cent of the general statutory minimum wage and has a decreasing tendency[54]).[55] Based on the public employment legal relationship, a public worker is entitled to social insurance and a pension contribution. In the PW programme, the possible employers[56] and employees[57] are listed in the law, as well as the potential PW activities. The programme is under the control of the Ministry of Interior. Public employment is funded by the state in the form of public employment support. PW often stigmatise employees as workers who could not find better positions on the labour market.[58]

This large-scale PW programme is believed to stimulate labour market demand. Public work has, in fact, been the source of rising employment rates recently. But the programme does have its critics,[59] as the scheme has been developed at the expense of other active labour market measures, and it offers a rather isolated, often demoralizing, non-productive working environment. Furthermore, employing people in PW projects for a short time and for little money may help the statistics, but, according to some opinions, there are no real sustainability concerns behind such a policy. The PW programme is not linked closely to the real, competitive labour market, so it is disputed how it can support smooth transition to the "real" labour market. PW is also criticized for (re)creating "a political-clientelistic dependency" from local authorities and impacting labour standards negatively.[60]

Back in 2014 a study was published by HAPN (Hungarian Anti-Poverty Network) titled *The Workfare Scheme Trap*. It is a summary of a non-representative research. The main findings of the research follow. The majority of public scheme workers perform low-prestige jobs. This type of employment really does not help members of the target group to get back into the labour market. The salary is lower than the minimum wage; the living wage is under the poverty line as well. The workfare scheme is unpredictable, the majority of people work part-time and the working conditions are unfavourable. In spite of these facts, the majority of respondents prefer to stay in PW, because the money they earn in the short term is more than the level of relevant social transfers; and their opinion is that it is easier to get into the world of workfare than to find their way back into the primary labour market. According to HAPN, the most threatening feature of this system is that workfare workers become trapped in a vicious circle, because in most of these cases they circulate in an ecosystem composed of the grey/black labour market, the workfare work scheme and social transfers. According to the most optimistic estimates of this research, only five to ten per cent of workfare workers can find their way back to the primary labour market.[61] It must be noted that these statistics have been improving continuously since then.

54 For instance, the same proportion was around 80 per cent in 2011, at the beginning of the Programme.

55 Detailed statistics available at: https://kozfoglalkoztatas.kormany.hu/download/e/58/52000/KF%20B%C3%A9rek%20%C3%A9s%20juttat%C3%A1sok%20v%C3%A1ltoz%C3%A1sa%202011-2019.pdf.

56 For example, municipalities or other organizations basically performing societal, public functions.

57 For example, disadvantaged, low-skilled workers.

58 Gábor Kártyás, "New Forms of Employment: Casual Work, Hungary", 14.

59 For a summary, see: Martin Risak and Erika Kovács, "Active and Passive Labour Market Policies in Austria and Hungary: A Comparative Analysis of Recent Changes and Trends", *European Labour Law Journal* 8, No. 2 (2017), 168–187.

60 Tibor T. Meszmann, "Industrial Relations and Social Dialogue in the Age of Collaborative Economy", 17.

61 Hungarian Minimum Income Network, *The Progressive Realization of Adequate Minimum Income Schemes (Year 2 Report, 2014)*, December 2014.

From a more positive perspective, it must be stated that the PW programme focuses specifically on domestic territories where employment opportunities are very poor. Furthermore, public workers are increasingly provided with training programmes as well, in order to help them enter to the primary labour market after a transitional period of public work.[62] Due to the low transition rate to employment from the scheme, EU country specific recommendations continue to recommend complementing PW with more effective activation elements such as training or counselling. The government, to a certain extent, has made amendments to the scheme over the past years to follow these recommendations.[63] The orientation of public employees to the primary labour market has become a fundamental objective of sectoral policymakers and has been further promoted through continuous fine-tuning of the system.

There are more and more targeted programmes for PW participants that focus on integration, personalized services, incentives for finding regular employment, hiring subsidy measures, "employment bonuses" (fiscal incentives to PW participants and to their potential employers), career counselling programmes and so on. One of the activation programmes that combine PW with activation elements is "Pathway to the labour market", a European Structural Fund (ESF) programme.[64] The programme is targeted at disadvantaged jobseekers and PW participants and offers tailormade services ranging from personalized counselling to start-up incentives. The measure also extended the eligibility of the hiring subsidy for long-term unemployed to former public workers. The programme is expected to reduce the number of registered jobseekers by supporting nearly 200,000 jobseekers or inactive people by the end of 2021.[65] Another ESF-funded measure is "Training for low-skilled and public works participants", which is a small-scale programme targeted at jobseekers with primary education and on PW living in underdeveloped regions of Hungary.[66] The primary objective of the scheme is to provide training measures to participants, and counselling and mentoring services also complement these activities.[67]

On 20 March 2017, the Government adopted a comprehensive package of measures in order to reduce the proportion of public works. PW will be still available for those who are unable to find a job in the primary labour market. Better targeting of public works is supported by various programmes.

PW still involves a large number of disadvantaged workers, but it is becoming less and less important in the labour market. In about two years, the number of public workers fell by about half. The number of public employees was the highest in 2015 and 2016, with about 230,000 people participating in the programme. According to the data of the Ministry of the Interior, in February 2019, only 117,831 people were employed. About 118,000 people account for about 2.6 per cent of all Hungarian workers. Many of the public workers are now finding employment on the primary labour market due to increasing labour demand in the economy.[68] The monthly average statistical number of people registered as public workers was 135,600 in 2018, which meant a decrease of 24.4 per cent compared to the previous year.[69]

62 Hungary, Contribution to the 2015 United Nations Economic and Social Council (ECOSOC).

63 Fruzsina Albert, *Reforms to the Hungarian Public Works Scheme*, ESPN Flash Report 42 (2017).

64 GINOP 5.1.110 and VEKOP 8.1.1.

65 Government of Hungary, *National Reform Programme 2018 of Hungary*. https://ec.europa.eu/info/sites/info/files/2018-european-semester-national-reform-programme-hungary-en_0.pdf.

66 GINOP 5.1.110 and VEKOP 8.1.1

67 Agota Scharle, *Labour Market Policy Thematic Review 2017: An In-depth Analysis of the Impact of Reforms on Inequality – Hungary* (Brussels: European Centre of Expertise (ECE) in the field of labour law, employment and labour market policy, European Commission, 2017).

68 https://kozfoglalkoztatas.kormany.hu/statisztika

69 Hungarian Statistical Office, *Labour Market Trends, Quarters 1–4 2018, Statistical Reflections*, May 2019.

Household work (in tax law)

So-called "household work" (HW) has a special status in Hungarian tax law. Household work is a personal service performed for a natural person as employer. Since 2010, wages from household work (i.e. paid by a natural person "employers" to household service "employees") do not bear any common charges. This unique tax category ("outside" of the tax regime) is regulated by Act 90 of 2010, chapter I. The category of "household services" shall be interpreted narrowly as only those activities are exempted from tax which are listed in the Act (home cleaning, cooking, washing, ironing, childcare, home teaching, home care and nursing, housekeeping, gardening), and no similar tasks can be considered as a household job under this framework.

The household worker must be a natural person performing household work who does not perform this activity as a sole proprietor or as an entrepreneur. The employer must also be a natural person. Such employment must be free from all kinds of business motives.

Although this form of employment is free of common charges (and it is exempt from the tax regime), the employer has to send a report (via an electronic form or telephone) to the tax authority every month when he or she employs a household worker and has to pay a – rather symbolic – monthly flat-rate registration fee (HUF 1,000, approximately €3). The fee is irrespective of the days worked and of the amount of the wage. In the absence of a notification, the tax authority may impose a fine on the employer or may order the subsequent payment of common charges corresponding to the employment relationship.

In practice, as statistics show, despite the very low registration fee, household work is rarely registered (and/or such natural person employers are unaware that registration is compulsory). As Kártyás – and Kelemen as well – note, household workers still form an invisible workforce in Hungary.[70]

The tax regime of household work is neutral towards the labour law status of household workers, and it is not a separate form of atypical/non-standard work. In other words, the household worker and the natural person employer may choose the form of their legal relationship freely (it might be an employment contract, contract of services under civil law or simplified employment; however, in practice, such work is often informal). After all, the construction of household work is not really seen as genuine "labour"; it is more perceived as an economic activity and a lawful source of auxiliary income. Furthermore, as no contributions are paid, a household worker is not covered by social security.

Household work can be mediated via platforms; there are some examples for this in Hungary (e.g. C4W).

The number of legal relationships related to household work is very low (for example, less than 1,000 in 2018 and it was only slightly more than 1,000 in the previous years[71]). It seems that the obligation of registration (and the payment of the – otherwise very low HUF 1,000 – registration fee) is manifested as overly onerous and bureaucratic in the particular world of domestic household work, and people tend to choose informality. Thus, the legislature's aim to fight against undeclared work via this scheme has not been realized successfully so far.

70 Gábor Kártyás, "New Forms of Employment: Casual Work, Hungary", 6; Melinda Kelemen, "A háztartási alkalmazottak foglalkoztatásának kérdései Magyarországon – a láthatatlan munkaerő", *Esély* 3 (2013).

71 Data of the Ministry of Finance and the Tax Authority, based on interviews.

Conclusions

It is obvious that "standard" employment continues to be the leading form of employment in Hungary (similarly to other Central and Eastern European countries).[72] On a general level, when analysing flexible working arrangements in Hungary, the OECD states that "only a fraction of workers has such entitlements".[73]

As for the unique Hungarian non-standard forms of employment "on the cusp" of labour law, as tools of employment policy (SE, SC, PW and household work) – it seems that most of them represent a considerable portion of the labour market. SE, SC and PW seem to be the three most prominent and notable forms of non-standard work in Hungary. In the case of SE and SC, the explanation for this fact can be rather simple: both forms can be pretty "cheap" for employers (SE entails lower minimum wages; SC is supported by preferential common charges) and both are partly "outsourced" from the standard protective scope of labour law. As for PW, even though its significance and volume is now decreasing and it represents a specific enclave on the labour market (focusing on public employment of disadvantaged groups on the labour market, and even a kind of sheltered employment for a less effective workforce), it is still an essential and unique part of the world of work. In general, it is remarkable and exceptional that in Hungary, "non-standard" forms of work – and not the genuine, modern, digitalization-oriented, market-driven, bottom-up forms (such as platform-work, telework, part-time work and so forth)– that are mostly in the forefront are backed heavily by government-driven, top-down labour market policies (PW) and/or financial advantages (such as SE, SC) and – to some extent – fall beyond the traditional scope of labour law. One may have the impression that mostly those non-standard forms of work can really flourish in Hungary which fulfil three practical criteria: considerably "cheaper" than standard employment, "outsourced" from the scope of labour law (at least partly) and backed by some form of top-down policy support. It seems to be obvious that – without these backing factors – the "simple" regulatory flexibility within the boundaries of labour law is not enough (this fact is exemplified by the relatively low incidence of the more "traditional", more labour-law-related atypical forms of employment). Even if these forms originally follow positive labour market policy-oriented goals (the fight against undeclared work, support for disadvantaged groups on the labour market and so forth), their misuse in practice is extensive (replacement of standard jobs, PW: poverty trap). They also can monopolize and supplant the forces of the labour market towards other non-standard forms of work (by distortion of the free choice of the form of work and, at the end of the day, "the right to work").

72 Tamás Gyulavári, "Az alkalmi munka a magyar jogban", 103.

73 OECD, *Economic Surveys – Hungary* (Paris: OECD, 2019).

Montenegro
Non-standard forms of work in Montenegro: Fixed-term, part-time and agency work contracts

Vesna Simović-Zvicer

Introduction

This chapter presents a general overview of non-standard forms of work provided for in the Labour Law of Montenegro, such as fixed-term work, part-time work and temporary agency work. Special attention is paid to legal protection and access to justice for workers in non-standard forms of work. Issues of equal treatment and dismissal protection are of particular importance.

The Labour Law,[1] which has been in force since 2008, continues to be amended to adapt its regulations on employment relationships to the conditions of a market economy. However, in the implementation of this law, there has been a need to further harmonize existing solutions with ILO Conventions; the revised European Social Charter, which was ratified by the end of 2009; and a number of EU Directives. Consequently, this law has endured multiple amendments. However, the most significant amendments to the Labour Law occurred in December 2011 with the introduction of new forms of work and the creation of conditions for a more flexible regulation of employment relationships – such as leasing employees. However, these amendments do provide for solutions aimed at establishing a balance of interests between employees and employers in accordance with international standards in the field of labour such as fixed-term employment contracts.

The Labour Law envisages different forms of employment such as fixed-term contracts, part-time contracts, and temporary and occasional work contracts. These contracts can be concluded for the manufacturing of certain items and providing services to an employer's industry; they are performed outside the premises of the employer: for instance, manufacturing artisanal products; collecting raw materials; the sale of books, brochures and newspapers; IT and online services and so on.[2]

Fixed-term work

One of the most significant amendments to the Labour Law is the introduction of rules on the conclusion of employment contracts of an indefinite duration. There are, of course, exceptions to this, as is the case for any rule. In fact, article 25, paragraph 1 of the Labour Law provides for the following: "A contract of

1 *Official Gazette of Montenegro*, Nos 49/2008, 26/2009, 88/2009, 26/2010, 59/2011, 66/2012, 31/2014 and 53/2014.

2 Labour Law, article 164.

employment may be concluded for a fixed term, for the purpose of performing certain jobs whose duration is predetermined by objective reasons or due to the occurrence of unforeseeable circumstances or events."

It should be noted that one of the essential elements of the employment contract is the period for which employment is concluded (definite or indefinite).[3] In order to prevent misuse, the law envisages that, if an employment contract does not specify the duration of employment, it shall be deemed to be concluded for an indefinite period of time (article 24, paragraph 3). In addition, an employer is required to conclude an employment contract with an employee before work commences. Otherwise, if an employee begins to work without a signed employment contract, it shall be considered that they have commenced employment for an indefinite period of time on the day of commencement of work (article 22, paragraphs 1 and 2). This is conditioned on an employee accepting such employment. The standpoint of case law is that this provision applies to both employees who are employed for an indefinite period of time and those who are employed under a fixed-term contract.[4]

The possibility of concluding a fixed-term contract is limited as an employer cannot conclude one or more fixed-term contracts with the same employee if the duration of the fixed-term contract is continuous or intermittent for more than 24 months (paragraph 2). In addition, to further protect against abuse, it is stated that, if the intermission lasts less than 60 days, it shall be deemed that the employee has been continuously employed by the employer (paragraph 3). Such a legal solution is imprecise. In fact, it is not explicitly defined whether an employee who has been employed by their employer for 24 months, in the case where they subsequently stop working for a certain period, later may conclude a fixed-term contract or a contract for an indefinite period of time with the same employer.

Exceptions to the limitations on the conclusion of a fixed-term contract for a period of 24 months are foreseen in three cases, namely: (1) if it is necessary to replace a temporarily absent employee, (2) to perform seasonal jobs and (3) to work on a given project until its completion, in accordance with the law and the respective collective agreement. Replacement of an absent worker is one of the most common reasons for concluding a fixed-term contract. Temporary absence may happen in the following cases: maternity and parental leave,[5] leave for adoptive parents, temporary inability to work due to illness, suspension of rights and obligations,[6] unpaid leave and other reasons.

The Labour Law does not provide for a definition of seasonal jobs, which may leave space for misuse in terms of concluding a fixed-term contract. In practice, seasonal jobs are carried out during a particular season (e.g. picking crops, maintaining green areas), and they may last for a few months, continuously or with interruptions.

3 See: Labour Law, article 24(1), item 7.

4 Supreme Court of Montenegro, Rev. No. 583/14 of 26 March 2014.

5 Amendments to the Labour Law of 2011 provide for significant changes in relation to maternity leave. The law protects the rights of employees who take care of their children. In this way, in accordance with the principle of reconciliation of professional and family obligations, the protection of rights of both parents, in addition to maternity leave, also includes parental leave. Maternity leave applies to a working mother – 45 days after childbirth, and a compulsory 28 days before delivery. Parental leave can be used for a period of 365 days from the date of birth of the child and this right can be exercised by both parents equally, or if the mother terminates the use of this right, the father can use the remaining days of the leave. See Labour Law, articles 111 and 111a.

6 Under the Labour Law, article 76, the rights and obligations of an employee are suspended if they are absent from work due to: (1) assignment to work abroad as part of an international and technical or cultural and educational cooperation in diplomatic, consular and other representation, as well as for vocational training or education, with the consent of the employer; (2) election or appointment to a state function, in accordance with the Law whose performance requires the temporary cessation of work with the employer, until the expiry of a term of office; (3) serving a prison sentence, safety measure, corrective or protective measure, for up to six months. The right to suspension of employment applies to the spouse of an employee who is sent to work abroad in terms of paragraph 1, item 1 of this article.

Work for a specific project also is envisaged as an exception in terms of concluding a fixed-term contract. The law stipulates that a contract in this case can last until the completion of the project, in accordance with the Labour Law and collective agreement. However, there is no *lex specialis* dealing with this type of contract, and this issue has not been considered even in the context of collective agreements. The justification is that there may be the need to employ persons for certain projects, such as theatre, television, construction and the like. However, this type of contract is used most commonly by nongovernmental organizations, whose functioning (and funding) is based predominantly on projects.

Solutions of the Labour Law relating to limitations on the conclusion of a fixed-term contract are not in line with the aim that was in mind when adopting amendments to the Labour Law, which was to limit fixed-term employment contracts. This is because the law does not regulate the number of successive contracts which may be concluded between employer and employee within a period of 24 months. In addition, the main disadvantage of this solution is that the limitation on the conclusion of a fixed-term contract is not linked to the workplace but to the person (i.e. employee). This means that an employer at a specific workplace where there is continuing need may conclude an unlimited number of fixed-term contracts with different persons. Arguably, a better solution would be for the duration of the employment contract to be linked to the workplace rather than an individual employee. This would mean that, if a person was employed in the workplace for more than 24 months, the need for work at that place should be considered permanent, and no longer temporary, so that any future employment contract at that workplace should be concluded for an indefinite period of time, irrespective of whether the employer employs the same or another person. This limitation should apply to jobs covering the same type of job position and not constitute a general limitation on an employer to not sign fixed-term contracts for other types of jobs.

That being said, in order to prevent misuse of the legal norms that regulate the conclusion of fixed-term contracts, the Labour Law in article 26 provides that, if a fixed-term contract is concluded contrary to the aforementioned provisions or if an employee continues to work for an employer after the expiration of the time limit of the contract, it shall be considered that the employment contract was concluded for an indefinite period, provided that the employee agrees to such employment. Thus, the law provides for the conversion of a fixed-term contract into a contract for an indefinite period of time against the will of the employer in the following situations:

- if a fixed-term contract is concluded contrary to the provisions of the Law or contrary to the cases provided by the Law;
- if an employee, after the expiration of 24 months, continues to work with the same employer. In this case, in order to convert the employment relationship, it is sufficient that the employee continues to work just one day after the expiry of this period. Additionally, the consent of the employee is essential, i.e. to accept the transformation of employment for an indefinite period. However, when it comes to an employer, an exception is made to the principle of consensuality. In fact, the employer is obliged to transform the contract into a permanent employment contract. Fines are applied to both the employer as a legal entity (fine ranging from €500 to €20,000) and to the responsible person representing the employer (fine of €30 to €2,000).

It should be noted that Montenegro's General Collective Agreement[7] provides that the conversion of a fixed-term employment into indefinite employment may be regulated by an annex to the contract of employment.[8] However, in order to arrive at this transformation, fixed-term employment must be concluded

7 *Official Gazette of Montenegro*, No. 14/14. The General Collective Agreement applies to all employers and employees in Montenegro.

8 See: General Collective Agreement, article 7.

in a legally stipulated procedure. This procedure is regulated by the Law on Employment and Exercising Rights with Respect to Unemployment Insurance,[9] which, in article 27, requires a public announcement. In this regard, if the employment relationship is not concluded based on a public announcement, it will be illegal. The case law treats such a situation as *de facto* work, and, thus, if a person works on the basis of a fixed-term contract concluded without a prior public announcement procedure, there are no conditions for the transformation of this contract into a contract for an indefinite period.[10] This implies that the position must be publicly advertised, otherwise the employment relationship is unlawful. However, in such cases, employees will be entitled to earnings and other rights arising from employment within the term of the contract of employment.

In relation to fixed-term employment, it should be noted that the amendments to the Labour Law of 2011 provide that, for a female employee whose fixed-term contract expires during the period of exercising the right to maternity leave, the period for which she concluded a fixed-term contract shall be extended until the expiration of the right to maternity leave (article 108, paragraph 4). In this case, the General Collective Agreement provides for the extension of employment contracts through annexes to the contracts (article 7), which becomes an integral part of the contract. Hence, an issue arises whether the transformation of the contract for an indefinite period of time in this case occurs if the woman, after the extension of the employment contract due to maternity leave, was employed for more than 24 months. It can be concluded that, in this case, there will be no transformation of the employment contract, because the employer had no free will (this is on the basis of consensuality, an essential element of the concept of employment) to decide on the extension of the employment contract, but the contract will be extended according to the Labour Law.

Another issue is often a subject of attention in practice: whether the time of an internship must be included when calculating the end of the 24-month limit. Since interns, pursuant to article 39 of the Labour Law, conclude a fixed-term contract in order to be trained to work independently, the position of the case law is that, even in this situation, there will be no transformation of the employment contract if the intern, after the expiration of the probation period, continues to work for the employer, or if the internship is extended in case of the absence from work due to temporary inability to work according to the regulations on healthcare, health insurance and maternity leave, i.e. that the duration of the employment contract as a trainee cannot be included in the duration of a fixed-term contract.[11]

Termination/End of fixed-term contracts

The most common method of termination of a fixed-term contract is the expiry of the contracted time limit. However, there is a legal vacuum in the law because the law does not define in what form a decision on termination of employment must be adopted. Since the adoption of this decision is a condition for the exercise of rights upon termination of employment (such as rights related to unemployment), in practice, the provisions concerning decisions on the termination of an employment contract shall be applied to this situation. The case law takes a different approach to this question – this indicates that the current situation is inadequate. In fact, in some cases, the Supreme Court delivered a judgment stating that the employee cannot ask for the transformation of the fixed-term contract into the contract for an indefinite period of time unless they refuted the decision on the termination of employment; or that, in the event that they have not refuted the decision on termination of employment, it shall be considered

9 *Official Gazette of Montenegro*, No 14/10, 40/11, 45/12, 61/13 and 20/15.

10 Supreme Court of Montenegro, Rev. No. 240/15 of 06 May 2015.

11 Supreme Court of Montenegro, Rev. No. 315/15 of 01 April 2015.

that they agreed with the consequences arising from that decision.[12] In another judgment, the Supreme Court took a different position, stating that the decision on termination of employment in this case had a declarative character, i.e. that the "termination of the fixed-term employment is not bound by adoption of such act, since it ends with the expiry of the contracted time limit".[13] Such a legal solution and case law indicate legal uncertainty since the Labour Law does not recognize this situation among the grounds for termination of employment by force of law, even though this is the case due to its time-limited nature. Therefore, the expiry of the term should be viewed as the termination of employment by force of law.

When it comes to the termination of a contract before the expiry of the contracted time limit, this may be caused by termination of one of the parties or due to some of the cases in which employment terminates by force of law.[14] Regarding termination of employment caused by an employee's fault, the law foresees two methods: through dismissal[15] and by adopting a decision on termination of employment in disciplinary proceedings (due to a serious breach of work obligations).

Thus, a fixed-term contract can be terminated both after the expiry of the contracted time limit as well as prior to the expiry of that time limit.

Rights and status of fixed-term workers

Pursuant to article 25, paragraph 5, of the Labour Law, employees who concluded a fixed-term contract have the same rights, obligations and responsibilities at work and on the basis of work as employees with permanent employment contracts. However, equal treatment is not guaranteed in relation to the scope of rights, especially those that are exercised in proportion to the time spent at work. This applies particularly to the exercise of the right to annual leave. Namely, the Labour Law in article 63, paragraph 3 provides that an employee is entitled to one twelfth of the annual leave for each full month of employment with their employer, if they concluded employment in that calendar year or their employment with the employer terminates.

There are no provisions within Montenegrin law regarding the conclusion of an employment contract that gives priority to persons who were previously employed with the employer. This is because an employment relationship is based on voluntariness, an employer having the discretionary power to choose among the applicants the candidate who meets the necessary requirements for employment.

12 Supreme Court of Montenegro, Rev. No. 226/15 of 03 April 2015.

13 Supreme Court of Montenegro, Rev. No. 396/15 of 21 April 2015.

14 These cases are defined in the Labour Law, article 139:

(1) when the employee reaches the age of 67 and minimum 15 years of pension insurance, unless otherwise agreed between an employer and an employee – as of the day of delivering a final decision to the employee;

(2) if it is determined in a manner set out by the law that an employee has suffered a loss of working ability – as of the date of delivery of the final decision determining a loss of working ability;

(3) if, pursuant to provisions of the law, i.e. a final court decision or a decision of another body, an employee is forbidden to perform particular jobs and he/she cannot be deployed to other jobs – as of the date of delivery of the final decision;

(4) if an employee is absent from work for more than six months due to serving a prison sentence – as of the date of commencement of serving the prison sentence;

(5) if a security, correctional or protective measure of more than six months has been pronounced to an employee and consequently he/she would be absent from work – as of the date of commencement of application of such measure;

(6) in case of bankruptcy or liquidation, or in all other cases when an employer ceases to work, in accordance with the law.

15 The cases in which the employer may terminate an employment contract are provided by the Labour Law, article 143, and the General Collective Agreement, article 51.

Equality in the exercise of employment rights, under article 25, paragraph 5 of the Labour Law, refers to both the exercise of individual and collective rights. This means that employees employed for a fixed-term period may formally be members of trade unions and thus exercise other collective rights, such as the right to be informed and consulted. However, in practice, trade union activity of fixed-term workers is minimal due to the fact that they do not enjoy steady employment.

Pursuant to article 2 of the Labour Law, this Law applies to employees who work for employers in the territory of Montenegro, as well as to employees sent to work abroad by employers situated in Montenegro, employees in state bodies, state administration bodies, local authorities and public services as well as to employed foreign citizens and stateless persons working for an employer in Montenegro, unless otherwise specified by law.

Different solutions in relation to fixed-term employment are envisaged by the Law on Civil Servants and State Employees,[16] which, in article 48, paragraph 2, provides that an employment relationship may be concluded for a definite period of time for the purpose of:

- replacement of a temporarily absent civil servant or state employee for the period of the absence of a civil servant or state employee, and for no longer than two years;
- performance of project-related tasks with a specific duration, for the lifetime of the project, and for no longer than two years;
- performance of temporarily increased workload, which is not possible to be handled by the existing number of civil servants and state employees, for the period of the temporary increase in the workload, and for no longer than six months;
- training of interns for the duration of the internship.

The Law on Civil Servants and State Employees leaves no possibility for the transformation of fixed-term employment into employment for an indefinite period of time. Article 126 provides that fixed-term employment shall terminate by expiration of the period for which a civil servant or state employee concluded employment or by completion of tasks for the performance of which they were employed for a fixed period of time. Bearing in mind the specifics of employment relationships of civil servants and state employees, and especially given the fact that civil servants do not conclude an employment relationship through an employment contract but through a decision having the character of an administrative act, the case law provides that the provisions of the Labour Law concerning the transformation of fixed-term contracts into a contracts for an indefinite period cannot be applied to civil servants and state employees. Their different legal status prevents the application of the same rules to both civil servants or state employees and all other employees.[17]

The Labour Law does not allow the possibility to regulate other cases of concluding fixed-term contracts by collective agreement. However, in terms of the scope of rights and conditions for exercising employment rights, collective agreements may provide more favourable conditions compared to those of the Labour Law.[18] However, this has not occurred in practice.

16 *Official Gazette of Montenegro*, Nos 39/11, 50/11, 66/12, 34/14, 53/14.

17 Supreme Court of Montenegro, Rev. No. 249/16 of 13 April 2016.

18 See: Labour Law, article 4(2).

Part-time work

The Labour Law recognizes a part-time employment contract as a special type of employment contract (article 31). This contract, as the standard employment contract, may be concluded for an indefinite or definite period of time. However, article 46 of the Law provides for a limitation in terms of concluding part-time employment: "A contract of employment may be concluded with part-time engagement, but for no less than 1/4 (10 hours) of a full-time employment." In Montenegro, full-time work amounts to 40 hours per week (article 44). Thus, part-time work cannot involve less than 10 hours of work per week.

By nature, a part-time employment contract is concluded to meet the needs of the work process. In this regard, in order to prevent misuse in the conclusion of these contracts, the Law provides that the positions for which part-time employment contracts are concluded shall be established by the Act on internal organization and job classification (i.e. Systematization Act), depending on the nature of work and organization type (article 46, paragraph 2).

It should be noted that these contracts must be concluded in writing, and one of the essential elements of the content of the employment contract is the duration of working hours (article 23, paragraph 1, item 10).

The Labour Law provides for the right of employees to perform part-time work (20 hours per week). This possibility is foreseen only in two cases, as follows:

- for one working parent[19] or adoptive parent of a child,[20] or for a person to whom the competent guardianship authority entrusted the child to their custody and care. This possibility exists until the child reaches three years of age, if the child needs additional care;[21]
- for a parent, adoptive parent or a person to whom the competent guardianship authority entrusted a child with disabilities to their custody and care, or a person providing care to a person with severe disability in accordance with special regulations.[22]

Employees who perform part-time work have the same individual and collective rights as full-time employees. In this regard, the Law on Social and Child Protection[23] provides for the right of an employer to a reimbursement of funds based on pay-outs of salary reimbursement to an employee for performing part-time work. This reimbursement is provided in the amount of 50 per cent of paid salary. However, not all employers are granted this reimbursement as the payment of these funds is linked to the previous duration of the employee's employment with that employer. Thus, if an employee was, prior to exercising this right, in an employment relationship with the employer for at least 12 continuous months, the employer is entitled to a reimbursement of 50 per cent of average salary for the 12 months preceding the month of exercising the right to work part-time. If the employee, before applying for the right to perform part-time work, was employed by the employer for less than 12 months, the employer will be entitled to the reimbursement for the period of work preceding the month of exercising the right to work part-time.[24]

19 Pursuant to the Labour Law, a working woman is entitled to maternity leave of 45 days after childbirth, and 28 days prior to delivery as mandatory leave. Thereafter, the right to parental leave can be used by one working parent, until the child reaches one year of age. See: Labour Law, articles 111 and 111a.

20 Pursuant to the Labour Law, article 116, one of the adoptive parents of a child under the age of eight shall be entitled to leave from work for the purpose of nursing the child for a continuous period of one year as of the day of adoption with salary reimbursement, as he/she is at work.

21 See: Labour Law, article 113.

22 See: Labour Law, article 114.

23 *Official Gazette of Montenegro*, Nos 27/2013, 1/2015, 42/2015, 47/2015, 56/2016, 66/2016, 1/2017 and 31/2017.

24 See: Law on Social and Child Protection, article 5.

Rights and status of part-time workers

The Labour Law does not provide for cases in which the employer is obliged to extend the duration of working time to employees who work part-time. However, depending on the good will of the employer, a part-time employment contract can be transformed into a full-time contract. This is provided for by article 7 of the General Collective Agreement. Interestingly, a possibility for "reduction of working time" for employees who have concluded a full-time employment contract is no longer envisaged. This was made possible in the original text of the Labour Law of 2008 due to improvements in technology and the introduction of shift work, but the provision was deleted by amendments to the Labour Law of 2011.[25]

Employees who work part-time may conclude employment contracts with several employers in order to work for a full-time working period (40 hours per week). The Labour Law provides that the manner of part-time employees' exercising their rights and obligations and the schedule of working hours for several employers are regulated by agreement between the employers. However, this legal solution has been little used in practice because few employers have signed this agreement, mostly due to the fact that that there are no penalties envisaged for employers who do not sign it. In addition, the Law does not provide any obligation to keep records of these agreements.

For employees who work reduced working hours, the possibility to extend the duration of working time is not provided due to the nature of their work (especially jobs involving risks to personal health and safety). In addition, the Labour Law introduced a ban on working overtime for employees in such occupations; it is also forbids an employee from concluding an employment contract for such jobs with another employer.[26]

The prohibition of discrimination in the field of labour is provided by the Law on Prohibition of Discrimination,[27] which, in article 16, stipulates that unequal salaries or remuneration for work of equal value is considered discrimination. This prohibition applies both to persons employed on the basis of an permanent employment contract and to persons employed under contracts for temporary or occasional work under a special contract as well as for any person who, on any ground, performs work for an employer. However, this provision must be viewed in the spirit of the solutions contained in the Labour Law, which, in article 31, paragraph 2, provides that a part-time employee shall have all rights arising from and based on employment in proportion to the time spent at work. In this regard, the right to earnings is exercised in proportion to the time spent at work. Proportionality comes to the fore also in exercising the right to a daily work break and annual leave. Thus, employees who work full-time are entitled to a break of 30 minutes during working hours, while employees who work shorter than full-time or those who work longer than four and less than six hours during the day have the right to a break of 15 minutes during work.[28] It follows that some categories of employees who work part-time are not entitled to a break during work, namely employees who have a contract for a working time shorter than 20 hours per week, if that amount of hours is allocated in five working days. The principle of proportionality to the time which an employee has spent at work is envisaged also in terms of exercising the right to annual leave.[29]

In terms of the protection against termination, the Labour Law makes no exceptions depending on the length of working time of an employee; valid reasons for dismissal as well as disciplinary liability are applied equally to all employees, including part-time workers.

25 *Official Gazette of Montenegro*, No. 59/11.

26 See: Labour Law, article 47.

27 *Official Gazette of Montenegro*, Nos 46/2010 and 18/2014.

28 See: Labour Law, article 59(2).

29 See: Labour Law, article 63(2).

Employees who work less than full-time are fully equal in the exercise of collective rights compared to employees who work full-time. There are no restrictions in terms of choice of trade union representatives, given that this issue is regulated by the internal acts of trade unions. The Labour Law allows for working less than 40 hours a week under collective agreement, but, in practice, Montenegro has yet to have such a collective agreement.

Temporary agency work

The Law on Amendments to the Labour Law introduced a new concept of temporary work through the use of an agency for temporary employee leasing to another employer – the user.[30] Temporary employee leasing entails the existence of the following parties:

- the agency for temporary employee leasing, which appears as the employer;
- the employee;
- the user, to whom the employees are transferred (typical for employers performing cyclical activities and who assign employees to a specific job).

Temporary employee leasing is performed on the basis of two documents:

- the agreement governing the relationship between the agency and the user;
- the employment contract that the employee signs with the agency.

According to the opinion of trade unions, the legal mechanism of assigning employees through agencies for temporary work is flawed in Montenegro. A significant number of employers use the services of agencies in order to avoid the legal obligation to transform the employment contracts of employees who worked for them for 24 months into contracts of indefinite duration. Instead, employers use a vehicle known as the "assignment of employees" in such a way that, after the expiration of a period of 24 months, they repeat leasing the same employee through an agency, whereby the agency employee is employed again in the same workplace, without any restrictions under the Labour Law.

An agency obtains the capacity of a legal person upon entry into the commercial registry maintained by the public administration authority in charge of labour affairs. An agency may assign employees to a user provided that this is its sole activity and that it has a license issued by the Ministry of Labour and Social Welfare. In order to be able to assign employees, the agency must meet the conditions defined by the act issued by the Ministry of Labour and Social Welfare (conditions at work, number of staff on administrative duty and so on). The law provides for a short deadline for making a decision on granting a license to an agency, which is seven days from the date of application.[31]

The assigned employee is employed by the agency with whom they have concluded an employment contract for a definite or indefinite period. Given that the agency has the status of an employer, limitations regarding the conclusion of a fixed-term employment contract as well as regarding part-time work are applied to this type of employment contract.

30 The work of the agency for assignment of employees is governed by the Labour Law, articles 43a to 43g.

31 See: Labour Law, article 43a.

An employment contract that an employee signs with an agency must contain all the elements of a standard contract, but it also shall contain the following information:

- that the contract is concluded for the purpose of assignment for temporary performance of particular jobs with a user;
- obligations of the agency towards their employee during assignment to the user.

Rights and obligations/liabilities

In addition to the rights of employees in an employment relationship, the Labour Law provides for the additional protection of employees who have an employment contract with an agency for assignment to a user. Specifically, for the time in which an employee is unassigned, they are entitled to remuneration. In addition, the Labour Law spells out the following obligations for agencies acting as employers:[32]

- the agency shall introduce the employee to the content of the agreement and deliver the agreement upon their request not later than on the day of commencement of work with the user;
- prior to the assignment of an employee to a user, the agency shall introduce the employee to all the risks of performing work with a user relating to occupational safety and health at work and appropriate training in accordance with the regulations on protection at work, unless the employee assignment agreement stipulates that these obligations are to be met by the user;
- the agency shall introduce the employee to any new work technology to be performed on the job, unless the employee assignment agreement stipulates that the user committed to meet that obligation;
- the agency shall pay the agreed salary to an employee for the work carried out with a user even if the user does not deliver the agreed pay slip to the agency or does not meet its obligations towards the agency.[33]

In terms of the termination of an employment relationship of employees employed by temporary work agencies, Labour Law provisions and collective agreements apply. However, one exception can be identified: cessation of the need for an employee's work with an employer, prior to the expiry of the time period for which they were assigned, may not constitute a reason for terminating the employment contract.[34]

The Law also regulates the issue of compensation of damages within the legal mechanism of "assignment of employees". Thus, if an employee suffers damage at work and in connection to work with a user, they must be indemnified by the agency, unless otherwise stipulated by the employee assignment agreement. When it comes to compensation of damage caused by an employee at work and in connection with work, the principle of liability for damage to a third party will be applied. On the one hand, if an employee caused damage to their user, it shall be indemnified by the agency. On the other hand, if an employee caused damage to a third party (i.e. client or business partner of a user), it will be indemnified by the user. This implies that a user will be later entitled to a reimbursement of paid damages by the agency.[35]

32 See: Labour Law, article 43e.

33 Note that national minimum wage provisions apply here.

34 See: Labour Law, article 43d(1).

35 See: Labour Law, article 43g.

The agency is formally an employer to the assigned employee because it has concluded an employment contract, on the basis of which they exercise the rights arising from employment. However, there are some exceptions to this rule. In fact, the user, in relation to the assigned employee, is considered an employer in terms of having the obligation to apply measures governing the protection of occupational safety and health at work and special protection of certain categories of employees. This means that a user must not only provide adequate safety at work but also may be held responsible for any damage suffered by employees in connection with safety measures.

The Labour Law prescribes that the activities of assigning employees shall be performed on the basis of an agreement signed between agency and user. The agreement governing relations between agency and user must include the following components: the number of employees who are assigned to a user; time period for which an employee is assigned; place of work; tasks an employee will perform; applicability of occupational safety and health measures in the workplace where an employee will perform their tasks; the manner and time in which the user is required to provide the agency with salary payment records and regulations the user applies to determine salaries; and any responsibility of the agency if an employee who is assigned to work does not fulfil their obligations.[36]

It is important to note that, in order to prevent abuse of this form of work, the Law stipulates cases in which an agreement on temporary employee leasing may not be concluded, namely: the replacement of employees who are on lawful strike at a user where the strike is carried out; assignment of an employee to perform tasks for which a user, in the past 12 months, has terminated employment contracts due to redundancy; the performance of tasks belonging to an agency's activities, and performance of tasks in other cases stipulated by a collective agreement binding a user. In order to prevent abuse by a user, the law requires a user to inform its relevant trade union on the number of and grounds for concluding contracts with employees through the agency at least once every six months.[37]

One important question is the equal treatment of employees. Although an agency is treated as an employer in relation to their assigned employees, in order to protect employees' rights more effectively, the Law envisages some exceptions. Specifically, the law requires that the salary of an assigned employee must not be lower than the salary earned by employees working at the user, on same or similar jobs with the same qualifications, levels of education and occupation. It is worth noting that the salary of assigned employees is paid by their agency, which has this obligation even when a user does not submit the calculation of agreed salary to the agency or does not fulfil its obligations towards the agency. Also, an employee will be entitled to salary reimbursement for the time when they are not assigned to the user, in accordance with the Law and employment contract.[38]

When it comes to the right to information and consultation, although formal collective rights belong to all employees, including those who are engaged with the agency for assignment, in practice, their realization is exceedingly difficult. Agency employees are not physically present at the agency (at its premises) as they are assigned to one or more employers. Due to the fact that, pursuant to the Law on Trade Union Representation, the right to collective bargaining is only enjoyed by the representative trade union at the workplace, the exercise of this right for employees at the agency for assignment is nearly insurmountable. So far, it has not been possible to conclude collective agreements because agency employees have not organized in trade unions. This may be a consequence of the fact that the legal mechanism of working through temporary work agencies is a recent phenomenon in Montenegro.

36 See: Labour Law, article 43b(1).

37 See: Labour Law, article 43b(2).

38 See: Labour Law, article 43c(4–5).

Other NSFW

The Labour Law also stipulates other specific types of employment contracts, namely:

Contracts for the performance of jobs with increased risk (article 30): they can only be concluded with employees who meet specific requirements regarding to health status as determined by a competent healthcare authority.

Telework (articles 32 and 33): jobs that are part of an employer's activity can be carried out via telework as well as jobs that are related directly to this activity. It is important to note that, in respect to labour rights, employees who work from home are considered fully equal to employees who perform work at an employer's premises. The terms and manner in which work is performed at home is determined by collective agreement with an employer. The Law requires an employer to keep records of contracts for work at home. In addition, an employer is obliged to inform the labour inspectorate about such contracts, which may prohibit an employer's activity if it is deemed that there is an imminent danger to the life and health of the employee during their performance of work at home and if such work threatens the environment.

Contract for work in the household (article 35): what is specific to the performance of work in the household is the ability to pay part of the salary in kind, whose value must be expressed in monetary equivalents in an employment contract. This means that the salary paid in kind is included in the total amount of the employee's earnings on which taxes and contributions to the salary of employees are paid. This option of paying part of the salary in kind may include money for food and housing costs. In addition, the minimum pay out percentage of an employee's cash salary may not be lower than 50 per cent of an employee's gross salary, and during an employee's absence from work, their employer shall pay them a net pecuniary compensation.

Casual labour (article 163): this contract can be concluded for jobs that do not require special knowledge and expertise, and which, by their nature, do not last longer than 120 days within a calendar year.

Contract for performing work outside an employer's premises (article 164): a contract for performing work outside an employer's premises is concluded for the manufacture of specific items and the provision of services and are represented in the employer's activities. Examples of such work typically are performed outside the employer's premises and may refer to manufacturing artisanal products; collecting raw materials; the sale of books, brochures and newspapers; IT and online services and so on.

Conclusion

The implementation of non-standard forms of employment has several shortcomings in practice, especially in the case of fixed-term contracts and temporary agency work.

Namely, the shortcomings of solutions relating to fixed-term contracts arise from the lack of a definition of seasonal jobs, which leaves room for abuse. Additionally, abuse of fixed-term contracts also results from the fact that the law does not set a limit on the number of fixed-term contracts an employer can conclude within the same workplace; the Labour Law only regulates the number of contracts the employer concludes with individual employees. Thus, jobs that are, *de facto*, permanent in nature are being performed under successive fixed-term contracts with different employees in the workplace.

Since 2011, work secured through agencies for temporary employee leasing has served to prolong contracts for a definite period of time, and employers have abused this type of contract: after the expiry of a contract for 24 months, employees are sent to work for agencies for a reasonable assignment and the agency continues to hire them out to the same employer. This is a typical example of abuse of work through temporary assignment agencies. This issue has been addressed with special care by a draft of a new Labour Law, so that, pending its approval, within the period when an employee can be engaged with the employer for a defined period of time (i.e. maximum of 24 months), the employer cannot hire the same employee through a temporary agency work contract to escape the time limitations imposed by the law.

When it comes to the protection of part-time workers, the Labour Law contains solutions that adequately protect the status of this category of workers in Montenegro.

North Macedonia
Fixed-term contracts and disguised employment relationships in North Macedonia

Aleksandar Ristovski

Introduction

The evolution of non-standard forms of work in North Macedonia can be analysed through the development of North Macedonia's labour legislation. In this regard, the labour legislation of North Macedonia is marked by two periods: the period from the adoption of the first Law on Labour Relations of 1993[1] until the adoption of the second Law on Labour Relations of 2005,[2] and the period from the adoption of the second Law on Labour Relations of 2005 until today.[3]

The Law on Labour Relations of 1993, in the entire period of its validity, envisaged three non-standard forms of work. The first two could be classified as "temporary employment" and such forms were an *employment relationship of a definite duration* (fixed-term employment contracts) and *seasonal work*. A third non-standard form was an *employment contract for work at home*. The manner in which this small number of non-standard forms of work was regulated in the first phase of the development of the Macedonian labour legislation was rather restrictive, and employers did not have much flexibility to use them.

The adoption of the Law on Labour Relations of 2005 (which is still in force, despite numerous amendments – hereinafter, LLR), came about because of the realization of two basic goals: the harmonization of North Macedonia's labour legislation with the EU *Acquis Communautaire* and the continuation and deepening of a trend to loosen employment relationships – particularly in relation to flexibility in firing and hiring. To achieve the first goal, North Macedonia's labour legislation (which not only includes the Law on Labour Relations but also other acts on labour law as well) so far has transposed more than 20 European Union Directives, including Directive 1999/70/EC on fixed-term work, Directive 97/81/EC on

1 Law on Labour Relations (Закон за работните односи) (Сл.весник на Република Македонија, бр.80/93).

2 Law on Labour Relations (Закон за работните односи) (Сл.весник на Република Македонија, бр.62/05).

3 At the time of writing, a third phase in the development of North Macedonian labour legislation has already begun. This involves the adoption of new law(s) in the field of labour relations. Unlike the previously used nomotechnical approach, where the regulation of labour law was built upon one general and fundamental law (the Law on Labour Relations) that became a codifying act of North Macedonian labour law because it systematized both individual and collective labour law issues, the "new" approach of the initiator (a working group composed of representatives of the Ministry of Labour and Social Policy and the Social Partners) for the adoption of the new law(s) radically abandoned the previously established nomotechnical practice. In 2018, two new laws were drafted, the first of which, the draft Law on Labour Relations, aims at regulating individual labour relations and the second of which, the draft Law on Trade Unions, Employers' Associations and Collective Bargaining, aims at regulating collective labour relations. The author of this chapter advocates in favour of a holistic approach in the regulation of labour law, against the division of issues falling within the scope of individual and collective labour law in separate legislation.

part-time work and Directive 2008/104/EC on temporary agency work.[4] The achievement of the second goal of increasing flexibilization initially meant drastic reductions of employees' rights in the field of legal protection against dismissal.[5] In parallel with the firing flexibility, the labour legislation has also started a process of gradual flexibilization of existing non-standard forms of work. Starting from the ILO typology for classification of non-standard forms of employment,[6] the following forms can be found in the current labour legislation of North Macedonia: in the group of temporary employment (fixed-term employment contracts and seasonal work); in the group of part-time and on-call work (part-time employment contracts, additional work, multiple part-time employment contracts) and in the group of multi-party employment relationship (temporary agency employment contracts). In addition to the aforementioned non-standard forms of work, Macedonian labour legislation regulates the following forms: home working employment contracts, employment contracts for domestic workers and employment contracts for managerial persons (managerial contracts). However, the existing "list" of non-standard forms of work in North Macedonia has room for extension and further regulation. Above all, there is the need to regulate "casual work" as this can contribute to reducing informal employment in the country.[7]

We argue that a future Law on Labour Relations should address non-standard forms of work that are classified in the fourth group according to ILO typology, encompassing non-standard forms of work that are outside an employment relationship. Hence, the law should be oriented primarily towards addressing employment misclassification and combating "disguised employment relationships". In practice, disguised employment is present both in the private and public sectors. Workers who are in disguised employment relationships also form part of informal employment. Problematically, this form of work has not yet been properly recognized by the main stakeholders involved in North Macedonian labour regulation (e.g. policymakers, social partners, labour inspectors, judges in labour disputes, among others), while the labour legislation still fails to provide for an adequate protection for workers in disguised employment relationships.

4 Stojan Trajanov, *Legal Commentary of the Law on Labour Relations* (Skopje, 2016), 379–380; Todor Kalamatiev and Aleksandar Ristovski, "Implementation of the European Social Model in the Labour Legislation of Republic of Macedonia", *Collection of Papers*, No. 68 (2014), 118.

5 The reduction of the legal protection against dismissal can be identified by the weakening of the following rights of employees: **the right to a minimum notice period** in the event of a dismissal on the initiative of the employer [in comparison with LLR of 1993 (basic text), which stipulated that the minimum duration of the notice period shall be *at least thirty days up to six months* (article 121), the current LLR of 2005 (consolidated text) provides for a minimum duration of the notice period of *at least one up to two months*, taking into consideration the number of dismissed employees (article 88)]; **the amount of severance pay in the event of termination by dismissal due to business reasons** [in comparison with LLR of 1993 (basic text), which provided for severance pay of *at least one up to twelve salaries* taking into consideration the employee's period of service (article 130), the current LLR of 2005 (consolidated text) provides for severance pay in the amount of *at least one up to seven salaries* taking into account the employee's period of service (article 97)]; **the period provided for information and consultation of workers' representatives in the event of collective redundancies** [in comparison with LLR of 1993 (basic text), which imposed an obligation on the part of the employer to inform and consult workers' representatives *up to six months* before the termination of the employment contract (article 127), the current LLR of 2005 (consolidated text) provides for a period of *at least one month* before the commencement of collective redundancies (article 95)].

6 ILO, *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects* (Geneva: ILO, 2016), xxii.

7 In the North Macedonian legal system, "temporary and occasional work" (i.e. contracts for temporary and occasional provision of services to legal and natural persons) can be considered equivalent to ''casual work''. These contracts are regulated formally by the Law on Personal Income Tax (Сл.весник на Р.М, бр. 241 од 26.12.2018) and are addressed solely in the context of tax law, not labour law. In terms of their legal nature, contracts for temporary and occasional provision of services to legal and natural persons are not treated as employment contracts.

Fixed-term contracts

In theory, an employment relationship of an indefinite duration (договор за вработување на неопределено време) is usually treated as a "rule", while an employment relationship of a definite duration (i.e. fixed-term employment – договор за вработување на определено време) is an "exception" to the established rule.[8] Arguably, this principle should apply both in legislation and in practice. First of all, the LLR provides that the employment contract must be concluded for a period of time which is not defined in advance (employment for an indefinite period of time).[9] However, an employment contract also may be concluded for a period of time defined in advance (fixed-term employment).[10] An employment contract whose duration is not determined therein "shall be considered an employment contract for an indefinite period of time".[11] Consequently, the legislature introduced an irrefutable presumption which excludes the possibility of proving that a fixed-term employment relationship has been established if the particular employment contract does not stipulate a provision determining the period for which the contract was concluded. Fixed-term employment contracts are also fairly common in practice. According to the statistical data of 2019 (second quarter), 16.7 per cent of the total number of employees in North Macedonia worked under employment contracts of a temporary duration.[12] However, the overall picture of the role and significance of fixed-term contracts, their position vis-à-vis contracts of indefinite duration (open-ended contracts) and the level of protection of fixed-term employees should not be based solely on the initial premises on which labour legislation and statistical data are founded.

Admissibility of fixed-term contracts (existence or non-existence of objective justification)

The dilemma of "existence" or "non-existence" of objective justification (reasons) for establishing a fixed-term employment relationship can be addressed by means of a short chronological analysis of North Macedonia's labour legislation from the period of the country's independence to date.

The LLR of 1993 (until the amendments of 2003) exhaustively enumerated the admissible "cases" for establishing a fixed-term employment relationship: seasonal work; increased volume of work; replacement of an absent worker; work on a project. [13] Compared to the basic text of the LLR of 1993, its amendments of 2003 and the basic text of the LLR of 2005 introduced a more general and flexible formulation for the determination of the objective reasons for concluding fixed-term employment contracts. The amendments of 2003 stipulated that the fixed-term employment relationship may be established for performing activities which by their nature are of a definite period, with or without interruption, for up to three years.[14] The basic text of the LLR of 2005 retained the same legal formulation for the determination of the objective reasons for commencement of fixed-term employment relationship, but it increased the

8 Todor Kalamatiev, *Employment Relationship of a Definite Duration in the Law on Labour Relations of the Republic of Macedonia,* (Skopje: Liber Amicorum – Proceedings in Honour of Professor Vasil Grivcev, Ss. Cyril and Methodius University, Iustinianus Primus Faculty of Law in Skopje, 2002), 307.

9 Law on Labour Relations, article 14(1).

10 Law on Labour Relations, article 14(2).

11 Law on Labour Relations, article 14(3).

12 *Source:* Eurostat, "Temporary Amployees As a Percentage of the Total Number of Employees, by Sex and Age", 6 January 2020. https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsq_etpga&lang=en.

13 See Law on Labour Relations of 1993, article 23.

14 See Law on Amending and Supplementing the LLR (Службен Весник на Република Македонија, бр.25 од 08.04.2003), article 2.

maximum limitation *up to four years*. Nevertheless, the Law on Amendments and Modifications of the LLR of 2008 repealed the phrase "performing activities which by their nature are of a definite period of time" from the basic text of the Law.[15] By doing so, **it practically abolished the existence of an "objective justification" (reason)** as a precondition to conclude a fixed-term employment contract.[16] Thus, the current labour legislation does not require the existence of an "objective justification" to conclude the initial or subsequent (successive) fixed-term contracts. Therefore, it turns out that employers have full freedom to employ fixed-term employees regardless of the fact that the work position or the work for which they are employed is of an open-ended and permanent nature. This practice is not explicitly forbidden by the Law, but it does not appear to be in conformity with the principal position taken in the LLR that fixed-term employment is merely a "possibility" or an "exception" from the "rule" that employment relationships are established for an indefinite duration.

Taking into consideration the general guidelines stipulated in the ILO Termination of Employment Recommendation, 1982 (No. 166), the EU Directive 1999/70/EC on fixed-term work, as well as the principal position taken in the LLR, we consider that North Macedonian labour legislation should *de lege ferenda* make the conclusion of fixed-term employment contracts conditional on the existence of an objective reason, i.e. justified ground (tasks that are of a temporary nature). The only case in which the legislation explicitly refers to the existence of an objective justification for concluding a fixed-term contract is the case "*replacement of a temporarily absent employee*".[17] However, in light of the very fact that the LLR in none of its provisions requires an objective justification to validly conclude a fixed-term contract, we consider that the failure to stipulate a reason (i.e. such as the replacement of a temporarily absent employee) does not actually make a contract null or result in the transformation of the fixed-term contract into employment contract of an indefinite duration.

Although a fixed-term contract does not require an objective reason for its conclusion, the contract nevertheless must specify the term of its duration. The term may be fixed by calendar or by satisfying a certain condition (i.e. by the completion of certain task and by the occurrence of a certain event).[18] *The fixing of the term by calendar* involves designating the date of expiry of the contract (e.g. "the contract expires on 10 June 2019") or indicating the time for which the contract has been concluded (e.g. "the contract has been concluded for the total period of three months from the date of its conclusion"). Apart from the calendar method, fixed-term contracts may expire with the *completion of certain task* (e.g. work on a project).[19] Finally, a fixed-term contract may also terminate by *the occurrence of certain event* (for example, the

15 Law on Amending and Supplementing the LLR (Службен Весник на Република Македонија, бр.106 од 27.08.2008), article 4.

16 The abolition of objective reasons for concluding fixed-term contracts in the national labour legislation should be viewed with special caution. Such caution primarily stems from the need to harmonize North Macedonian labour legislation with international labour standards, such as the ILO Termination of Employment Recommendation, 2006 (No. 166), which refers to limiting recourse to fixed-term contracts to tasks of a temporary nature (see Part I, 3(1)). Similar to the ILO Recommendation, the EU Directive 99/70/EC on fixed-term work emphasises the need for a balanced use of fixed-term contracts. The principal position of Directive 99/70/EC is that "employment contracts of an indefinite duration are the general form of employment relationships and contribute to the quality of life of the workers concerned and improve performance" (see General Considerations, 6). Directive 99/70/EC also stipulates that the protection of workers from abuses of their employment relationship can be provided by introducing objective reasons in the use of fixed-term employment contracts (see General Considerations, 7). Arguably, however, the Directive should not be interpreted as introducing a mandatory requirement for establishing objective reasons for the parties' entry into the first fixed-term employment contract (see Mia Rönnmar, "Labour Policy on Fixed-Term Labour Contracts in Sweden", in *Regulation of Fixed-Term Employment Contracts – A Comparative Overview*, ed. Hiroya Nakakubo and Takashi Araki, 164 (Kluwer Law International, 2010)). In this regard, it can be considered that the Directive leaves a so-called "regulatory limbo" in allocating the initial period of employment (see Deirdre McCann, *Regulating Flexible Work* (Oxford: Oxford University Press, 2008), 132).

17 See Law on Labour Relations, article 46(2).

18 See Law on Labour Relations, article 5(1) point 3 and article 64.

19 Law on Labour Relations, articles 5(1) and 64.

return to work of a temporarily absent worker).[20] In such a case, the validity of the employment contract will expire at the occurrence of the resolutive condition (e.g. the return to work of the temporarily absent employee) which determines the date of termination of the employment relationship.[21] In practice, there are also cases in which the temporarily absent employee becomes permanently absent (for example, due to dismissal, permanent incapacity for work, death and so on). Thus, a dilemma arises as to whether the permanent absence of an employee can be treated as a fulfilment of the condition, i.e. occurrence of an event that will result with an *ipso iure termination* of the fixed-term contract concluded by a replacement employee. The LLR neither resolves this dilemma nor does it envisage any instructive provision to resolve it. In practice, it shall be considered that the fixed-term contract of a replacement employee is terminated because "the purpose of the contract" (i.e. the replacement of a "temporarily" absent employee) has been met or, at least, the legal status of the contract will depend on the intention of the employer to offer the employee a new contract of employment of definite (fixed-term) or indefinite (open-ended) duration.[22]

Legal mechanism for the protection of employees against abuses in their employment through the conclusion of successive fixed-term contracts

North Macedonian labour legislation applies one of the three measures of protection against abuses of fixed-term employment relationships which are foreseen in the EU Directive 1999/70/EC on fixed-term work. This is the measure on the "limitation of the maximum total duration of the successive fixed-term employment contracts".[23] Argumentum a contrario, labour legislation does not envisage the remaining two measures of protection against abuses of fixed-term employment relationships: the determination of objective reasons justifying the renewal of the fixed-term employment contracts and the limitation of the number of renewals of such contracts.[24] This means that an employer may conclude one or multiple successive contracts with the same employee and that contract renewal is not conditioned on the existence of an objective reason as long as the limitation of the maximum duration of the fixed-term employment relationship determined by law is respected. According to the LLR, the employment contract may be concluded for a definite period of time of up to five years for carrying out the same activities, with or without interruptions.[25]

The limitation of the duration of the fixed-term employment relationship of up to five years refers to the performance of the **"same"** activities. However, the law lacks a provision which closely defines the term "performance of the same activities". In practice, "same activities" may encompass activities belonging to the same group or category of job positions that are prescribed normally by collective agreement or an employer's act (i.e. Act on Job Systematization). Ultimately, an employment contract is the most direct legal source which is supposed to contain a clause that regulates the key aspects in terms of the type of work that is carried out and the activities performed by workers. Frequently, there are cases in which – just before the expiration of the maximum period which limits the duration of the fixed-term employment relationship – employers enter into a new fixed-term employment contract with employees,

20 See: Todor Kalamatiev and Aleksandar Ristovski, *Fixed-term Work and Part-time Work – Non-standard Forms of Work in the Labour Legislation of the Republic of Macedonia* (Skopje: Business Law, Year XVII, Ho.34, 2016), 662.

21 See Kamcevska, *Employment Relationships – Commencement, Deployment and Termination* (Skopje: Сигнум, 1997), 190.

22 See Aleksandar Ristovski, *Home Working Employment Contract and Other Alternative Forms of Employment and Flexible Forms of Work* (Skopje: Business Law, Year XII, No. 25, 2011), 114.

23 See Council Directive 1999/70/EC on fixed-term work (*Official Journal* L 175, 10/07/1999 P. 0043 – 0048), clause 5 (1) b.

24 *Ibid.*, clause 5 (1) a and c.

25 Law on Labour Relations, article 46(1).

employing them to perform "other" activities that are nominally but not essentially different from the activities that specified in their previously concluded employment contracts.[26] In this way, employers are able to avoid legal consequences resulting from expiration of the maximum period of limitation of fixed-term employment contracts – i.e. the transformation of the fixed-term employment relationship into an indefinite employment relationship.[27] Hence, it arguably would be preferable if the maximum period of limitation of fixed-term employment contracts referred to *"any"* activities performed by a particular employee *with the same employer*, not only for the performance of the "same" activities.

Apart from the dilemma over the "type of activities" that fixed-term employees are supposed to perform, the LLR of North Macedonia has created another problem regarding the continuity of work performance. This concerns the need to have a consistent interpretation of the legislative phrase **"work with or without interruption"** which should be analysed in terms of the maximum period of five years for the limitation of fixed-term work. In fact, the current LLR does not contain any legal provision to determine the time gap between the expiration of a previous contract and the conclusion of a new fixed-term employment contract.[28] Such an approach might imply a certain level of job security for fixed-term employees. The job security aspect for employees relates to the fact that the LLR does permit the existence of discontinuity, i.e. interruptions between successive fixed-term employment contracts. But this approach may be too rigid and constraining for employers who, even after the expiry of a period of several years in which there is both a *de facto* and a *de jure* interruption between the successive contracts of employment for the performance of "same" activities, must respect the maximum limit of fixed-term work of up to five years if they have no intention to transform the employment relationship of the particular employee into an indefinite employment relationship.

Conditions for the transformation of a fixed-term employment relationship into an employment relationship of an indefinite duration

"The fixed-term employment relationship **shall be transformed** into an employment relationship of an indefinite period, provided that the employee continues to work after the expiry of the maximum period for the limitation of the employment contract, under the conditions and in the manner defined by law."[29] With this provision, the legislature introduced an irrefutable legal presumption, according to which, if the employee continues to carry out the work tasks with the employer, even one day after the expiration of the maximum term determined by law (i.e. five years), the employment relationship will be considered to be transformed from fixed-term to open-ended. The transformation into an employment relationship of an indefinite period does not depend on the adoption of any act (decision, notice) by the employer. For its occurrence, it is irrelevant whether the employer knew that the absolute term which limits the duration of the fixed-term employment relationship has expired or not. Yet, should an employer refuse to transform the employment relationship of the employee indefinitely, an employee can initiate a procedure for protection of their rights. However, the procedure for the protection of employees' rights in cases of the transformation of an employment contract is not explicitly regulated by North Macedonian labour

26 Aleksandar Ristovski, *Binary Model of Employment Relationships and Non-standard Forms of Work* (Skopje: Doctoral Dissertation, 2015), 327.

27 See Law on Labour Relations, article 46(3).

28 In comparison, the amendments and modifications on the Law on Labour Relations of 2003 stipulated that an interruption of work amounting to less than 30 working days shall not be taken into consideration when calculating the total period of fixed-term employment whose maximum duration is three years. See Law on Amending and Supplementing the LLR of 1993, article 2(1).

29 See Law on Labour Relations, article 46(3).

legislation. In practice, an employee initially submits a request for the transformation of the employment relationship to their employer, and, if their employer refuses to accept such a request or fails to act on it, the employee may exercise their rights by filing a declaratory lawsuit against the employer before the competent court.[30] If, however, an employer does not intend to transform the fixed-term into an indefinite employment relationship, they may terminate the fixed-term employment contract. It is a special (*ex lege*) termination of the employment contract that occurs when the term for which the contract was concluded expires – which is different from the termination by "dismissal", i.e. the unilateral termination of a concluded fixed-term contract.[31] When the fixed-term employment contract is terminated *ex lege*, an employer is not obliged to state any valid reasons for its termination, regardless of whether the duration of the fixed-term contract was one month or four years, eleven months and 29 days. In such cases, the LLR does not condition the termination of the fixed-term employment contract on the adoption of a separate formal notice by an employer to end an employment relationship. However, in practice, it is considered desirable for an employer to inform the employee (usually in writing) beforehand about the fulfilment of the condition that the term of an employment relationship has expired.[32] North Macedonian labour legislation does not contain any provision on the possibility of either an employer or employee cancelling the fixed-term employment contract and the legal consequences of such a dismissal for the duration of the contract (i.e. early termination of the fixed-term employment contract). Under such circumstances, the standard rights and obligations applicable to the cancellation of employment contracts of indefinite duration usually apply, including, *inter alia*, the existence of a justified ground for dismissal and compliance with the procedure prior to the cancellation of the contract (i.e. the notice period).[33]

There is an exception to the legal presumption of the transformation of the employment relationship referring to *employment contracts for carrying out seasonal work*, which, despite the fact that their total duration may include multiple successive contracts, they cannot be transformed into contracts of employment of an indefinite period.[34] Additionally, the LLR stipulates another circumstance which is treated as an "exception" to the general rule of transformation of employment relationships after the expiry of the cumulative period of five years. In this case, the transformation may occur "if the employee works for more than two years at a position which has become vacant due to retirement or other grounds and for which funds are provided, if the employer determines that there is a permanent need for the employee, under the conditions and in the manner determined by law".[35]

The conclusion of a *fixed-term contract for the replacement of a temporarily absent employee* could also be analysed in the context of "exceptions" from the rule on the maximum duration of fixed-term contracts and the transformation of the employment relationship. The LLR fails to adequately regulate an exceptionally important issue which opens unnecessary dilemmas in practice: for instance, the question whether or not fixed-term contracts concluded for the replacement of a temporarily absent employee are transformed into open-ended contracts after the expiry of the maximum term of five years. In order to resolve this dilemma, the prevailing stance followed in practice is that the duration of such fixed-term

30 The request for the transformation of the employment relationship is not a procedural action explicitly provided for by the Law on Labour Relations. Yet, the case law attributes importance to this action in the capacity of a prior action before filing a lawsuit for the transformation of the employment relationship into an indefinite one. See in the following cases: Court of Appeal of Štip, РОЖ 1135/11 from 12 September 2011; Basic Court in Tetovo, РО бр.87/13 from 13 June 2013и РО бр. 136/13 from 20 September 2013.

31 See Law on Labour Relations, article 64.

32 Dimko Milenkov and Teofil Tomanovikj, *Handbook on Employment Rights and Obligations* (Skopje: Агенција „Академик", 1995), p. 205.

33 See Todor Kalamatiev and Aleksandar Ristovski, "Atypical Employment Relationships: The Position in the Republic of North Macedonia", in *Restatement of Labour Law in Europ: Vol II*, eds. Berna Waas and Guus Heerma van Voos (Oxford: Hart Publishing, 2019), p. 286.

34 See Law on Labour Relations, article 46(3).

35 See Law on Labour Relations, article 46(4).

contracts may be shorter or longer than five years, but, in any case, it must not be longer than the completion of the absence (i.e. the return to work of a temporarily absent employee).[36]

We conclude this section by referring to another "regulatory gap" which creates great legal uncertainty in practice and therefore requires an appropriate statutory intervention. This gap occurs in cases where a fixed-term contract was concluded for a period shorter than five years, and an employee continued to perform their tasks with the same employer even after the expiration of the contract without concluding a new (successive) contract and the employer has not deregistered (signed out) them from compulsory social insurance.[37] In practice, these cases put employees in an extremely uncertain and precarious position. On the one hand, the employee is formally reported on the system of compulsory social insurance; on the other hand, however, the employee does not have a clear view of the actual duration of their "new" employment contract because there is neither a new signed contract nor an "annex" for the extension of the duration of the previously signed fixed-term contract. Employers often abuse this existing "grey zone" by unilaterally terminating this "*de facto* employment relationship" and signing fixed-term employees out of compulsory social insurance, as these employees do not have proper legal grounds for legal protection against termination of their employment contracts.

In the absence of an explicit legal provision that fills this specific "legal void", interpretations in theory and case law vary. For instance, it has been argued that the contracting parties concluded a "new" (successive) contract of employment, the nature and duration of which shall depend on their will,[38] or that that the employment relationship should simply be transformed into an indefinite employment relationship.[39] On the other hand, the Supreme Court of the Republic of North Macedonia, in its 2015 decision, seems to be legitimizing the "silent" extension of the expired fixed-term contract, without any resulting legal consequence in relation to the duration of the employment relationship.[40] It follows from the Court's decision that the only way of transforming the fixed-term employment relationship into one of an indefinite duration is to fulfil the statutory requirement of exceeding the maximum period of five years. *Argumentum a contrario*, if the duration of the fixed-term employment relationship is less than five years, and if, after the expiry of the initial fixed-term contract, there is no successive fixed-term contract in which the term is fixed, a legal consequence of such a factual situation (i.e. a *de facto* employment relationship) cannot be the transformation of the employment relationship into an employment relationship of an indefinite period. This indicates that legal changes are, indeed, necessary in order to fill the existing regulatory gaps.

A *de lege ferenda* solution could be to add a new provision in the LLR, stating that "if the employee continues to work with the employer after the expiry of their fixed-term employment contract and without

36 Vojo Belovski and Osman Kadriu, *Legal Commentary on the Law of Labour Relations* (2011), p. 129.

37 At the request of the business community of North Macedonia, since 2012, the Employment Agency of North Macedonia, along with the Health Insurance and the Pension and Disability Insurance Fund, introduced a simpler procedure for registration/deregistration of employees whose fixed-term employment contracts for the performance of the same activities are extended without an interruption in the employment relationship. With the modified procedure, the prior practice of deregistration of employees from the Employment Agency due to the expiry of their contracts and their re-registration on the same day at the same employer has been abandoned. In fact, the first submitted application in the compulsory social insurance arising from the initial fixed-term employment contract at the employer is valid as long as the cumulative employment relationship lasts, and it includes all the consecutive contracts of employment until the expiry of the maximum statutory limit of fixed-term employment. The consecutive employment contracts with no interruption in between are usually concluded in the form of new contracts or in an annex to the existing contract.

38 Kalamatiev and Ristovski, *Fixed-term Work and Part-time Work* (2016), p. 661.

39 See *Bulletin of the Case Law of the Supreme Court of the Republic of Macedonia 2016–2017* (Skopje, 2018), p. 40.

40 In the present case, the plaintiff (i.e. employee) continued to perform the same activities for the defendant (i.e. employer) after the expiry of the initial fixed-term contract (concluded for a period of three months) without concluding a new contract of employment or without being informed in any way about the duration of her "factual employment relationship". The total length of service of the employee (including the initial fixed-term contract) was 3 years, 5 months and 15 days, before the employer terminated the employment relationship by notice of dismissal. See Judgment of the Supreme Court of the Republic of North Macedonia, Рев.3, бр.95/2014 од 23 January 2015.

signing a new or extended fixed-term contract, it shall be considered that the employee has entered into an indefinite employment relationship". In other words, a legal consequence of the non-extension of a fixed-term contract, provided that an employee continued to "*de facto*" work with their employer, should be the "*ex lege*" transformation of the employee's employment contract into employment contract of an indefinite duration.

Disguised employment relationships

The systematization and classification of contractual relationships in the event of and in connection with labour (договорни односи по повод и во врска со трудот) in North Macedonia is influenced strongly by the so-called "binary" system.[41] On one side of this system are the "employment relationships" (работни односи) based on an "employment contract" (договор за вработување) and regulated by the LLR. On the other side, are the "remaining" contractual relationships based on "contracts for services" (договори за дело) or other personal work contracts which derive from general contract law and are regulated primarily by the Law on Obligations.[42] Despite the fact that the North Macedonian legal system seemingly distinguishes the scope of application of labour legislation from the scope of application of general contract law, in reality, the situation is very different. This is evidenced by the significant presence and spread of so-called "disguised employment relationships" (i.e. bogus self-employment, sham contracts and so forth) that put workers in a vulnerable and precarious position, impeding their access to labour law protections and social security rights.

In North Macedonia, disguised employment can be defined as deliberate and manipulative classification of an employment relationship as an "other" contractual relationship in the event of and in connection with labour, in order to avoid or reduce the costs of employers that would arise from the proper application of regulations, primarily in the field of labour law and social security law.[43] In practice, contracting parties conclude various designated or undesignated contracts, which only by their title, legal classification or content (that usually does not reflect the genuine relationship between the parties) constitute civil law contracts, i.e. contracts which are not treated as employment contracts. Part of such contracts is subject to regulation under classic civil law legislation (e.g. contracts for services, copyright contracts and so on); another part is subject to regulation of labour legislation or other legislative acts (e.g. the so-called "special contracts", volunteer contracts, contracts for temporary and occasional work and so on). These contracts are often concluded as civil law contracts contrary to their purpose and in situations where there are clear factors pointing to the existence of an employment relationship.

In order to define the term "employment relationship/employment contract", establishing the criteria and indicators of subordination is a starting point for an accurate classification of a contractual relationship in the event of and in connection with labour and the protection of employees from abuses in the misclassification of their genuine employment status. In North Macedonia's labour law system, legal subordination is the only applicable and clear-cut criterion for determining the existence of an employment relationship. Economic dependence as an independent criterion has no relevance in determining the employment status of workers as "employees" or "self-employed".[44] The LLR defines the

41 See Todor Kalamatiev and Aleksandar Ristovski, "The Concept of 'Employee': The Position in the Former Yugoslav Republic of Macedonia", in *Restatement of Labour Law in Europe: Vol. I*, eds. Bernd Waas and Guus Heerma van Voos (Oxford: Hart Publishing, 2017), 240.

42 Law on Obligations (Закон за облигациониоте односи) (*Official Gazette of Republic of Macedonia*, No.18/01).

43 See Todor Kalamatiev and Aleksandar Ristovski, *Factual Employment Relationship and Freelance Work in the Macedonian Legal System* (Београд: Радно и Социјално Право, Бр.1/2015, Година XVIV, 2015), 10–11.

44 Kalamatiev and Ristovski, "The Concept of 'Employee" (2017), 238.

term "employment relationship" – the definition is provided below – but it does not contain any additional specific provision aimed to prevent the concealment of the employment contract which can be treated as a principle of "primacy of facts" or "legal presumption for the existence of an employment relationship". The aforementioned legal principles derive from ILO labour standards, and their introduction into the North Macedonian labour legislation would enable workers to seek legal protection before the competent court, which could "reclassify" (i.e. annul or alter) the disguised (i.e. concealed) "civil" contract into a genuine contract of employment. In addition, these standards would also deepen the legal competencies of labour inspectors to combat bogus self-employment.

Definition of the term 'employment relationship' and establishment of criteria and indicators of subordination

Unlike the definition of the employment contract, which is left to labour law theory,[45] the definition of an employment relationship is set out in North Macedonian labour legislation. According to the current LLR, an employment relationship is defined as any "contractual relationship between the employee and the employer where the employee voluntarily takes part in the employer's organized working process in exchange for salary and other remuneration, personally and continuously carries out the work according to the instructions and under the supervision of the employer".[46]

In the definition of the term "employment relationship", the LLR refers to two subordination criteria: the performance of work according to the instructions and under the supervision of the employer and the participation of the employee in the employer's organized working process. The first criterion – which, in comparative labour law, is called "control of the work and instructions"[47] or "control test"[48] – is regulated by the LLR under additional provisions. In this regard, the LLR stipulates that an employee must observe the requirements and the instructions of their employer in relation to fulfilment of working duties under the employment relationship.[49] Further on, the LLR provides that an employee must conscientiously carry out the work at the job for which they have concluded their employment contract, during the working hours and at the location set down for carrying out the work, respecting the organization of the work and the business activity of the employer.[50] This statutory provision is related closely to the second subordination criteria – which, in comparative labour law, is referred to as the "integration of the worker in the enterprise"[51] or "integration test".[52]

An important indicator that emphasises the differences between "contracts of employment" and "contracts for services" is the indicator that relates to the question whether the work is performed within or outside the scope of the business activity/profession of the employer. In the period before the adoption

45 In North Macedonian labour law theory, the contract of employment can be defined as a contract on the basis of which a person commits himself or herself to work on behalf and at the expense of another person in exchange for remuneration. See: Gzime Starova and Tito Beličanec, *Labour Law* (Скопје: Универзитет "Св.Кирил и Методиј" , Правен факултет, 1996), 128.

46 Law on Labour Relations, article 5(1).

47 European Labour Law Network, *Regulating the Employment Relationship in Europe: A Guide to Recommendation No. 198* (Geneva: ILO, 2013), 38.

48 Simon Deakin and Gillian Morris, *Labour Law* (Oxford: Hart Publishing, 2009), 133–135.

49 See Law on Labour Relations, article 31.

50 See Law on Labour Relations, article 30(1).

51 European Labour Law Network, *Regulating the Employment Relationship in Europe: A Guide to Recommendation No. 198* (Geneva: ILO, 2013), 38.

52 Simon Deakin and Gillian Morris, *Labour Law* (Oxford: Hart Publishing, 2009), 135–136.

of the LLR of 2005, many employers, unable or unwilling to employ persons under employment contracts, frequently engaged workers by means of contracts for services, which started to be "identified" as contracts of employment or substitutes.[53] Hence, the LLR of 2005 introduced the so-called "special contracts" (посебни договори), aimed at separating contracts of employment from contracts for services, which often were misused in practice to disguise genuine employment relationships. As "special contracts", the current LLR considers "those contracts the subject of which is the independent manufacture or repair of certain things, independent performance of certain manual or intellectual work".[54] Taking into consideration their definition, it can be concluded that, in principle, "special contracts" (regulated by the LLR) can be compared to "contracts for services" (regulated by the Law on Obligations), i.e. they may be treated as a subspecies of contracts for services. Still, the key difference between these contracts is found in the scope of application. In this regard, unlike contracts for services which can be concluded for carrying out certain work/services regardless of their scope of application, "special contracts" can be concluded for the performance of work/services that do not lie within the scope (i.e. are outside the scope) of the employer's activity.[55] Special contracts also may be concluded for cultural and artistic work with a person who carries out cultural and artistic activities.[56] Hence, the conclusion of employment contracts is restricted to the scope of an employer's core activities, while special contracts are concluded beyond the scope of an employer's business activities or respective field.

In the contemporary forms of organization of business and production activities, there is often a loose and blurred border between "core" and "non-core" activities of employers. Hence, in practice, employers in North Macedonia use different ways to recruit workers to carry out certain work/services that are outside the scope of their "core" activities. This includes, for example, subcontracting (i.e. outsourcing, especially by engaging firms that perform maintenance and cleaning, security, IT services among others); temporary agency employment; directly engaging workers on a casual (temporary and occasional) basis, whereby their payment is provided through a so-called "copyright agency", in which case only personal income tax is paid; the casual worker may also be directly paid by the employer (cash-in-hand) without using the services of a "copyright agency".[57] Theoretically, "special contracts" can be concluded for all from the abovementioned ways of recruiting workers. However, in practice, these contracts are usually concluded for engaging workers directly by employers on a casual (temporary and occasional) basis for carrying out work/services in low-skilled jobs, construction, crafts, catering, tourism, cultural activities, IT services, sales agents and other forms of freelance activity. Special contracts are not subject to any formal registration, and persons employed under these contracts are usually not covered

53 Gzime Starova, *Labour Law* (Скопје: Просветно Дело А.Д.,2005), 254.

54 Law on Labour Relations, article 252(1).

55 See Law on Labour Relations, article 252(1).

56 *Ibid.,* article 252(2).

57 In the North Macedonian legal system, there is no specific legal act regulating the competencies and activities of the so-called "copyright agencies". These agencies find the legal basis for their functioning in the Law on Copyright and Other Related Rights (*Official Gazette of the Republic of Macedonia*, No. 115/10). Usually, copyright agencies provide outsourcing services to their clients related to making copyright contracts and contracts for services and regulating the payment under such contracts, after their clients have engaged "external" providers of services who are always natural persons. Hence, copyright agencies cannot be equated with temporary employment agencies because they do not recruit and contract out workers but only regulate the "manner of engagement and payment" of already recruited workers (i.e. external providers of services) by their clients. While the regulation of payment of persons engaged with copyright contracts serves to formalize the legal transactions with authors for the creation of copyright works (e.g. books, computer programs, musical work, photographic work, audio-visual work and so on), the services of the copyright agencies are also used for concluding various contracts for services that are not considered copyright contracts (e.g. contracts for the engagement of consultants, persons engaged in promotions and presentations, as well as contracts for occasional engagement of persons in technical and auxiliary work). It is questionable whether copyright agencies are authorized to provide services related to the conclusion of contracts for services, given that many of these contracts are, in fact, temporary and occasional work contracts or contractual relationships which, in fact, contain clear criteria and indicators for the existence of a genuine employment relationship.

by the compulsory social insurance system and appear as "formally" unemployed persons.[58] From the aforementioned, it becomes evident that the direct employment of workers by employers on a casual (temporary and occasional) basis can, to a lesser or greater extent, be treated as informal employment.

De lege ferenda, "special contracts" should be viewed as derogations from the LLR because, in practice, employers often use them as a "backdoor entry" for concealing genuine employment contracts and preventing workers from exercising their labour and social security rights. On account of the abolition of "special contracts", the legislature should consider the possibility of introducing "contracts for temporary and occasional work" (i.e. casual work arrangements). These contracts could be regarded as either entirely outside the employment relationship, as "imperfect contracts" between labour and civil law that provide for limited employment rights (such as minimum wage, limited duration of working time and so forth) or as classic employment contracts, fully subsumed under the personal scope of the application of labour legislation. A solid basis for the modelling of casual work in North Macedonian labour legislation may also be the legal frameworks of certain Central and Eastern European countries (e.g. Hungary,[59] Romania[60] and so on).

Other indicators aimed at distinguishing employment contracts from contracts for services mentioned in North Macedonian labour law theory are the following: *bearing economic risk* (when the parties conclude an employment contract, usually the overall economic risk is borne by the employer; under a contract for services, usually the risk is borne by the service contractor, i.e. the performer of the work); *methods of payment for the performance of work* (in the employment contract, the employee usually is entitled to receive a salary at regular intervals; in a contract for services, the service contractor usually gets a single monetary compensation for the entire work performed, paid after the work has been performed); *obligation to perform the work personally* (in an employment contract, only the employee and no other person can do the job in their behalf, while in the contract for services, the service contractor/entrepreneur can entrust the execution of the work duties to a third party).[61]

Apart from the statutory provisions defining the term "employment relationship" and their interpretation in theory, in North Macedonia there is no specific case law from which the criteria and indicators relevant for labour law judges in the process of distinguishing between employment and service contracts can be

58 With amendments in five separate laws on which the foundations of labour and social security legislation of North Macedonia are based (Law on Labour Relations, Law on Pension and Disability Insurance, Law on Health Insurance, Law on Contributions for Mandatory Social Insurance and Law on Insurance against Unemployment), in 2015, an attempt was made to regulate so-called "freelance work" (хонорарна работа). The basic goal of the legislature was to determine the legal position of "freelance workers" and to include this category of persons within the social security regime. In that regard, the then amendments to the Law on Labour Relations concerning "special contracts" stipulated that the remuneration received by the worker for the work/services carried out on the basis of a concluded special contract was subject to payment of contributions for mandatory social insurance in accordance with the law. Still, the unclear legal provisions that shaped the legal regime of "freelance work", the unpreparedness of the state institutions (primarily, the Pension and Disability Insurance Fund of North Macedonia) as well as the inadequate financial burden on persons who had generated income performing certain physical and intellectual work resulted in the abolition of the regulations on "freelance work" after only seven months of being introduced.

59 Act LXXV of 2010 on Simplified Employment regulates so-called "occasional work", defining it as an employment relationship that is established between an employer and employee with the following limitations on its duration: up to a total of five consecutive calendar days; up to a total of fifteen calendar days within one calendar month and up to a total of ninety calendar days within one calendar year. This form of work may occur in the following variants: seasonal work in agriculture; seasonal work in tourism and occasional work. See Gyorgy Kiss, "New Forms of Employment in Hungary", in *New Forms of Employment in Europe*, eds. Roger Blanpain and Frank Hendrickx (Alphen aan den Rijn: Wolters Kluwer, 2016), 237.

60 Romania started to regulate casual work with the adoption of the Law on Day Labourers (No. 52/2011) of 2011. Day labourers are employed on a temporary basis and paid per day worked. The most common sectors in which day labourers are employed are agriculture, tourism and entertainment and audio-visual industries. The minimum duration of work for the same beneficiary is one day (eight hours of work) while the maximum is 90 days (not necessarily continuous) within a calendar year. See Raluca Dimitriu, "New Forms of Employment in Romania", in *New Forms of Employment in Europe,* eds. Roger Blanpain and Frank Hendrickx (Alphen aan den Rijn: Wolters Kluwer, 2016), 324.

61 See Todor Kalamatiev and Aleksandar Ristovski, *Differentiation of the Employment Relationships from Other Contractual Relationships and Addressing the Issue of "Disguised Employment"* (Skopje: Business Law, Year XIV, No. 33, 2015), 21–26.

extrapolated. Courts simply cannot rely on adequate legal grounds to act on potential legal disputes related to misclassification of the employment status or contracts of workers. Nor did we come across any document or other form of soft law adopted by the State Labour Inspectorate or the Ministry of Labour and Social Policy. This may be a consequence of the fact that North Macedonia still has not accepted and incorporated the ILO Employment Relationship Recommendation, (No. 198),[62] which, *inter alia*, provides for the establishment of two types of indicators for the purpose of determining the existence of an employment relationship: indicators related to the performance of work and indicators related to the remuneration of the worker.[63]

Combating informal employment and concealment of the employment relationship (i.e. disguised employment relationship)

According to data from 2016, "informal employment" in North Macedonia[64] accounts for approximately 18 per cent of the total number of employees in the country.[65] Informal employment in North Macedonia can be viewed in a broader context, encompassing forms of unregistered activities, "under-declared" employment (envelope wages) and forms of employment that are not registered at the Employment Service Agency, i.e. not reported to the system of compulsory social insurance (so-called "undeclared" employment). For the purposes of this chapter, the term "informal employment" also refers to cases where there is a concealment of the employment relationship (disguised employment).

The prohibition and prevention of performance of *unregistered activities* in North Macedonia became subject to statutory regulation for the first time in 2014 with the adoption of the Law on Prohibiting and Preventing Performance of Unregistered Activities.[66] This Law primarily determines what must be considered performance of unregistered activities and its exemptions. In this respect, the following actions are considered unregistered activities: "performing an activity that is not registered in the special registries determined by law, except for the trade registry (for legal entities) or not registered with a competent body (for natural persons); performing an activity without having a prescribed act issued by a competent body in accordance with law and without fulfilling the conditions for carrying out a registered activity (for both legal entities and natural persons) and performing an activity contrary to the prohibition of performing an activity issued by a competent body (for both legal entities and natural persons)".[67] The Law also lists a wide range of activities that are considered exemptions from unregistered activities.[68]

62 ILO Employment Relationship Recommendation, 2006 (No. 198).

63 ILO Employment Relationship Recommendation, 2006 (No. 198), 13(a) and (b).

64 Informality is a complex and multi-layered concept. In defining this concept, the ILO uses the term "informal employment" which refers to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements. See ILO, Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), I.2(a). Within the EU, it can be encountered under the term "undeclared work" and is therefore defined as any paid activity that is lawful in nature (excluding criminal activities) but is not declared to public authorities. See European Commission, Communication from the Commission on Undeclared Work, COM (1998) 219 final, 4.

65 Informal employment in North Macedonia is characterized by different structural features that can be viewed through several criteria such as: *gender representation* (according to this criterion, informal employment is higher among men and accounts for 20 per cent of the total number of employed men in 2016 compared to informal employment of women, which accounts for 15 per cent of the total number of employed women in the same year); *level of education* (according to this criterion, informal employment dominates among workers with completed primary education and among workers with three and four years of secondary education – with approximately 40 per cent each); *economic sectors* (according to this criterion, around two thirds, 65–66 per cent of the total number of informally employed workers work in the agriculture sector, 10 per cent in construction and around 6 per cent in wholesale and retail trade, vehicle repair); *economic status* (according to this criterion, the self-employed have the highest share of informal employment with 36 to 39 per cent and unpaid family workers); *most common domain of informal employment* (according to this criterion, around two thirds of the total number of informal workers are found at unregistered businesses). See: Ministry of Labour and Social Policy, *Strategy for Formalising the Informal Economy in the Republic of Macedonia*, 2018–2022 (Skopje: February 2018), 13.

66 Law on Prohibiting and Preventing Performance of Unregistered Activities (Закон за забрана и спречување на вршење на нерегистрирана дејност) (Сл.весник на Република Македонија, бр. 199/14).

Considering the legislature's approach in the regulation of unregistered activities, we conclude that combating unregistered activities in North Macedonia is mainly focused on two forms of unregistered paid activities: first, unregistered *business* carried out by a legal person (i.e. small enterprise) and, second, unregistered *work activity* performed by a natural person (entrepreneur) within the framework of self-employment.[69] The Law on Prohibiting and Preventing Performance of Unregistered Activities neither regulates the form of "undeclared employment" (i.e. undeclared work, performed in the form of a "*de facto*" employment relationship) nor governs other forms of work that have the same characteristics as informal employment (e.g. disguised employment relationships).

Undeclared employment is a type of "employment" which usually lacks a formal – i.e. written – employment contract between the contracting parties and the worker, which is not declared for compulsory social insurance purposes.[70] Earlier (before the amendments to the LLR in 2009), employers were required to register workers with compulsory social insurance ***three days after*** their employment contracts were signed. Despite this legal requirement, certain employers still found ways to circumvent the law and failed to register workers for compulsory social insurance in a timely manner.[71] When faced with labour inspection control, the "justification" of these employers was that three days had not elapsed since the "signing" of the employment contract and that they would complete the registration within the legally prescribed period. The subsequent legislative changes therefore were intended to prevent such abuses. In this regard, the current text of the LLR primarily provides that "the employee may not commence work prior to entering into an employment contract and registration to mandatory social insurance by the employer".[72] In addition, the Law requires employers to file a registration form for employees for compulsory social insurance, ***one day*** **before** the employee begins to work, and ***one hour*** **before** the employee begins to work in case of urgent and unpostponable matters.[73] Hence, these legal provisions can be interpreted in a way that every worker who has begun to work – i.e. they are found at a certain job performing work tasks which resemble work tasks resulting from an employment relationship – shall be considered an "employee" registered in mandatory social insurance. This approach facilitates the work of the State Labour Inspectorate in combating undeclared employment. A labour inspector who finds an undeclared (i.e. unregistered) worker working with an employer has the authority to take the following measures: *first*, to order the employer within a period of eight days as of date of receipt of the decision to enter into an employment relationship of an indefinite period[74] with the undeclared worker or other persons and without public advertisement of the vacancy and, in the following three months, not to reduce the total number of employees; *second*, to put forward to the employer a settlement by issuing

67 See Law on Prohibiting and Preventing Performance of Unregistered Activities, article 6(1).

68 These are the activities listed: (1) performing other activities that are necessary for the performance of the activity or that are performed along the registered activity; (2) occasional performance of an activity for which the obligation to register with a competent body is excluded by law; (3) own-use work; (4) family assistance; (5) neighbourhood assistance; (6) sale of personal used items; (7) work performed without financial compensation or other material benefit if it is not performed on a regular basis; (8) publishing, performing and presenting the work of artists; (9) activity performed by individuals at selling points in organized markets, who are registered in the registry of the Public Revenue Office and are lump-sum taxed for the activity they perform; (10) necessary work to prevent accidents or to eliminate the consequences of natural and other disasters; (11) service performed for household needs and (12) work performed outside the scope of the employer's activity, and for which the employer concludes a contract with a certain person. See Law on Prohibiting and Preventing Performance of Unregistered Activities, article 6(2–8).

69 For more on "paid activity" as unregistered work, see Edoardo Ales, "Undeclared Work: An Activity Based Legal Typology", *European Labour Law Journal,* Volume 5, No. 2 (2014), 157.

70 Aleksandar Ristovski, *Rights at Work for Youth in Macedonian Context: Decent Work for Young People* (ILO: National Adaptation of Facilitator's Guide and Toolkit on Rights at Work for Youth, 2018), 28.

71 See Law on Amending and Supplementing the Law on Labour Relations from 28 October 2009 (*Official Gazette of the Republic of Macedonia*, No. 30/09).

72 Law on Labour Relations, article 13 (7).

73 Law on Labour Relations, article 13 (3).

74 Arguably, this should entail both registration with the social insurance as well as the conclusion of a contract of employment.

an order for a misdemeanour fine in accordance with the Law on Misdemeanours; *third,* if the employer does not accept the order, to initiate a misdemeanour procedure.[75]

"*Under-declared employment*" in North Macedonia primarily covers practices of employers in which they pay social security contributions and personal income tax to the employees in a lower amount compared to the actual remuneration of the employees and pay employees an additional salary "cash-in-hand". This kind of informality is also known as an "envelope wage" or "concealed wage".[76]

Despite the fact that the *disguised employment relationship* is not explicitly mentioned in the documents (strategies, programmes and so forth) which address informal employment in North Macedonia, we consider this as non-standard form of work, having the same characteristics as informal employment, which is often present in practice. Forms of disguised employment in the country can be found in various activities in the private sector such as transport, construction, tourism, consulting services, information technology, media[77] and the like. Disguised employment is particularly prevalent in the public sector (education, healthcare, social protection, state administration bodies). Despite the significantly higher regulation of public sector employment[78] compared to the private sector, public sector employers find abusive ways of engaging workers without entering into an employment relationship. Employers exploit the absence of adequate statutory provisions prohibiting disguised employment relationships and conclude various contracts with workers – usually using the services of so-called "copyright agencies"– which are not employment contracts and for which no social security contributions are paid (only personal income tax). Persons engaged in this way do not have the status of "employees" (they are not included within the scope of public sector employees) and are colloquially referred to as "volunteers" or "freelancers".[79] In the absence of provisions in the LLR establishing the principle of "primacy of facts" or "the legal presumption for the existence of an employment relationship", it appears that the legislature has focused solely on the public sector to combat disguised employment.

Disguised employment in the public sector is more visible as workers in such a position have more opportunities to express their problems publicly, thus attracting wider public attention. Given that the state

75 Law on Labour Relations, article 259 (1).

76 According to several studies, "envelope wage" is the most widespread type of informality in North Macedonia. In 2017, 17.8 per cent of workers with a formal employment contract received an "envelope wage". Envelope wage is most prevalent among the recipients of the minimum wage (62 per cent of minimum wage workers receive an envelope wage in addition to the salary received on their "account"). Structured according to economic activities, the envelope wage is most prevalent among workers in the construction industry (23.2 per cent) and services (21.5 per cent). See Finance Think, Плата во плико (Број 1, октомври 2017).

77 According to the survey of the Independent Trade Union of Journalists and Media Workers (CCHM), more than one third (36.6 per cent) of journalists in North Macedonia have the status of freelance workers, but, in reality, many of them are in disguised employment relationships. The employment of such journalists consists of an eight-hour working day (Monday to Friday), on-call work for weekends and holidays, and other duties and responsibilities similarly to other colleagues who have concluded employment contracts with the same employer, including the prohibition to write for another media outlet. In practice, there are cases in which long-standing engaged correspondents are faced with unexpected "termination of cooperation letters" from the media publisher, solely due to a change of management of the medium. In this way, the termination of cooperation is carried out in an informal manner (e.g. by sending an e-mail expressing appreciation for cooperation). See Todor Kalamatiev and Aleksandar Ristovski, *Employment Status of Journalists and Media Workers in the* Republic of Macedonia (Skopje: Collection of Papers of the Iustinianus Primus Law Faculty in Skopje, International Conference "Media and Human Rights", 2016), 254–255.

78 The Law on Public Sector Employees of 2015 (Закон за вработените во јавниот сектор, Сл.весник на Република Македонија, бр.27/14), which is a "*lex generalis*" for public sector employees, provides for the classification of job positions in the public sector. According to this classification, job positions in the public sector are organized into groups, subgroups, categories and levels (article 14 and article 15). The Law also regulates the procedure for employment in the public sector (chapter IV-a).

79 According to relevant data from 2016, there were a total of 4,684 persons engaged in the public sector with volunteer contracts, service contracts, authors' contracts or other contracts. The majority of these persons worked in public health institutions, universities, schools and kindergartens. See Ministry of Information Society and Administration, Annual Report on the Register of Public Administration Employees (2016), 29.

is their "employer", the ruling political parties have an interest in meeting the demands of these individuals, expecting their political support in return. Therefore, on 12 February 2015, the Parliament of the Republic of North Macedonia adopted the so-called Law on Transformation into Permanent Employment Relationships.[80] The reason for the adoption of this legal act was the need to address the long-standing and adverse practice of "employment" of persons in the public sector on legal grounds contrary to the contract of employment, and which, *de facto*, excluded these persons from the scope of labour legislation. The purpose of the Law on Transformation into Permanent Employment Relationships is to convert contractual relationships of persons engaged on the basis of a volunteer contract, service contract, copyright contract or other contracts with state government institutions in the fields of culture, education, health, and child and social protection, and with local governments and public enterprises, institutes, funds and other legal entities established by North Macedonia into indefinite employment relationships and to limit the period and number of persons who can be "hired" under such contracts.[81]

Furthermore, the Law provides for the possibility of transforming a contractual relationship into an employment relationship of an indefinite duration for persons who have been working on the basis of a contract lasting at least three months up to 30 November 2014 and who have valid contracts at the time that the Law was introduced. This law also envisages a procedure for the transformation of these contracts into indefinite employment relationships, restrictions on future hiring of workers with volunteer contracts and contracts for services and so forth.[82] Despite the positive intention of the legislature to regulate the employment status of many disguised public sector employees, dilemmas regarding the discretionary and voluntaristic approach in the determination of the criteria for transformation still remain. In this regard, we cannot find a logical explanation to the following questions: why a minimum of three months is taken as a criterion (and not, for instance, two or four months); what happens to persons who had interruptions, i.e. breaks in their contracts precisely in the period necessary to prove the continuity of their engagement, despite having been engaged in the same work for years; what about persons who had the required continuity in their work but did not have or could not submit appropriate evidence (e.g. contracts or notices of payment for their work) because the contracts or payment notices they received were issued on a quarterly basis rather than a "month-to-month" basis, among others. Additionally, it seems that the positive effects of this law only had a "one-time" effect and application. Despite the regulation of the genuine employment status of a large number of persons in the public sector, there are still many other workers who continuously work with contracts different from employment contracts and still find themselves in disguised employment relationships.

Conclusion

This in-depth analysis of the legal regime of regulating fixed-term work in North Macedonia conducted in this chapter shows that the existing provisions are fairly flexible and oriented towards the interests of employers and that there are obvious regulatory gaps that need to be filled in future in order to achieve more adequate protection of fixed-term employees and prevent abuses in the duration of their employment through the conclusion of successive (consecutive) fixed-term contracts. The traditional position, both in North Macedonia's labour legislation and labour law theory, is that the employment relationship of an indefinite duration is a "rule" while fixed-term employment is an "exception". Nonetheless, such an assumption is not supported by existing labour regulation and practice. In reality, there is insufficient

80 Law on Transformation into Permanent Employment Relationships (Закон за трансформација во редовен работен однос) (Сл. весник на РМ бр. 20/2015).

81 Law on Transformation into Permanent Employment Relationships, article 1.

82 Law on Transformation into Permanent Employment Relationships, articles 2–7.

protection of fixed-term employees, uncertainty that accompanies their employment relationship and an inadequate legal regime for preventing the abuse of fixed-term employment contracts. The new Law on Labour Relations will need to address this. In this regard, it is more likely that the legislature will reintroduce the objective justification (i.e. making the conclusion of fixed-term contracts conditional upon the existence of objective reasons). What is likely to be a source of debate is the manner for determining such objective reasons: whether by introducing a general ground (a mandatory requirement that the work for which the employer requires employees is of a temporary nature) or by providing an exhaustive listing of specific cases for which the conclusion of fixed-term employment contracts is allowed (e.g. replacement of a temporarily absent worker, increased volume of work, seasonal work, project work and so forth). It is also expected that the maximum duration of fixed-term work of five years shall also be reduced to maximum of three years.

De lege ferenda, the legislature should also resolve the dilemmas concerning the following: the legal "fate" of the employment relationship of fixed-term employees replacing temporarily absent employees who became permanently absent and do not return to work; the legal consequences of the "*de facto*" extension of employment relationships of employees whose fixed-term employment contracts have expired; the more adequate protection of trade union members and female employees against discriminatory termination, i.e. non-renewal of their fixed-term contracts and so on.

Additionally, in North Macedonia, there is a lack of a systematic approach for identifying and combating disguised employment. The disguised employment relationship – a relatively "new" phenomenon which became apparent after the country's independence and the introduction of the contractual conception of employment relations – is studied insufficiently in North Macedonia's labour law theory. Although the labour legislation defines the term "employment relationship" along with the basic criteria of legal subordination, there is no adequate statutory framework and appropriate legal mechanism for the protection of the rights of workers in disguised employment relationships. This is further reflected in the fact that case law does not provide for the possibility of bringing a legal dispute before the court to determine the legal status of the subject of the contract for services, particularly when it effectively meets the "factual" assumptions associated with an employment contract. All this leads to an erroneous legal position that the contracting parties have unlimited freedom in determining the classification of their contract and absolute autonomy in regulating their mutual rights and obligations. In the future, the legislature will have to take into account the solutions embedded in the ILO Employment Relationship Recommendation, (No. 198), especially those related to the introduction of the principle of "primacy of facts" or "legal presumption for the existence of an employment relationship". In parallel, it is arguably necessary to extend the statutory competences of the Labour Inspectorate to prevent and protect workers against disguised employment relationships and to consider the possibility of according competences to the Labour Inspectorate to reclassify "sham contracts" into contracts of employment.

Romania
Non-standard forms of work in Romania: An analysis of disguised employment relationships and part-time work

Raluca Dimitriu

Introduction

Romanian legislation and practice has remained faithful to traditional forms of employment as the use of non-standard forms of work (NSFW) is still rather limited. However, theoretical and practical issues do arise, especially in terms of identifying the true legal nature of employment contracts disguised as civil agreements. For instance, the lack of legal criteria for identifying the employment relationship continues to make it difficult for courts to carry out a reclassification of disguised employment relationships. Furthermore, in the context of Romanian labour law, challenges also arise in the case of part-time contracts, which have clearly been discouraged by recent legislative developments. Indeed, the current number of part-time contracts in Romania is below the European average.[1]

In this context, this chapter attempts to examine the mechanism for the reclassification of disguised civil contracts and a series of practical consequences arising thereof, as well as analysing the Romanian legal framework on the protection of part-time workers.

Disguised employment relationships

Preliminary remarks

Standard work is usually regarded in practice as the work performed from 9:00 to 17:00, Monday to Friday, at the headquarters of the undertaking, based on an open-ended contract, where the beneficiary of the work is the direct employer. Work carried out in any other more or less specific way is considered "atypical", "special", or even "very atypical". Atypical work is defined in negative terms as work that does not correspond to the definition of standard work. Atypical work includes the most diverse forms of employment: fixed-term employment contracts, part-time, temporary or home-based work, teleworking, zero hours contracts and so forth. Essentially, atypical work also includes the "non-classifiable" legal relationships that escape any taxonomy, "niche" contracts or even contracts that are specific to a single legal relationship expressing the particular interests of the contractors. In labour law theory, the emergence of these contracts marks **the transition from a mass approach to an individual approach** in labour regulation.

1 Eurostat, "Employment Statistics", May 2019. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment_statistics

Postmodern reality is one of diversity, renunciation of uniformity, directly reflected in the variety of contracts under which work is performed. The tendency to widen contractual diversity is opposed to another trend, which equally reflects the time we are going through: globalization, accompanied by the abandonment of certain elements of local, cultural or traditional specificity. Indeed, in parallel with the diversification of contractual arrangements, we are also witnessing the opposite tendency in the standardization of hiring arrangements. Hiring arrangements are often imposed by companies that control national subsidiaries and international economic entities that sometimes disregard the specific characteristics of each country and their labour markets.

The paradox of this situation is that both tendencies – although seemingly in opposition – appear to disadvantage the same contractual parties, namely the ones carrying out the work (i.e. employees).

In essence, globalization does not limit the diversity of contracts, it even stimulates it.

Contractual differences may result in differences in legal treatment and indirect discrimination. That is why, at the European level, there is a concern to eliminate the differences in legal regimes between workers employed by the same employer on the basis of different types of contractual arrangements, hence the emergence of the concept of the "comparable employee", also used in Romanian law. Given the great variety of the types of contracts that can be concluded, the elimination of discrimination arising from such diversity is one of the current challenges faced by European labour law.

Workers may consider atypical work contracts as suitable in certain stages of their lives (e.g. start of career, end of study periods, childcare periods, end of career and so on). Sometimes, however, workers may feel "trapped" by this type of contractual arrangement due to the lack of a better alternative. In fact, the degree of diversification of employment contracts and the extent to which, once allowed by the legislation, they are actually used by the parties is an indicator of the flexibility of working relationships.

Romanian legislation regulates and allows few atypical varieties of employment contacts. Although the Labour Code has been amended over time, gradually increasing the flexibility of labour relations, atypical contracts present in other legal systems, such as labour pooling, job sharing or zero-hour contracts cannot be concluded in Romania, in light of current regulation. In fact, the preference of the Romanian legislature for the typical employment contract persists to the detriment of its variations. However, the practice of labour relations has taken precedence over legal regulations and, in some cases, atypical contracts are "disguised" by the parties as civil contracts. For a worker, the conclusion of a civil contract instead of an employment contract can result either from an error or with the aim of defrauding the interests of creditors (i.e. the state budget, by failing to pay the contributions due). For example, a person who carries out an activity under a civil contract does not owe any social contribution, compared to an employee who has to pay around 35 per cent of gross salary as social contributions.

Therefore, the worker is most often the one who lodges a claim to reclassify the contract and to have his/her employee status recognized. The worker will do so when he/she realizes that, by concluding the civil contract, he/she was deprived of a number of benefits to which he/she would have been otherwise entitled. In fact, a person who has the formal status of an employee benefits from the protection of labour legislation in terms of working time, health and safety at work, the right to information and consultation, right to training or protection against arbitrary dismissal. Employees can form trade unions and can exercise the right to collective bargaining and collective action. Employees are also entitled to sick leave, maternity or childcare leave, and at the end of professional career or in case of invalidity, he/she acquires the right to public pension. None of these rights are enjoyed by a person who works under a civil contract.

There are also other factors relating to the desire to avoid labour law: the employer is not bound by the restrictions imposed by labour legislation. A common reason is also the attempt to avoid bureaucratic requirements, such as the need to register employment contracts in the General Register of Employees.

Beyond the reasons behind the attempts to hide the true nature of employment relationships, the fiscal or labour control bodies or the courts may be called upon to restore consistency between the classification of a contract and its effects. Revealing the true nature of such contracts is all the more difficult since the work performed under employment contracts is often not performed in the standard Fordist manner, with a constant and uniform work schedule, with the work taking place on the premises of the company and with the equipment provided by the employer. In addition, both the Romanian courts and the control bodies are faced with the lack of legal, easy-to-use and flexible criteria for identifying a contractual arrangement which is, *de facto*, a contract of employment.

The question of the correct classification of the contract under which work is performed is important because in the case of ambiguous contracts, not formally circumscribed to the concept of "employment contract", this issue acquires a normative character. In other words, the legal nature of the contract affects the applicability of the entire labour legislation, which provides protection to the party performing the work.

Who may re-qualify the contract?

The courts

The courts are the first bodies called to identify the true legal nature of a contract. In fact, this is also the constant practice of the Court of Justice of the European Union, which, for instance, in Case C-256/01 *Allonby,*[2] decided that "the formal classification of a self-employed person under national law does not change the fact that a person must be classified as a worker within the meaning of that article if his independence is merely notional".[3]

In Romania, there has never been a real prohibition of the possibility for courts to requalify the contract. Indeed, a contract is presumed to have the legal nature corresponding to the name given by the parties, but this presumption can be overturned by proof of the parties' genuine will. This is the application in labour law of the general rule enshrined in the Civil Code (article 1266): "Contracts are interpreted according to the concordant will of the parties, and not according to the literal meaning of the terms."

However, Romanian law lacks specific labour law instruments to combat disguised employment contracts. If we use conceptual tools specific to civil law, we could say that this legal operation has the legal configuration of an objective relative simulation through total disguise.[4] Indeed:

- it is a simulation because the parties concluded a secret contract (the employment contract) and also a fictitious contract (the civil contract);
- the simulation has a relative character because the parties did conclude a contract, based on which the work is performed. The absolute simulation takes place when the parties do not intend to be bound at all;

2 European Court of Justice, C-256/01 *Allonby v Accrington & Rossendale College* ECLI:EU:C:2004:18 (13 January 2004).

3 *Ibid.*, paragraph 79.

4 See Flavius Baias, *Simulaţia, Studiu de doctrină şi jurisprudenţă [Study of Doctrine and Jurisprudence]*, ed. Rosetti (Bucharest, 2003), 97–128.

- the simulation has an objective character (and not a subjective one) because it concerns the contract, and not the identity of the parties;
- the simulation takes place by total disguise because it does not concern only one element of the contract, but its very legal nature.

However, judicial practice is scarce on this point. The first reason for this is that, throughout the period 2011–2017, the employment contract was considered a solemn contract, meaning that its validity depended on whether it was concluded in writing as an employment contract (the parties thus classifying it as an employment contract). Consequently, requalifying a verbal contract, or one concluded with a different name other than that of employment contract, presented the courts with a virtually impossible dilemma: courts were unable to recover the nullity of the concluded contract by reclassifying it as an employment contract. In fact, the finding of the essential characteristics of an employment relationship did not have any legal effect as it clashed with the formality requirement imposed by the Labour Code.[5] Thus, if an undeclared worker tried to obtain in court the recognition of employee status, for example, by using witness evidence, the courts could have hesitations – and they did in fact have hesitations – in admitting such evidence as proof of a solemn contract. In an attempt to resolve this issue, the High Court of Cassation and Justice in 2016 ruled that "in the event of failure by the parties to fulfil the obligation to conclude an individual employment contract in written form, the natural person who has worked for and under the authority of the other party has the right of action to determine the employment relationship and its effects even if the employment relationship had ceased prior to the filing of the court action".[6] This solution, albeit innovative, did not produce the expected change in court practice because the courts could not properly rely on a legal provision that would allow them to perform such reclassification. Additionally, this decision was mostly not followed by other court decisions.

In fact, there was not even time to crystallize the new case law as, a year later, the Labour Code was amended and the consensual form of the employment contract (as provided before 2011)[7] was reintroduced. The consensual nature of the employment contract was reinstated[8] along with the increase of administrative penalties for contracts not concluded in writing. As a result, an employment contract became valid and legally binding, even though it was not concluded in writing as an employment contract. Thus, it became possible for the courts to reclassify verbal contracts or civil contracts concluded in writing.

Naturally, the fact that an employment contract is consensual does not mean that its verbal conclusion is allowed. On the contrary, the validity of the verbal agreement does not exclude the penalty applied by the control body as the failure to conclude the contract in writing leads to substantial fines. However,

5 For example, in one case, the applicant requested recognition of the status of employee, indicating that he was a full-time editor for 8 hours per day with a work schedule from Monday to Friday 9-17, and a salary of 750 lei, terms negotiated from the beginning. The court, however, dismissed the action, pointing out that since the applicant was unable to prove that he had entered into a written individual employment contract and received a copy of the contract which he had signed, there was in fact no labour relationship performed under an individual employment contract. See Dolj Tribunal, Decision No. 1015/2016. https://www.lege5.ro/

6 High Court of Cassation and Justice, Decision No. 37/2016, published in the *Official Gazette of Romania* No. 114 of 10 February 2016.

7 By Government Emergency Ordinance No. 53/2017, published in the *Official Gazette of Romania* No. 633 of 7 August 2017. Government Emergency Ordinance No. 53/2017 was approved with amendments and supplements by Law No. 88/2018, published in the *Official Gazette of Romania* No. 315 of 10 April 2018.

8 As a result, the jurisprudence has also gradually changed. For example, in one case, the employment contract concluded with the employee, who was a security guard, expired and, thereafter, the parties signed a collaboration contract (i.e. civil contract). However, the court found that the work carried out by the applicant employee on the basis of the original employment contract was equivalent to the work carried out under the collaboration contract, since the applicant still carried out the same activity, with the same objectives and working schedule (12/24 shifts) during the period of validity of both the employment contract and the civil contract. Thus, the court held that the applicant's employment continued, even after the formal termination of the employment contract and the conclusion of the collaboration contract. Alba Iulia Court of Appeal, Decision No. 1093/2018. https://www.lege5.ro/

the difference is that the verbal employment contract is no longer considered null and void. The contract is valid, even when concluded verbally, although the administrative control body will still sanction the employer. However, from the point of view of the possibility for courts to requalify contracts, this amendment is useful because courts are no longer faced with the obstacle of the solemn – written – form required for the conclusion of employment contracts.[9]

However, courts are faced with another obstacle: the lack of legal criteria for requalifying the employment contract. The Labour Code contains a definition of the employment contract,[10] but this is insufficient to replace the absence of criteria for classifying a legal relationship as an employment contract, in case the parties have named the contract differently. Indeed, unlike other systems of law, the Romanian legal system does not include specific labour law instruments to disclose disguised employment contracts.

Another obstacle is the question of proving that the employment contract is consensual. First, as this can be characterized as an issue arising from an individual labour conflict (without this premise we cannot accept the competence of the labour law court[11]), the provisions of article 272 of the Labour Code apply. According to this article, the burden of proof lies with employers, who must submit evidence in their defence until the first hearing. For example, if a worker claims to be, in fact, an employee, the beneficiary of the work (i.e. the employer) will bear the burden of proof, being in a position to demonstrate that the contract was in fact a civil contract, and not a contract of employment. The employer will have to share with the court all the documentation related to the contract, as well as evidence regarding its performance.

However, it is the worker who must submit at least preliminary evidence: the worker must prove that he/she has concluded a contract that has at least the appearance of a contract of employment, so that the court can analyse this issue further. Overturning the burden of proof implies the recognition of the status of employer for the beneficiary of the work and that is precisely the issue here. Only after, *prima facie*, the appearance of an employment contract is shown, the beneficiary of the work (i.e. the employer) may prove that, on the contrary, the concluded contract was in fact a civil contract. If the employer's defense is not convincing, the judge will decide that the agreement is an employment contract.

Nevertheless, is it sufficient for workers to prove that some criteria for classifying the contract correspond to an employment relationship in order for the court to requalify the contract? A substantive objection may be raised here, i.e. *nemo auditur propriam turpitudinem allegans* (no one shall be heard, who invokes his own turpitude). Indeed, if the worker initially agreed to the disguised legal form under which he/she was required to perform the work, he/she consented to the disguise of the contract – perhaps even for an unlawful reason (e.g. to avoid payment of social contributions). As a matter of principle, he/she cannot invoke his/her own illicit act in order to gain an advantage in recognition of the rights provided by labour law. In common law systems, this is known as the rule of "*clean hands*": the one who claims that a certain right has not been recognized must not be himself/herself to blame for the failure to

9 However, jurisprudence in the matter has remained sporadic and sometimes hesitant. For instance, the High Court of Cassation and Justice ruled by Decision No. 5/2014 (published in the *Official Gazette of Romania* No. 686 of 19 September 2014) on the possibility of reclassifying an employment contract. The High Court considered that a contract was a civil contract and not an employment contract because "it was concluded punctually, in relation to activities and services expressly individualized, provided by specialists, in exchange for a consideration – the payment due – which was negotiated between the parties." However, all these characteristics could also have been found in the case of an employment contract.

10 According to Labour Code, article 10, the individual employment contract is the contract under which a natural person, called an employee, undertakes to perform the work for and under the authority of an employer, a natural or legal person, in return for a remuneration called salary.

11 It should be mentioned that the court competent to reclassify such a contract and to declare the status of employee is the labour law court, not the civil law court, although the Social Dialogue Law No. 62/2011 does not explicitly mention this action among the tasks of labour law courts.

recognize that right. Certainly, under civil law rules, the worker could prove that he/she intended to conclude an employment contract, but the other party took advantage of the state of necessity the worker was in (article 1.218 of the Civil Code), forcing him/her to conclude a civil contract. The worker's consent would, thus, have been vitiated to conclude the disguised contract. This would result in the annulment of the civil contract. The worker could also prove that he/she was mistaken in law (article 1.207 (3) of the Civil Code), not knowing that the contract concluded, according to its clauses, should take the form of an employment relationship[12] or that the other party to the contract mislead him/her by deceptive means (article 1.214 of the Civil Code), making the worker conclude a contract of a legal nature other than what was expected. However, if the worker is not able to produce such proof – which is a quite difficult task – how can he/she benefit from labour law protection after he/she has already consented to circumvent its provisions? A special rule of labour law could be useful here, *de lege ferenda*, to eliminate such restraint.

The court should discern between the situation of a worker who has accepted the conclusion of the disguised agreement in a state of necessity, which the other party has taken advantage of, and the situation of an opportunist worker who concludes a civil contract in order to pay lower contributions, thereafter requesting it to be reclassified in order to benefit from the rights provided by labour law.

The control bodies

The requalification carried out by the fiscal control body does not relate to the contract itself, but the revenue obtained under it. In fact, the decision of the fiscal body is not enforceable either by labour law courts or by labour inspectors. However, it establishes an extremely important indicator for the labour law court called upon to rule in an action to determine the existence of an employment contract, and, all the more so, for labour inspectors.

Besides, Government Decision No. 488/2017 regarding the approval of the Regulation for the organization and functioning of the Labour Inspection[13] provides in article 12, paragraph (1) B that Labour Inspection has, *inter alia*, the following tasks:

> d) [it] determines whether the activity performed under a contract other than employment contract is carried out under an employment relationship;
>
> e) [it] orders the conclusion of individual employment contracts and their recording in the General Register of Employees for the workers identified as performing activities without an individual employment contract.

Therefore, the labour inspector is able to determine the legal nature of the contract concluded by the parties, ascertaining whether it corresponds to an employment relationship. However, there are no criteria for doing so as the effects of such requalification are not foreseen. As work performed under a contract of employment not concluded in writing (article 15[1] (a) of the Labour Code), or written but not registered (article 15[1] (b) of the Labour Code) constitutes undeclared work, it follows that work carried out under an employment relationship on the basis of a contract with a different denomination is also undeclared work. After requalification of the contract as a contract of employment, the labour inspector could apply administrative fines for undeclared work.[14]

12 The ILO, Employment Relationship Recommendation, 2006 (No. 198), article 4(a) provides that States, through their national policies, will provide guidance to stakeholders, especially employers and workers, to effectively establish the existence of an employment relationship and the distinction between employed and self-employed workers.

13 *Official Gazette of Romania* No. 594 of 25 July 2017.

14 Raluca Dimitriu, "Choosing Between Civil Contract and Employment Contract", *Journal of Accounting and Management Information Systems*, Vol. 17, No. 4 (2018), 670.

Criteria used in order to distinguish the employment relationship from civil contracts

The issue of disguised employment contracts is particularly important when, although the legal relationship between the parties corresponds to a contract of employment, the name given by the parties corresponds to:

- a civil contract, or
- a contract that the law has removed from the protection provided by labour law. Among these contracts tangential to the employment contract are the day-labourers contract[15] and the recently regulated internship contract.[16]

However, as we have seen, Romanian labour law does not contain a set of legal criteria that the courts may take into account to reclassify the employment contract.

According to ILO Recommendation No. 198/2006, Member States should consider the possibility of defining in their laws and regulations, or by other means, specific indicators for the existence of an employment relationship. These indicators might include:

- the fact that the work is carried out according to the instructions and under the control of another party; it involves the integration of the worker in the organization of the enterprise; it is performed solely or mainly for the benefit of another person; it is carried out personally by the worker; it is carried out within specific working hours or at a specific workplace or agreed by the party requesting the work; it is of a particular duration and has a certain continuity; it requires the worker's availability; or it involves the provision of tools, materials and equipment by the party requesting the work;
- periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.

According to article 7(3) of the Romanian Fiscal Code,[17] independent activity (cf. dependent activity under an employment contract) is an activity carried out by a natural person for the purposes of obtaining income, if it meets at least four of the following seven conditions:

- the natural person is free to determine the place and the way to carry out the activity, as well as the work schedule;
- the natural person is free to work for more than one client;

15 Regulated by Law No. 52/2011 regarding the exercise of occasional activities performed by the day-labourers, republished in the *Official Gazette of Romania* No. 947 of 22 December 2015.

16 Regulated by Law No. 176/2018, published in the *Official Gazette of Romania* No. 626 of 19 July 2018. Unlike the apprenticeship contract or traineeship contract, the internship contract is not an employment contract. Under the internship agreement, concluded for a maximum of six months, an intern undertakes to develop professionally and carry out a specific activity for and under the authority of a host organization. The latter, in turn, undertakes to provide an internship allowance and all the conditions required for the completion of the internship programme. Interns, who are not employees, receive at least 50 per cent of the gross national minimum wage. Internship activity is limited to 40 hours per week, with no possibility of overtime, and harmful or dangerous activities are excluded. The vocational training of the intern is carried out under the guidance of a mentor who also carries out the evaluation. If, at the end of the internship programme the host organization hires the intern and maintains him/her for two years, he will receive a job promotion premium.

17 Law No. 227/2015, *Official Gazette of Romania* No. 688 of 10 September 2015.

- the natural person performs tasks (under their own responsibility) bearing the risk of the activity;
- the activity is carried out by using the patrimony of the natural person who performs it;
- the activity is performed by the natural person by using his/her intellectual capacity and/or physical performance, depending on the type of activity;
- the natural person belongs to a professional body/order with the role of representing, regulating and supervising the profession, according to special normative acts regulating the organization and the exercise of the respective profession;
- the natural person has the freedom to carry out the activity directly with employed personnel or by contracting third parties under the law.

Per a contrario, it follows that failure to meet these criteria would indicate the dependent nature of the activity performed by the worker.

Admittedly, these criteria are provided by tax law, not labour law. In this case, the purpose of reclassifying the contract is not to protect the rights of the person performing the work and the application of the regime established by the Labour Code, but to retroactively pay the contributions owed to the state by the parties and the applicability of the rules of social security law. The criteria listed in the Fiscal Code, though not perfect, are nevertheless useful as the only currently existing legal criteria to reclassify a civil contract as an employment contract. Labour law courts might consider them in cases concerning the determination of an employment relationship alongside the criteria laid down by the ILO Recommendation. Moreover, if a contract has already been requalified by the fiscal control body, and the worker asks the labour court to ascertain the existence of an employment contract, the court may look carefully into the decision of the tax authorities. Reclassifying income as salary does not automatically entail the requalification of the contract as employment. However, once the income has been reclassified as salary, the beneficiary of the work (i.e. the employer) should present clear evidence (in particular, the test of legal equality between the contracting parties) in order to refute the presumption thus created and show that the contract is in fact a civil contract.[18]

Admittedly, the crucial criterion for identifying an employment relationship, namely subordination, is missing from the enumeration contained in the Fiscal Code. However, Romanian labour courts can and sometimes do use this criterion.[19] The criterion of subordination is reflected in a series of rights enjoyed by the employer under an employment contract: the employer is entitled to "establish the organization and functioning of the establishment", "to establish the duties of each employee, in accordance with the law", "to issue orders that are mandatory for the employee, subject to their legality" and "to exert control over the manner in which job tasks are carried out".[20]

18 Dimitriu, "Choosing Between Civil Contract and Employment Contract", 669.

19 For example, in Decision 16/2016, the High Court of Cassation and Justice ruled that the provisions of the Labour Code apply to the legal relations between the mayor/deputy mayor and the administrative-territorial unit. There is no civil legal relationship – as the Supreme Court showed – because in this case one can identify the subordination characteristic of the legal employment relationship. "This subordination implies the inclusion of the worker in the employer's collective, in an organizational structure and in a certain functional hierarchy; in this predetermined organizational framework the work is performed, as opposed to the civil contracts under which the obligor organizes his/her work alone, without belonging to a group and without subordinating to the one with whom he/she contracted. Subordination also implies the obligation to respect the discipline of work, this obligation having as an essential component the observance of the work programme, within a minimum number of hours per day, in a given period."

20 Labour Code, article 40 (1), a), b), c) and d).

Grey area: NSFW where no criteria are currently useful

The traditional criteria for identifying an employment contract may be difficult to use in cases involving NSFW. For example, a popular type of contractual arrangement is where a worker has to ensure certain results at a predetermined date. Thus, the employer's prerogative of control tends to fade because the worker's obligation is not a duty of diligence but rather a duty of result. The employer does not monitor the working time, but the results of the work. This may be the case for a contract of employment disguised as a civil contract, or even a home work or telework contract.[21] According to the Labour Code, teleworkers and home workers are subject to the same working time rules as other employees, but the employer's prerogative to monitor this working time is limited. The employer will simply check the results of the work submitted by the employee (which could be in fact the results of working hours that exceed the legal limits). If the worker's obligation is not of diligence but mostly of result, working time is no longer actually monitored, and, by using the criteria of independent work set out in the Fiscal Code, the worker may falsely appear to be self-employed. With the shift of focus from the work itself to its results, the protection afforded by labour law runs the risk of being jeopardized.

In the case of NSFW, a lesser emphasis is placed on integrating the worker into the organization of the enterprise (the employee can also work at home or in another place), the existence of a specific work programme (which, in the case of the employee, can be individualized), a specific working place (teleworkers or mobile workers may not have such a working place) or on the condition that the salary is the only source or the main source of income (the employee may have other sources of income, as he/she can accumulate several employment contracts). Conversely, however, performing work under the instructions and under the control of the employer, personal performance of the activity by the worker (without the possibility of using assistants or substitutes), the duration and continuity of the work, the provision of tools, materials and equipment by the employer, the remuneration of the worker and the absence of financial risk for the worker have been and remain decisive in classifying an employment contract.

The only solution left is a case-by-case analysis, whereby the court takes all these criteria into account as well as their interdependence, especially in view of identifying the degree of legal or economic dependency, thereby distinguishing NSFWs from civil contracts.

Conclusion on disguised employment relationships

From the moment when, under Romanian law, the employment contract has become consensual, courts have been presented with the possibility of reclassifying employment contracts disguised as civil agreements.

However, some difficulties persist. Proving that, despite the name given to the contract by the parties, the agreement is in fact an employment contract may still be challenging, especially in case of NSFW. Moreover, the absence of legal criteria for identifying the employment relationship makes it more difficult for courts to deal with this matter. However, courts may rely on the criteria established in the Fiscal Code and the ILO Recommendation No. 198/1996, given that no current labour legislation in force provides for the application of these criteria.

21 Teleworking is regulated by Law No. 81/2018, published in the *Official Gazette of Romania* No. 296 of 2 April 2018. This law was drafted taking into account the Framework Agreement on Telework (ETUC, 2002); however, it imposes more restrictive and rigid rules compared to other European legal systems. Telework is legally defined as the form of work organization whereby the employee, on a regular and voluntary basis, performs his/her duties in a place other than the workplace organized by the employer, at least one day per month, using information and communication technology.

Finally, especially in the case of non-standard forms of work, the reclassification of the contract may sometimes be particularly challenging whenever the employee has the appearance of an independent worker, even if he/she is essentially in a relationship of subordination to his/her employer.

Part-time: Drivers and trends

Premises

While part-time work was initially used more as a way to supplement income as a second job, in the last decades of the twentieth century has became a widespread phenomenon. Part-time work gradually became in many cases the only activity carried out by the employee – often as an alternative to unemployment. The European legislature's reaction was to adopt Council Directive 97/81/EC concerning the Framework Agreement on Part-Time Work, requiring part-time workers be granted, proportionally, the same rights as full-time workers: "in respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds. Where appropriate, the principle of *pro rata temporis* shall apply".[22]

However, not any kind of part-time contract is relevant as an atypical form of work. The crucial distinction here is between:

- voluntary part-time work: seen as an expression of free choice. In this case, the part-time contract is, for example, a form of reconciling work and family life, a free expression of the will, which does not raise any special concerns regarding protection;
- involuntary part-time work: an agreement that is a compromise for the worker who has failed to get a full-time job. In this case, it is not the choice of the employee to conclude such a contract, but only a solution (temporary, as intended) due to lack of jobs.

Therefore, the problem of protection of part-time workers must be raised in light of their actual purpose. If these contracts are transient in a worker's career, what trend do they express? **Are they milestones on the road to full-time employment or to unemployment?**

Additionally, underemployment is not only about the actual number of hours worked, but it also relates to the overall feeling of dissatisfaction with the work performed. Part-time workers seldom obtain management positions, having little chances of promotion, or they carry out activities that are below their level of qualification.

Regulation of the part-time contracts in Romanian law: New developments

According to the Romanian Labour Code, an employee who works for less than 40 hours a week is a part-time employee.[23] In practice, not every work can be divided into fractions: apart from the example of professional nursing assistants and professional personal assistants, where work, by its nature, involves a

22 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-Time Work concluded by UNICE, CEEP and the ETUC – Annex: Framework Agreement on Part-Time Work, published in the *Official Journal* L 014, 20/01/1998, clause 4.

23 Labour Code, article 103.

permanent activity of surveillance, the extent to which the tasks of a particular job can be partly performed by one employee and partly by another will determine the specific way in which the work is organized.

The Labour Code no longer provides a minimum working time, the status of the employee being determined by other criteria independent of the working time, such as the dependent nature of the work performed by the employee and the continuity of work.

As noted above, we should distinguish between voluntary and involuntary part-time work (the so-called "under-employed workers"). European rules aim to encourage the conclusion of voluntary part-time contracts. However, the current problem faced by the Romanian business community from the point of view of part-time employment is that, despite the rules of the European Directive urging Member States to encourage work under voluntary part-time contracts, Romania adopted an avalanche of restrictive regulations, regardless of the motivation behind the use of these contracts. Thus, in Romania, it has become both expensive and risky for employers to hire part-time employees. This is due to the following factors:

a) **overtime provided by part-time employees is considered undeclared work.**

A specific aspect of the part-time contract, which has created many difficulties over time, is the prohibition to work overtime for part-time workers. As the volume of work is often fluctuating, one can assume that this prohibition is a further obstacle to internal flexibility.

However, with Government Emergency Ordinance No. 53/2017, the Labour Code was amended not towards more flexibility, but in the opposite direction, imposing even more rigid conditions on employers. Even before this piece of legislation, overtime was prohibited in case of part-time employees because there was always a risk that full-time employees could be abusively declared and paid as part-time employees.[24] Indeed, facing repeated increases of the minimum wage, employers sometimes reacted by declaring full-time employees as part-time, maintaining the wage at the previous level.

Currently, however, the work of an employee outside the work schedule established under an individual part-time employment contract has ceased to be sanctioned as mere non-compliance with overtime provisions (punished with a fine of 1,500 to 3,000 lei) and it is considered undeclared work (punished with a fine of 10,000 lei). Thus, article 151 of the Labour Code now provides that work carried out outside the pre-established programme for part-time employees is work performed without a legal contract. This is a non-derogable rule, so neither individual employment contracts nor collective agreements can allow part-time workers to work overtime.

This regulation is somewhat surprising because it establishes a different legal regime for part-time employees compared to full-time workers. Thus, when a full-time employee works for more than the statutory limit (i.e. more than eight hours per week overtime, within the four month reference period allowed by the Working Time Directive 88/2003), the applicable penalty is for the failure to comply with overtime regulations. On the other hand, if the employer accepts or requires a part-time employee to work overtime, the penalty imposed is for the offence of using undeclared work.

Apart from the disadvantage experienced by the employer in relation to this penalty, which is disproportionate to the degree of danger created by the offence, part-time employees will not be able to participate alongside their full-time colleagues in the effort to overcome difficult moments for the company with increased workload. This prohibition can, therefore, affect their prospects for promotion.

24 Non-compliance with this prohibition was more moderately sanctioned as a mere violation of the provisions regarding overtime, according to the Labour Code, article 260(i).

b) Part-time employees cannot have an individualized work programme.

According to article 118 of the Labour Code, the employer may establish individualized work programmes with the consent or at the request of the employee concerned. The individualized work programme involves a flexible way of organizing working time in which the daily working time is divided into two periods:

- a fixed period during which the staff is simultaneously at work;
- a variable, mobile period during which the employee chooses arrival and departure hours, respecting the daily working time.

However, only full-time employees may have such a programme, not part-time employees. According to article 118 (4) of the Labour Code, the individualized programme may only operate in compliance with the provisions of article 112, which only refers to full-time employees. The aim of this restriction is to eliminate the risk of circumventing the legal provisions on working time of part-time employees. However, this indirectly results in excessive rigidity.

To make it possible to verify compliance with these rules, Government Emergency Ordinance No. 53/2017 also modified the content of article 119 of the Labour Code, which now provides that the employer has the obligation to keep the record of the hours worked daily by each employee at the workplace, highlighting the starting and ending hours of the work programme, and subjecting this record to the control of the labour inspectors, whenever required.

As a result, at present:

- the work schedule of the part-time employee must be expressly specified in the contract;
- the monitoring of the time of arrival and departure from work must be carried out on a daily basis;
- the employee cannot be on the premises of the company outside the timeframe specified in the contract;
- accepting the performance of overtime by part-time employees is considered undeclared work, and it is subject to a penalty that is disproportionately harsh.

c) The employer must pay part of the social contributions in the case of part-time employees who earn less than the national minimum wage.

Until 1 January 2018, social security and health insurance contributions for part-time employees with a lower wage than the minimum wage had to be paid by the employer. However, with Government Emergency Ordinance No. 79/2017,[25] social contributions were shifted from employers to employees. The rule of paying contributions at least to the level of the national minimum wage, even when the actual salary earned by the part-time employee is lower, was maintained, except that it was no longer the employers paying these contributions, but the employees. Soon it became clear that in this way some employees working few hours had to pay even higher contributions than the salary they had earned. As a result, a new legislative amendment was introduced, through Government Emergency Ordinance No. 3/2018.[26] According to this normative act, part-time employees have to pay contributions related to their income, and the difference to the level of the minimum wage contributions is no longer paid by the employees, but by the budgetary institution employing them or by the private employer.

In other words, **contributions are calculated at the level of the minimum wage**, but the difference is not paid by the employee, but by the employer.

25 *Official Gazette of Romania* No. 885 of 10 November 2017.

26 *Official Gazette of Romania* No. 125 of 8 February 2018.

If the part-time employee has more jobs, he/she must declare if the sum of all the earnings is above the minimum wage. If, by summing up the fractions, the worker gets a lower wage than the national minimum wage, **each employer** will have to pay the difference of the contributions due for the minimum wage.

The situation is even more complicated at present, as there are practically three minimum wages in Romania:

- a general minimum wage of 2,080 lei per month (Government Decision No. 937/2018);[27]
- a special minimum wage of 2,350 lei per month for positions requiring higher education (Government Decision No. 937/2018);
- a special minimum wage for construction workers of 3,000 lei per month (Emergency Ordinance No. 114/2018 on the establishment of measures in the field of public investments and fiscal-budgetary measures, the amendment and supplement of some normative acts and the extension of some terms).[28]

Fighting against discrimination in case of part-timers

Part-time workers generally benefit from the same legal status as full-time workers. Some authors do not even include part-time work among the categories of non-standard contracts because part-time work does not contain the seeds of precariousness that typically characterise atypical work and the duration of the working day is not, by itself, a decisive factor in terms of non-standard work. However, in the case of involuntary part-time work[29] (involving employees who would have preferred to work full-time), the position of employees is characterized by a certain degree of vulnerability.

Discrimination against part-time workers, prohibited by Directive 97/81,[30] may obscure discrimination on other grounds as part-time employees are often women, young people, persons with disabilities and other people on the margins of the labour market that would accept any type of contract to avoid unemployment.[31] The vulnerability of part-time employees – be it economic or expressed in terms of identity – as manifestation of indirect discrimination that these contractual terms hide, is not as obvious as in the case of other non-standard forms of work. It can be considered that between standard employment contracts and part-time employment contracts there is not only a quantitative difference (i.e. working hours) but also a qualitative difference (what kind of workers conclude such contracts). In fact, the labour force that tends to conclude part-time contracts is the same that presents structural vulnerabilities: women, young persons, workers at the end of their careers and immigrants.[32]

27 *Official Gazette of Romania* No. 1045 of 10 December 2018.

28 *Official Gazette of Romania* No. 1116 of 29 December 2018.

29 In Romania, involuntary part-time work has one of the highest rates in the European Union. Over 55 per cent of part-time employees would rather work full time, if they had the opportunity (compared to the European average of 26 per cent). See Eurostat, "How Common – and How Voluntary – Is Part-time Employment?", 8 June 2018. https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180608-1 Note, however, that the calculation base is narrower, with only 6.5 per cent of all employees working part-time.

30 Directive 97/81, clause 4.1: "In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds."

31 Notably, however, in the attempt of limiting discrimination of certain categories of part-time employees, the Romanian legislature has exempted students under age 26, pensioners and persons with disabilities from the rule of payment of contributions at the minimum wage level (see above, section 2(c)).

32 See Raluca Dimitriu, "Vulnerability of Part Time Employees", in *Perspectives of Law and Public Administration*, Societatea de Stiinte Juridice si Administrative [Society of juridical and administrative sciences], Vol. 4 (1), 111–116.

In Romania, although the Labour Code provides for the prohibition of discrimination between full-time and part-time employees, as mentioned above, a number of fiscal norms have in fact led to the discouragement of part-time work.

Conclusions on part-time contracts

How can we, on the basis of this analysis, conclude that part-time contracts fall under a fair, comprehensive and well-balanced regulation in Romania? In reality, part-time work requires more than a regulation that prohibits discrimination: it requires a strategy.

However, the Romanian legislature has thus far been reactive. Here is an example: the increase of the minimum wage by normative act is compulsory for all companies operating in the country, regardless of size. Some employers have tried to circumvent these provisions by setting a reduced four or six-hour work schedule and keeping salaries at the previous level. Employees, however, were required in practice to work eight hours per day. In such cases, the duration of work was falsely declared as being lower than the real one, generally in the context of paying an envelope wage (without legal taxes and contributions). As a reaction, having detected the frequency of these practices of circumvention, labour inspectors have proposed not only a ban on overtime work by employees, but they have also applied penalties for overtime work, which is classified as undeclared work. A very rigorous system of monitoring the start and the end of the working time of each employee has also been imposed. These restrictive rules have their justification, but they have led to a drastic reduction in the number of part-time contracts concluded in Romania.

Another example: the contributions due by part-time employees were originally related to the workers' actual income, then to the national minimum wage and then again to the income earned, with the employer having to bear the difference up to the level of contributions corresponding to the national minimum wage. In fact, four successive legislative amendments have been adopted in this respect only in 2017. The current solution has a dissuasive effect on employers, who may find it cheaper to hire one full-time employee than two part-time employees performing the same work.

Indeed, on the basis of studies on the voluntary or non-voluntary conclusion of this type of contract, the Romanian legislature will have to decide in which circumstances it should encourage this form of work. The decision is not easy because the reasons behind this type of contract (mediated causes of part-time contracts) can be extremely diverse. The main problem that arises is whether the conclusion of a part-time contract is the first step towards the conclusion of a full-time contract or, on the contrary, part-time contracts – these "mini-jobs" that are so popular in today's Europe – actually erode the foundations of standard contracts.

One should not presume that, in the absence of an empirical analysis, the conclusion of part-time contracts always results from free choice, independent of economic constraints, especially when the offer of full-time jobs does not cover the demand. A strategy on how to regulate part-time contracts should start from an analysis of the categories of persons that conclude such contracts, as well as their voluntary or involuntary character. All that can be said at the time of writing is that, as a result of the rather chaotic legislative changes described above, the number of part-time contracts concluded in Romania have decreased by 35 per cent in just two years.[33]

33 See Cristina Somănescu, "The Experiment of Overtaxing Part-time Contracts and its Effects", 16 December 2019. https://www.economica.net/

However, the removal of part-time contracts from the landscape is not the solution, as part-time work often meets real needs, notably the need to reconcile family and work life. It is only on the basis of such analysis that national and European policies should be drawn up with the aim to encourage or, when needed, discourage this contractual form.

Serbia
Non-standard and flexible forms of work in Serbia

Senad Jašarević

Introduction

The first part of the chapter gives a brief overview of Serbian contemporary labour law and trends. The second part presents legal norms and practices related to traditional flexible forms of work (fixed-term employment, part-time employment, temporary and occasional work, agency work). In the third part, we address the influence of new forms of work on the Serbian labour market. The aim is to point out the problems present in regulation and practice and suggest the direction in which legislation should change. The basic conclusion is that Serbian labour law is currently lagging behind the needs arising from labour practice and the requirements imposed by new working conditions on labour law.

Acts regulating labour law in Serbia can be classified into several groups: (1) basic labour laws, (2) specific labour laws, (3) supplementary labour legislation. The basis for these Acts is the Constitution of the Republic of Serbia,[1] which among other things, defines basic social and economic rights (such as the right to work, the right to healthy and fair working conditions, the right to equal wages, the right to professional association, the right to strike), the sources of labour law (laws, collective agreements, "general acts" of employer),[2] and bodies that bring regulation.[3] The main source of labour law is the Labour Code (hereinafter, referred to as LC), originally adopted in 2005 and revised in 2014.[4] The Labour Code regulates important issues relating to labour law.

Over the last 20 years, several trends have characterized Serbian labour law: (1) further harmonization of Serbian labour law with international legal standards; (2) the "marketization" of the economy and labour law through a continued transition from socialist to market economy; (3) flexibilization of labour legislation. *Inter alia*, widespread use of flexible forms of work has resulted from the flexibilization of labour law. The process of introducing flexible forms of work into Serbian labour law began in the late 1990s. The latest major amendments to the Labour Code in July 2014 have brought positive developments.[5] The use of atypical forms of work is facilitated, for example, through an easier and prolonged use of fixed-term work arrangements and switch from part-time to full-time work and contract renewal, wider use of work from home (home work) or work with the help of IT technology (IC – mobile work). "On-call" work has also been specifically regulated for the first time.[6] Despite the visible improvements of Serbian labour law in

1 *Official Herald of the Republic of Serbia*, No. 98/2006.

2 General acts of employers in Serbian law are the company statute, work rules and safety at work acts.

3 See Constitution, articles 55, 60, 61 and 97.

4 The Code was published in the *Official Herald of the Republic of Serbia*, No. 24/2005, and the remaining amendments in Nos 61/2005, 54/2009, 32/2013, 74/2014, 13/2017, 113/2017, 95/2018.

5 Of 18 July 2014 (*Official Herald of the Republic of Serbia*, No. 75/2014).

6 See Labour Code, articles 37, 40, 42 and 50.

the last 20 years, including a number of new solutions introduced in 2014, Serbian labour legislation still lacks many provisions necessary to respond to new global trends (digitalization, triangular employment relationships, blurred distinction between employed and self-employed and so forth). For example, what is needed is a more precise definition of the concepts of the employment relationship, employee, employer, self-employed person, regulating the status of persons working through "platforms" and other "digital workers". Regrettably, due to the new trends in the area of labour, an increasing number of persons fall outside the protection of labour legislation.

Flexible forms of employment in Serbian practice

Apart from the "standard" full-time employment, the Serbian Labour Code provides for several types of "atypical employment relationships". The following types of atypical labour contracts can be concluded: fixed-term contract, part-time contract, temporary or occasional work contract, contract for services (*locatio operis*) and contract of apprenticeship or professional development.[7] Albeit foreseen by the labour legislation, flexible forms of work are quite rare in practice in Serbia. Fixed-term contracts and temporary or occasional work contracts are concluded to a slightly greater extent. In recent years, labour practice has been characterized by the abuse of flexible forms of work. The number of cases related to false flexible work contracts, such as disguised employment, false self-employment and fictive employment through occasional and temporary work or fixed-term work have increased over the past twenty years.[8] In addition, although not regulated by the LC, the practice of concluding "contracts on assignment of employees" through agencies (temporary agency work) has grown. Employers mainly use these contracts to avoid legal obligations towards full-time employees, including the obligation to guarantee decent working conditions, payment of social security contributions and taxes.

Below, we will look at the most widely used forms of flexible work in Serbia: fixed-term employment, part-time work and temporary work.

Fixed-term employment

The Labour Code, in Article 37, paragraph 1 indirectly defines ***fixed-term employment*** *(radni odnos na određeno vreme)* as follows: "A labour contract may be concluded for a definite time period for the employment whose duration is predetermined by objective reasons justified by the time limit or performance of specific work or occurrence of a specific event for the duration of these needs." A fixed-term contract is, therefore, a labour contract: (1) whose duration is predetermined by objective reasons, and (2) justified by: a) the time limit, b) performance of specific work, c) occurrence of a specific event. In practice, a fixed-term employment contract is concluded mainly in the following situations: replace-ment of a temporarily absent worker, a temporary increase of workload (objective reasons), directing of theatre performances (performance of specific work) and seasonal jobs (fixed-term duration of work).

7 These contracts are regulated by the Labour Code, articles 31, 37, 39–41, 197–202.

8 It is estimated that currently in Serbia every tenth worker performs a part-time job. See "Fleksibilni rad u Srbiji: pola posla" [Flexible work in Serbia, part-time job], *Biznis finansije*. http://bif.rs/2013/09/fleksibilni-rad-u-srbiji-pola-posla/; "Analiza stanja ekonomskih i socijalnih prava u Republici Srbiji [Analysis of the state of economic and social rights in the Republic of Serbia]" (Belgrade: Centre for Decent Work, 2019), 77.

In July 2014, amendments to the Labour Code provided for significantly more flexibility for concluding fixed-term contracts.[9] Pursuant to Article 37 of the LC, an employer may conclude one or more fixed-term labour contracts on the basis of which the employment relationship with the same employee shall last for a period which, with or without discontinuations, must not be longer than 24 months.[10] A discontinuation period shorter than 30 days shall not represent a discontinuation of this period. Exceptionally, a labour contract for a definite period of time may be concluded for a period exceeding 24 months, in the following cases: (1) if required for the purpose of replacement of a temporarily absent employee until his/her return; (2) to work on a project whose time is predetermined, not longer than until the end of the project; (3) with foreign citizens on the basis of a work permit in accordance with the law, not longer than the validity period of the work permit; (4) to perform work duties with a newly founded employer whose entry in the register with the competent authority at the moment of concluding the labour contract is not older than one year for the time period of total duration of up to 36 months; (5) with an unemployed person who lacks up to five years to fulfil one of the conditions for entitlement to old-age pension, and for not longer than up to the fulfilment of the condition, in accordance with the regulations on pensions and disability insurance.[11]

Although the legislature stipulated that fixed-term jobs listed above under points 1–5 may be concluded "exceptionally", the next paragraph of the same Article states that,[12] upon cessation of reasons given above under points 1–3 (i.e. the replacement of a temporarily absent employee, to work on a project whose duration is predetermined or to employ foreign citizens with a work permit), the employer may conclude a new fixed-term contract with the same employee on the basis of any of the above reasons. Therefore, it is possible that, by using a combination of any of these criteria, an employee may be engaged indefinitely on the basis of consecutive fixed-term contracts.

In order to avoid misuses in practice, pursuant to paragraph 1 (Al)(7) of Article 33 of the LC – which contains the required contents of an employment contract – it is envisaged that a fixed-term labour contract shall contain: the duration of the definite period of time and the reason for entering into an employment relationship for that definite period of time. This ensures that the employer does not avoid mentioning the reason and grounds for concluding a fixed-term contract, which often happened in practice in order to circumvent the control of such contracts.[13]

There must be reasonable grounds for the conclusion of the contract: a fixed-term contract may not be concluded when the type of work requires full-time employment. In practice, this is particularly misused. Since workers on fixed-term contracts are "significantly cheaper", much more cooperative and willing to endure abuses by employers and to work for much lower salaries – as they expect to gain stable employment in this way – such contracts are often used when the worker should, by right, be employed permanently. The problem here lies not so much in the Labour Code as in the inadequate case law. The courts, which are still influenced by a socialist heritage, are not prepared to engage in the assessment of the objectivity of the reasons for fixed-term employment ("objective assessment"). Courts are mostly satisfied simply by checking whether the formal requirements for the duration of employment (i.e. 24 months) are met and whether the relationship lasted longer than permitted or required by the contract.[14]

9 The possibilities to use fixed-term work have been increased.

10 The duration of fixed-term contracts has been extended from 12 to 24 months in 2014. See Labour Code, article 37.

11 Labour Code, article 39(3).

12 Labour Code, article 39(4).

13 Pursuant to article 273 of the LC, an employer who fails to comply with this obligation will be fined in the amount of about €6,500 to €16,000.

14 See *Pravno shvatanje Građanskog odeljenja Vrhovnog kasacionog suda od 25.12.2012* [Legal interpretation of the Civil Division of the Supreme Cassation Court of 25.12.2012], Supreme Cassation Court of the Republic of Serbia, Belgrade; Appellate Court of Kragujevac, Gž1. 507/2013, of 28 January 2014.

Sometimes, for example, employees worked for four or more years (which was four times longer than allowed by law at the time)[15] and a judgment that this violated the norms of the "fixed-term contract", i.e. that it was in fact a permanent employment, was not delivered.[16]

In 2014, new criteria for the implementation of fixed term labour contracts were introduced. Fixed-term contract with foreign citizens (on the basis of a work permit, not longer than for the duration of the validity period of the work permit) is one of these. The aim is to attract foreign investments and facilitate foreign companies to bring their management and other relevant staff. Another new type of fixed-term employment is the fixed-term contract for performing the work duties with a newly founded employer. This is an employer whose entry in the register with the competent authority when concluding the labour contract is not older than one year. Only in this case, the employment contract can be signed for a total duration of up to 36 months.[17] The aim is to facilitate the operations of new employers and allow them a more flexible approach to the hiring and firing of employees in the initial period. An additional legal novelty from 2014 is the fixed-term contract with an unemployed person who lacks up to five years to fulfil one of the conditions for entitlement to old-age pension. The duration cannot be longer than the period needed to fulfil the condition in accordance with the regulations on pension and disability insurance. The aim is to facilitate the employment of elderly employees who have lost their jobs on a large scale in recent years due to mass redundancies.

One of the main problems in legislation and practice is that there is no limit to the number of fixed-term contracts that can be concluded successively. It is only important that such work does not go beyond the legal time limit (24 months) and that the legal basis is legitimate. For this reason, there is a protective provision in Article 37, paragraph 5 of the LC aimed at preventing misuses: "If the labour contract for a definite time period has been concluded contrary to the provisions of this law or if the employee continues to work with the employer at least for five working days upon the expiry of the contract, it shall be considered that the employment has been concluded for an indefinite time period." Thus, instead of a fixed-term contract, permanent employment shall be deemed to exist under two conditions: (1) if the labour contract for a definite time period has been concluded contrary to the provisions of the LC, (2) if the employee continues to work with the employer at least for five working days upon the expiry of the contract. Although these provisions seem to define clear safeguards against abuses of fixed-term contracts, this does not work in practice. Problematically, this situation is a result of the courts' literal and unreasonable interpretation of LC provisions, under which fixed-term employment is largely abused. For example, employers conclude successive fixed-term contracts with workers for more than 24 months, allowing for an interval of more than five days between the individual contracts. Courts accept this as a legitimate practice. Also, after the expiration of the legal limit, many employers only formally change the basis for concluding fixed-term employment. This means that many employees perform the same work for years under successive fixed-term contracts. Courts do not consider this a violation of the Code, provided that the time limit has not been exceeded in each individual contract.[18] Another form of abuse in this area is the alternative succession of fixed-term contracts and temporary and occasional work contracts, although an employee performs identical tasks throughout.

There is also a provision of Article 31 of the LC, according to which "An employment contract where the duration of the contract is not set shall be considered an open-ended contract of employment." Courts have relied on this provision in many court decisions. In assessing whether there are conditions for

15 At that time, the maximum duration of fixed-term employment was one year.

16 See Supreme Cassation Court, Rev2. 486/2014, of 17.9.2014; Appellate Court of Belgrade, Gž1.1351/2010(3), of 6 October 2010.

17 Labour Code, article 39(3).

18 See Appellate Court of Novi Sad, Gž1 313/2014 of 14 February 2014.

converting a fixed-term contract into a permanent contract, courts mainly follow the principle of "primacy of facts", irrespective of the "labelling" of the contract by the parties. Thereby, "false fixed-term contracting" is illicit.[19] However, courts have not been consistent. The assessment criteria of "abuse of the legal basis" of fixed-term employment are not always completely clear. This approach allows employers to abuse labour law and evade legal provisions.

Indeed, even though fixed-term employment has existed for a long time in Serbian labour legislation, terms and conditions have changed, making it easier to use (and abuse) this form of work.

Part-time employment

Part-time employment – *Rad sa nepunim radnim vremenom,* is defined in article 51 of the Code: "Part-time work, pursuant to this law, shall be defined as work shorter than full-time." Full-time work involves a working time of 40 hours per week. The Labour Code dedicated a special chapter (three articles) to this type of work: "employment relationship for part-time work", in the part on concluding an employment relationship ("entry into employment relationship"). Article 39 states as follows: "An employment relationship may be concluded for part-time work, for indefinite or definite (fixed-term) periods."

Like other labour contracts, a part-time employment contract must be concluded in writing and it must specify whether it is for a fixed-term. Otherwise, it shall be deemed that the employee has concluded an employment contract for an indefinite period.[20] Part-time work in Serbia is used mainly when there is no need for full-time workers. This form of part-time work is most traditionally used in education (primary and secondary schools) as well as in the field of health (when medical staff, doctors and nurses work in several places).[21]

Pursuant to Article 41 of the LC, an employee working part-time for one employer may enter into an employment relationship with another employer to reach the full-time work quota of hours.[22] Additionally, there is a relatively new provision under article 40, paragraph 3 of the LC, according to which the employer should timely notify employees about the availability of part-time and full-time jobs, within the manner and deadlines determined in the "general document" (general documents are, pursuant to the LC,[23] collective agreements or labour rules). The purpose behind this provision is to facilitate employees who may decide to switch to part-time work. This rarely occurs in Serbia as it is very difficult to return to full-time work later on. Since the salaries in Serbia are relatively low,[24] employees cannot survive even on the income earned by working full-time. This is why they do not wish to switch from full-time to part-time.

A temporary or permanent reduction in the workload is sometimes the reason for moving to part-time work. Part-time work, but not less than half-time, is one of the possibilities that can be offered to

19 See Supreme Cassation Court, Rev. 2 761/2012, of 23 January 2013 and Supreme Cassation Court, Rev2 602/2014 of 23 October 2014; District Court in Valjevo, Gž. I. No. 266/05 of 26 May 2005.

20 See Labour Code, articles 197 and 31–32.

21 See "U prosveti 30.000 nastavnika s nepunim radnim vremenom" [In education 30,000 teachers with part-time work], *Blic [Daily newspaper],* 26 March 2014. http://www.blic.rs/vesti/drustvo/u-prosveti-30000-nastavnika-s-nepunim-radnim-vremenom/2v3qfwv

22 According to a decision of the Supreme Cassation Court, an employee may conclude part-time employment in the case that he/she do not work at another employer under a full-time contract. See Supreme Cassation Court, Rev2 368/2015, of 23 September 2015.

23 Labour Code, article 8.

24 The average salary in September 2019 in Serbia was RSD 53,698 (about €455). See "Prosečna mesečna zarada po zaposlenom u Republici Srbiji" [Average monthly earnings per employee in the republic of Serbia], *Paragraf* (December 2019). https://www.paragraf.rs/statistika/prosecna_mesecna_zarada_po_zaposlenom_u_republici_srbiji.html

employees who are to be made redundant.[25] The aim of this legal solution is for redundant employees to partially keep their employment so as to eventually return to full-time work when the economic situation of the company improves.

If an employee transfers from full-time to part-time work to reduce the scope of work or for another reason, the contract will be changed by making "an annex to the employment contract".[26] Pursuant to paragraph 4, article 40 of the LC, the employer must consider the request by the part-time employee to transfer to full-time, as well as the full-time employee to transfer to part-time. This is one of the novelties entered into the labour legislation of Serbia in 2005, when the Labour Code was adopted. The aim was to encourage flexible forms of work and enable employees to use more opportunities for part-time employment. We are not aware of such cases in practice and there are no available statistics on this.

Pursuant to article 40 of the Code, an employer must provide the part-time employee with the same working conditions as a full-time employee doing the same or similar job. An employee hired for part-time work shall be entitled to salary, forms of emoluments and other rights resulting from the employment relationship proportionally to the time spent at work, except when the law, general document and labour contract otherwise cover some of the rights. In reality, since part-time employees work fewer hours, they will have a proportionally lower salary and other rights (e.g. paid holiday leave, severance pay).[27]

Temporary and occasional work

Part XVIII of the LC, under the heading "Special provisions" – *"1. Working outside employment relationship"* regulates **temporary and occasional work** *(Privremeni i povremeni poslovi).* According to article 197 of the LC, an employer may conclude a contract for performance of temporary or occasional work when such work by nature does not last more than 120 days during a calendar year with: (1) an unemployed person; (2) an employed person that works part-time, up to full-time work; (3) a beneficiary of old-age pension. The contract must be concluded in writing. It is also provided, under article 198 of the LC, that the employer may conclude a contract for temporary and periodic work with a member of a youth or student cooperative in accordance with the regulations on cooperatives.

As already mentioned, this flexible form of work is widely abused in Serbia: jobs performed under temporary or occasional contracts are actually permanent in nature, and they should be based on permanent employment contracts.

Also temporary and occasional work through agencies is widely abused. It has become a widespread practice to dismiss full-time employees and recruit them again through work agencies for much lower wages. Temporary agency work is not regulated by the Labour Code at all. However, the "leasing of workers" has grown in Serbia in recent years, following international experience. Leasing of workers is conducted by temporary employment agencies. These are, in fact, traditional private employment agencies, most of which have only recently began to deal with the "leasing of workers". The state accepts such action by private agencies since the 'leasing of workers' is not expressly prohibited by the LC and Serbia ratified the ILO Convention No. 181 on private employment agencies[28] in 2013.[29] The only regulation that exists on "temporary agency work" can be found under a by-law, 'the Regulation on Classification

25 Labour Code, article 155(1), in. 5.

26 Pursuant to Labour Code, article 171(1), in. 6.

27 See Supreme Cassation Court, Rev2 205/10, of 6 July 2010.

28 Private Employment Agencies Convention, 1997 (No. 181).

29 *Official Herald of the Republic of Serbia*, International Treaties, No. 2/2013.

of Activities',[30] issued by the Government of Serbia in 2010. According to this Regulation, agencies must register to conduct this activity. There is an interesting description of activities called "temporary employment" in this Regulation. Under number 78.2, "Activities of temporary employment agencies", it is provided that this agency activity "includes the provision of workers to clients for a certain period, as a supplement to or temporary replacement of a client's workforce, where employed individuals are permanently employed in the units for the temporary provision of services. The units which are classified in this group do not perform direct control over their employees who work in workplaces to which they are allocated by the client-employer." Some experts believe that this provision is unlawful because the Labour Code, as the parent law, does not recognize "temporary agency employment". According to the constitutional provisions on the hierarchy of regulations,[31] a regulation cannot independently regulate matters of this type. In addition, the Labour Code does not recognize the term "worker", and the provision uses the terms "worker", "client", "unit" and "client-employer".[32]

Regardless of the fact that this form of work is not regulated by the LC, it is increasingly used in practice. An estimated 60,000 to 80,000 persons work through temporary employment agencies out of around 2.5 million employees in total.[33] Differently from other countries, temporary agency work is also used in the public sector.

Therefore, when it comes to Serbian legislation, the leasing of workers is neither allowed nor forbidden. However, tens of thousands of workers work in this way and their number is growing. The legal status of workers in these jobs is not clear. For instance, it is not clear who is responsible for guaranteeing the employment rights of this group of workers. In terms of administration, the agency is the employer. However, is the user company, in reality, the employer? The question is about who guarantees employees the right to rest, vacations, safety at work, equal treatment of employees, the right to associate and collective bargaining. This disorganization results in a large variation in the rights enjoyed by assigned workers, often reflected in the "deprivation" of many legal rights that employees should benefit from under labour law.

According to observations made by trade unions, workers who work on leasing have practically no legal protection and they are left at the mercy of employers and employment agencies: "Their rights are far less than those of the employees who work for an indefinite period of time... they do not have meal allowance, transport, paid overtime, they mostly work for minimum salary, and they can be transferred from one company to another."[34] The rights of this group of workers are so poorly protected that, in the public perception, the assignment of workers is seen as exploitation of people and a form of "legalized slavery".[35] That is why a draft Law on Agency Work has been prepared and is expected to be adopted next year.[36]

30 *Official Herald of the Republic of Serbia*, No. 54/2010.

31 See Constitution, article 194.

32 See Mario Reljanović, "Ko (ne) štiti prava radnika na lizing?" [Who (do not) protects workers' rights to leasing?], *Biznis & Finansije [Business & finance],* 23 June 2016. http://bif.rs/2016/06/ko-nestiti-prava-adnika-na-lizing/

33 The Director General of the Petroleum Industry of Serbia, one of the most important companies in Serbia, stated in March 2015 that more than half of the total number of employees of the company (almost 6,000) were employed through leasing. See: "Vodič: Radnici na lizing – Vodič o pravima radnika privremeno angažovanih preko agencija za zapošljavanje [Guidelines: Workers on leasing – Guidelines on the rights of workers hired through temporary employment agencies]" (Belgrade: Share Foundations and International Centre Olof Palme, 2016). http://savez.rs/wp-content/uploads/2016/03/RADNICI-NA-LIZING-VODIC.pdf

34 According to the words of Ranka Savić, chairwoman of the Association of Free and Independent Unions. See "Bez prave zaštite 70.000 radnika-najamnika" [70,000 workers without the legal protection], *B92,* 3 March 2016. https://www.b92.net/biz/vesti/srbija.php?yyyy=2016&mm=03&dd=16&nav_id=1108535

35 *See: "Pravni okvir i rupe u zakonu – ustupanje i lizing radnika u Srbiji"* [Legal framework and loopholes in the law – assignment and leasing of workers in Serbia], *HR Bulevar.* http://www.ustupanje-radnika.com/#!Pravni-okvir-i-rupe-u-zakonu-ustupanje-i-lizing-radnika-u-Srbiji/c219o/571e1d4c0cf232b075cd7e06

36 See Sonja Gočanin, "Predlog zakona: izjnamljivanje radnika bez ograničenja" [Bill: Hiring workers without restriction], Radio Slobodna Evropa [Radio Free Europe], 7 August 2019. https://www.slobodnaevropa.org/a/zakon-o-agencijskom-zaposljavanju/30095388.html

New forms of employment in Serbia

As we have seen, the current Labour Code of 2005 makes provision for the common forms of flexible labour (e.g. temporary employment, occasional work, part-time employment, fixed-term contracts).[37] In addition to these forms of work, the practice of developed European countries also involves completely new forms of work, which cannot be reduced to the classic forms of "flexible work". These new forms include "crowd work", "casual work", "portfolio work", "labour pooling", "job sharing", "interim management", "ICT based – mobile work", "digital work", "voucher systems work" and "specific employment status".[38] Characteristic of these new forms of work is the absence of the traditional bipolar employment relationship (employee/employer), the lack of a stable organization of work and no involvement of workers in the structure of the company. Legally, these relationships are unregulated and have "hybrid" characteristics, that is, they are a mixture of different legal relationships.

These "new forms of employment" originating in the EU in recent years are extremely rare or non-existent in Serbia owing to its economic stagnation over a period of many years, so employers are not ready for innovations in the area of labour relations and work organization. However, the economy's entry into the process of transition, along with the emergence of a market economy over the last twenty years, unavoidably introduced some novelties into the field of employment. Employers mostly found the practice of developed European countries to be inspirational. The following are some of the new forms of employment in Serbian practice.

Crowd employment (work through platforms): despite the growing use of the Internet in Serbia, forms of work engagement via the Internet are rare. However, it is estimated that over 100,000 people work on platforms.[39] Currently, the only platform for jobs we know to operate in Serbia is *Car: Go*, similar to Uber, dealing with passenger transportation.[40] As in many countries, this platform is not recognized to be an employer, but as a "technology platform that functions as an intermediary in organizing and electronically billing transportation in Belgrade".[41] The status of persons working through this platform is completely unregulated (it exists in a legal vacuum). In contrast, in England and France, Uber is recognized as an employer, with all the obligations this entails.[42] This should also be the case in Serbia when it comes to working across platforms.

Casual work is now used mainly in agriculture, tourism and construction. The employment status of the workforce falling under this category is still not sufficiently regulated. This type of work has been recently used by providers of technical services, where larger entrepreneurs occasionally hire smaller entrepreneurs (or self-employed workers) during specific seasons to meet the needs of increased workload. For example, this form of work is used extensively during the summer months to meet the increased need

37 See Labour Code, articles 37, 39–47, 197–203.

38 See: "New Forms of Employment" (Dublin: European Foundation for the Improvement of Living and Working Conditions, 2015); Bernard Waas, "New Forms of Employment: A Challenge for the Legislature", European Labour Law Network, 7th Annual Legal Seminar, November 2014.

39 See "U Srbiji više od 100.000 frilensera zarađuje preko internet" [In Serbia, more than 100,000 freelancers make money online], *O21*, 9 April 2017. https://www.021.rs/story/Info/Srbija/160183/U-Srbiji-vise-od-100000-frilensera-zaradjuje-preko-interneta.html

40 See Car:Go. https://appcargo.com/sr@latin/

41 These are the words of the President of Serbia about the taxi drivers' protest over the illegal operation of this platform. See "Aleksandar Vučić: CAR:GO nije direktni konkurent, već supstitut na tržištu prevoza i posluje po Zakonu" [Aleksandar Vucic: CAR: GO is not a direct competitor, but a substitute in the transportation market and operates under the Act], *Communications*, 5 June 2018. http://communications.rs/aleksandar-vucic-cargo-nije-direktni-konkurent-vec-supstitut-na-trzistu-prevoza-i-posluje-po-zakonu/

42 See Jeremias Prassl and Martin Risak, "Uber, Taskrabbit & CO: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork", *Comparative Labour Law & Policy Journal*, Volume 40, Issue 3 (Spring 2019), 619.

for installation of air conditioning units or provide skilled workers on construction sites. As a rule, the legal relations between these entities are poorly regulated. Yet, sometimes they are regulated by civil contracts.

Similarly, ***portfolio work*** is also occasionally used, mainly in services such as maintenance of telephone exchange boards, internal computer networks or computer equipment. Those who provide these services are usually self-employed persons and work under civil contracts. Some of them are full-time employees of large telephone or IT companies, and they carry out portfolio work as a part-time job.

Labour pooling is a situation when an individual worker is hired jointly by a group of employers. Formally, it is a completely unknown form of employment in Serbia. However, a similar form of employment is used when a person undertakes technical and hygiene maintenance of companies' premises and each employer regulates his/her hiring arrangement mostly through civil contracts (service contracts), or even more often by keeping the work force outside official records.

Employee sharing was relatively frequently used ten years ago, during the process of privatization of large publicly owned retail giants and chain stores from the socialist period. It was not uncommon to see that, during the selling of stores or department stores, private employers took over the staff as well, usually for a fixed time of two to three years, which did not prevent them from being re-hired by the old employer in case of its recovery. Referring to the present situation, article 174 of the Labour Code stipulates the possibility of *"temporary assignments with another employer"* (in the case of temporary absence of the need for the work currently provided for the present employer, or when office premises are leased to another employer or when the employer enters into a business cooperation contract). Such a referral of the employee may not exceed one year, but it can be extended with the employee's consent. The employee concludes the contract of employment with another employer for a specified period of time, after which he is entitled to return to the former employer.

ICT based – mobile work is in a slow but steady expansion in Serbia, despite the fact that it currently involves only a small number of workers. It is expected that the development of this form of employment will be enhanced after the novelties in the Labour Code introduced in 2014. In article 42, paragraph 2, this kind of work was recognized for the first time. In particular, article 42 of the LC provides regulations related to teleworking and working from home. According to this Code, these workers have exactly the same full-time employee status as the employees performing the same work. Another novelty opens up even greater opportunities by allowing employers to make arrangements with employees to perform part of their tasks from home (article 50, paragraph 2).

Voucher Systems Work is unknown in Serbian labour practice. ***Specific employment status*** is rare in Serbia. It was occasionally spotted in some privatized firms or companies in restructuring, where employers offered a number of workers to switch to self-employment. The offer included the possibility of financial aid and a guarantee that they will work for the employer for a certain period of time (three to five years). This was, for example, often seen in cases of transport workers, who were offered to purchase trucks and become self-employed, while still working for the same employer.

Conclusions

Serbian labour law is still in transition. The downside of the labour law transition process in Serbia is that many positive labour institutions, intended to protect workers from abuse, are being misused. This is also the case with flexible forms of work, which are greatly abused by employers. Instead of being a form of productive employment, non-standard forms of work have become synonymous with the exploitation of persons without permanent employment. The legislature should pay particular attention to prohibiting "false flexible work" when amending the Labour Code. Among other things, the abusive use of successive fixed-term employment contracts – concluded more than twice – should be prohibited, as other countries have already done so. Temporary or occasional work contracts should also be the treated in the same way when it is obvious that the jobs are part of the employer's regular business operations. Also, the number of employees employed by the same employer engaged in temporary agency work should be limited to 10 per cent and no more than 30 per cent of the total workforce, as provided for in the Draft Agency Employment Law.[43]

When it comes to new forms of work in Serbia, there is still no clear regulatory approach. However, in our opinion, new forms of work should be regulated by the Labour Code as an option in order to allow greater flexibility of the labour force and to enhance employment. Particularly, work across platforms, which is increasing, as well as forms of "digital work" for employers in Serbia, which is extremely rare, should be regulated. Quite simply, everyone living off their work should have equal rights. The form of the (labour) contract should not matter. Unfortunately, "digital workers" working for employers outside Serbia probably will remain unprotected for some time to come.

43 See Nacrt Zakon o agencijskom zapošljavanju [Draft of Agency Employment Law], article 14, https://www.paragraf.rs/dnevne-vesti/061118/061118-vest11.html

Slovakia
The role of social partners in the regulation of non-standard forms of work and the impact on labour market dynamics in Slovakia

Monika Martišková

Introduction

Slovakia's legal regulation of non-standard forms of work has experienced a dynamic development in the last 20 years. In 2001, the new Labour Code, with initially very flexible provisions, decreased employees' protection and opened space for flexible forms of work. Since 2007, several amendments have been approved, narrowing employees' level of protection in non-standard forms of work. The activities of social partners – both employers and trade unions – stand behind several legislative amendments due to the partners' common interest to abolish social dumping and avoid the deterioration of working conditions. This chapter studies the drivers behind this development and the impact of regulation on labour market dynamics in Slovakia. We argue that legal regulation brought significant improvements to agency and casual workers. However, unlawful practices are still contributing to precarious working conditions for specific groups of workers, especially foreign workers. In their efforts to protect vulnerable workers, trade unions did not try to recruit them as union members. Nonetheless, they worked towards improving their working conditions. Trade union representation without requiring membership might be viewed as a result of the decreased capacities of trade unions to attract members and their increased ability to propose legislation covering all workers. At the company level, on the other hand, trade unions in some cases managed to associate temporary workers as well as to include them in collective agreements. Through a case study of Volkswagen in Slovakia, we analyse the actions of trade unions to organize agency workers at the company level.

In the first part of this chapter, we introduce the trends of non-standard forms of work in the context of economic development in Slovakia in the last 20 years. In the second part, we concentrate on temporary agency work in greater detail and analyse the actions taken by social partners to improve the working conditions of temporary workers. We illustrate this through a case study of the Volkswagen trade union in Bratislava. In this section, we also briefly discuss future challenges affecting the labour market, focusing on the issue of protection of foreign temporary workers in light of their numerous vulnerabilities. In conclusion, we will offer a summary of the legal provisions and their impact on labour market dynamics in Slovakia and summarize the role of social dialogue.

The rise and fall of non-standard forms of work in Slovakia

Most non-standard forms of work (NSFW) were introduced into Slovak legislation in the transformation period in the 2000s when Slovakia liberalized its labour legislation, including fixed-term work, casual work and temporary agency work. The liberalization of the Labour Code was driven by efforts to attract

foreign direct investments and, thus, decrease the level of unemployment in the country, which struggled with almost 20 percent unemployment rate at the beginning of the 2000s (see table 1). Nevertheless, the liberalization of labour legislation cannot be viewed as the only factor explaining the Slovak economic boom after 2005. Fabo and Sedláková (2017)[1] have attempted to research the impact of legislative changes on the labour market, especially on unemployment rates. As they suggest, changes to the Labour Code should not be viewed as the only explanation behind the economic growth and the decrease in unemployment rates. Rather, Slovakia's rocketing growth in the pre-crisis period could be attributed to the general interest of investors to invest in Slovakia, an EU Member State since 2004, and, at the time, soon-to-be member of the Eurozone. An important driver of economic growth was also the Slovak government's involvement in the competitive bidding to attract foreign investors through subsidies and profit tax liberalization.[2]

▶ Table 1. Unemployment rate in Slovakia

Year	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Unemployment rate	12.2	15.9	19.1	19.4	18.7	17.1	18.6	16.3	13.4	11.1	9,5
Year	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	
Unemployment rate	12.0	14.4	13.6	14.0	14.2	13.2	11.5	9.7	8.1	6.5	

Source: Eurostat.[3]

Since its adoption in 2001, the Labour Code has undergone more than 40 amendments. The majority of changes were driven by efforts to either restrict workers' protection or liberalize labour market rules. During these years, "the scope of [the] Labour Code has broadened from setting formal employment conditions in standard employment contracts to governing non-standard, often precarious, forms of employment and their specific conditions of dismissal, pay, job security and social security access".[4] This contributed to labour market dualization that was partially narrowed in later years by several amendments aimed at increasing the protection of employees in non-standard forms of work.[5]

Employment relations in Slovakia are regulated by the Labour Code (Act No. 311/2001 Coll.). While the Labour Code explicitly regulates employer–employee relationships, other statutes such as the Commercial Code cover the regulation of commercial relationships that can be nonetheless disguised as employment relationships (i.e. bogus self-employment or business contracts), mostly because they entail low social contributions and short-term relationships.

In Slovakia, a **full-time open-ended contact** refers to work for 40 hours per week, or 8 hours per day for employees in one-shift work arrangements, for those working in two-shifts or three-shifts it is 37.75 or 37.5 hours, respectively (LC, article 85). The maximum working hours limit is 48 per week in four consecutive months. As an exception, healthcare workers can work for a maximum of 56 hours per week (LC, article 85a). The probationary period is set to three months and employee and employer can agree on a shorter period, which cannot be prolonged. The notice period is set to one month for the standard employment if the employment relation lasted less than one year, two months if the employment

1 Brian Fabo and Maria Sedláková, "Impacts of the liberalisation and re-regulation of the labour market in Slovakia", in *Myths of Employment Deregulation: How It neither Creates Jobs nor Reduces Labour Market Segmentation,* eds. Agnieska Piasna and Martin Myant (Brussels: ETUI, 2017). https://www.etui.org/Publications2/Books/Myths-of-employment-deregulation-how-it-neither-creates-jobs-nor-reduces-labour-market-segmentation

2 Petr Pavlínek, *Dependent Growth: Foreign Investments and the Development of the Automotive Industry in East-Central Europe* (Springer, 2017).

3 Eurostat, "Unemployment Rates by Sex, Age, and Educational Attainment Level (%)", 11 December 2019. http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_urgaed&lang=en

relationship lasted between two and five years, and three months if the employee worked for the employer for more than five years (LC, article 63 (3)). Severance pay is stipulated in the Labour Code in specific cases, such as when an employer is wound up or is relocating and the employee does not agree with the change, or if the employee has lost his/her ability to perform work due to a health condition (LC, article 76). Social protection of full-time employees is guaranteed through social contributions paid by both employers and employees. Social insurance includes insurance in periods of unemployment and illness and pension contributions. Additionally, health insurance is paid as well as income tax. Employers contribute 25.2 per cent on social insurance and 10 per cent on health insurance, and employees contribute 9.4 per cent on social insurance and 4 per cent on health insurance. After compulsory social and health insurance deductions, a 19 per cent income tax is applied. The difference between labour costs and net wage is thus more than 50 per cent.[6]

Slovakia's employment accounts for 2,533,000 employees, of which 95 per cent are reported to be in full-time employment.[7] The number of employed persons has increased by 200,000 since 2013. The level of unemployment was at a historical minimum in 2018 (6.5 per cent), although in some regions in the East and South of Slovakia we still find unemployment at 15 per cent or above. Slovakia, together with other countries in the region, has experienced in recent years an economic boom mostly driven by manufacturing production in export-oriented industries such as automotive and electronics. Despite the fact that the economic crisis hit the country intensively in 2009, Slovakia recovered quickly and, already in 2010, it experienced economic growth of 5.7 per cent (see table 2).

▶ Table 2. GDP growth in Slovakia

Year	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
GDP y-o-y changes, in per cent	4.1	–0.1	1.2	3.3	4.5	5.5	5.3	6.6	8.5	10.8	5,6
Year	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	
GDP y-o-y changes, in per cent	–5.5	5.7	2.9	1.9	0.7	2.8	4.8	2.1	3.0	4.0	

Source: Eurostat.[8]

When discussing non-standard forms of work, we will focus on five aspects of working conditions that help us understand the level of precariousness of particular forms of employment[9]:

- **employment security:** probation period, notice period and severance payment, accounting for the differences in job security between full-time standard contracts and particular forms of NSFW;
- **hours worked:** legally stipulated hours of work and overtime work;
- **duration of the contact:** typical and legally allowed duration of the contract and how prolongation is regulated;

4 Marta Kahancová, "The Rise of the Dual Labour Market: Fighting Precarious Employment in the New Member States through Industrial Relations (PRECARIR Report)", CELSI Research Reports 19 (2016). http://celsi.sk/en/publications/research-reports/detail/20/the-rise-of-the-dual-labour-market-fighting-precarious-employment-in-the-new-member-states-through-industrial-relations-precarir-country-report-slovakia/

5 *Ibid.*

6 Social Insurance Agency, "Obligations of Foreign Employers". https://www.socpoist.sk/obligations-of-foreign-employers/61527s

7 Eurostat, "Employment by Sex, Age, Professional Status and Full-time/Part-time (1,000)", 11 December 2019. http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_eftpt&lang=en

8 Eurostat, "GDP and Main Components", 7 January 2020. https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=nama_10_gdp&lang=en

9 Kahancová, "The Rise of the Dual Labour Market".

- **social protection:** protection of employees in a particular form of non-standard work in case of unemployment, illness, participation in pension schemes and so on;
- **voice:** possibility to be organized in trade unions and have representatives representing employees vis-à-vis employers.

Work precarization may stem from either internal flexibilization of full-time open-ended contracts or from external flexibilization, which encompasses additional forms of employment contracts outside the full-time employment contact. While through internal flexibilization employment security and hours worked deteriorate towards precarious forms of work, with external flexibilization various substandard forms of employment occur that significantly decrease employment stability and prospects of a decent income.

In the following section, we first introduce forms of internal flexibilization in the form of overtime work and flexible accounts regimes. Thereafter, we address four main categories of non-standard forms of employment that have contributed to external flexibilization: part-time work, casual work, bogus self-employment and temporary agency work. The reason for the inclusion of a wider spectrum of non-standards forms of work in this chapter is to understand the broader context of labour regulation and its impact on labour market dualization. Later, we pay special attention to temporary agency work that emerged in the post-crisis period and its growth significantly affected social partners' strategies to address precariousness.

Internal flexibilization

Despite many changes in Slovak labour legislation, the full-time open-ended contract secures a satisfactory level of employment stability which, however, has been criticized by business representatives for being too rigid.

A deterioration of working conditions of people with full-time contracts occurred during the economic crisis, when the **working time account** was introduced. This measure, originally called "flexiconto", allowed employers to spread working time unevenly within a 12-month period. In the crisis period, this measure allowed companies to temporarily reduce employment (working hours) without the necessity to conduct lay-offs. This was firstly introduced in Volkswagen in Bratislava and, in 2009, it was implemented into national legislation and amended several times. The advantage of this flexible working time account scheme was the possibility to maintain employment even during production decline. Trade unions and work councils gained a co-determination right on flexiconto provisions at the company level (LC, article 87a), meaning that working time accounts can be introduced only in companies where trade unions are present. Thus, if a trade union does not exist at a specific employer, including a temporary agency, a working time account cannot be introduced. Some agencies responded to this by establishing yellow unions. However, employer representatives claim that the estimated share of agencies with employee representatives is below five per cent.[10]

Trade unions remained critical of the length of the flexiconto balance period during which all plus hours and minus hours are cleared. The current length of balance period is maximum 30 months and a shorter period can be agreed through collective agreement (LC § 87a (3)). In practice, additional (negative) hours in which workers need to work when production increases are, in fact, overtime hours for the workers which are not considered overtime in terms of additional payments. While flexiconto was the most

10 Interview with TAW representative in 2015.

important crisis response measure at Volkswagen and PSA Peugeot Citroën, KIA Motors did not introduce it.[11] In the last few years, this measure has lost importance because of labour shortages.

Within internal flexibilization, we may also count **overtime work**. Currently, overtime work which the employer may unilaterally order is 150 hours per year and, upon agreement, it might involve an additional 250 hours. Overtime work can amount to a maximum of eight hours per week within a maximum of four months in a row. In light of the current economic boom, overtime work is used intensively and it affects the majority of workers.[12]

External flexibilization

External flexibilization regimes encompass forms of employment that guarantee lower standards of working conditions compared to the full-time open-ended contract. Among contracts which reduce standards of working conditions, we include part-time and fixed-term contracts as derivatives of full-time open-ended contracts with reduced duration of the contract and/or reduced working hours. Moreover, external flexibilization entails contracts outside the standard employment relationship which allow for casual work (so-called work arrangements). A special category within external flexibilization is temporary agency work, which gained importance in the post-crisis period, especially in the manufacturing sector.

Part-time and fixed-term contracts

Part-time and fixed-term contracts can be understood as derivatives of full-time open-ended contracts that regulate either working time or contract duration with the aim to allow for flexibility for both employers and employees. In both forms, social security contributions are compulsory and paid proportionally to wage levels.

A **fixed-term contract** has been a subject to several amendments to the Labour Code in terms of the maximum length and number of possible prolongations. While, until 2007, the maximum length was three years and an unlimited number of prolongations was allowed, the current regulation, valid since 2013, stipulates that the maximum duration for an employee to work for the same employer is two years, and only two prolongations within these two years are possible (LC §48(2)). In practice, this means that after the two years of fixed-term contract or after the two prolongations within this period, the fixed-term contract is automatically transformed into a contract of indefinite duration. If the two-year period expires, another fixed-term contact with the same employer can be concluded only after six months of a no-contract period have passed (LC §48(3)). Periods of fixed-term contract and six-month break can alternate unlimitedly. An exception from the six-month break is allowed for seasonal work which lasts less than eight months, i.e. here no six-month break period is applied (LC §48 (4 b, c)).

Another form of part-time contract is the **shared workplace arrangement**. Job sharing was introduced in Slovakia in 2011 and the main reason was "to institutionalise the possibility of flexible employment for employees unwilling or unable to engage in full-time employment (e.g. parents)".[13] Shared workplace arrangements, however, did not gain much attention from employers and employees. In fact, for part-time

11 Monika Martišková and Monika Uhlerová, "Trade Union Organizing in the Time of Crises: Do They Help Workers or Protect Themselves?", *Working Paper Series 6/2016* (Central European University: Centre for Policy Studies, 2016).

12 SITA Press Agency, "Smer chce znížiť rozsah prikázaných nadčasov" [Party Smer intends to decrease overtime work in legislation], *SME* Newspaper, 7 May 2019. https://ekonomika.sme.sk/c/22115483/smer-chce-znizit-rozsah-prikazanych-nadcasov-oznamil-fico.html

13 Kahancová, "The Rise of the Dual Labour Market", 20.

employees shared workplace is less attractive due to low wages. For employers, job sharing may be difficult to organize among two employees if the work can be actually performed by one person alone.

When the measure was introduced in 2011, four per cent of all employees worked part-time, although the number increased to 5.8 between 2015 and 2017. In 2018, the share of part-time workers dropped to 4.9 per cent.[14] Thus, Slovakia still belongs to the group of countries with the lowest share of part-time employees in the EU, similarly to other post-socialist countries that struggle with low wages. This discourages employment in part-time forms of work. At the same time, around 26 per cent of those working part-time reported to Eurostat LFS survey[15] that they wish to find a full-time job. This indicates that their part-time work is actually involuntary. Another 11.8 per cent working part-time are disabled, 7.4 per cent reported childcare as the main reason for performing part-time work (this figure has increased from 2.4 per cent in 2012), and 6.1 per cent are in education or training. However, around 44 per cent of those in part-time reported "other" reason for concluding this type of contract.

Casual work (work agreements)

The Slovak Labour Code allows for the use of two types of contracts named "contracts outside the employment relationship" (LC part 9, § 223): *agreement on work activity* and *agreement on work performance*. These contracts establish different regulations for the employee–employer relationship compared to the regular employment contract, in terms of working hours, social contribution payments and dismissal periods. Agreements on work activity are intended for small tasks performed up to 20 hours per week within one year. Agreements on work performance allow for short-term work for up to 350 hours per year for the same employer. Both forms of employment can be concluded simultaneously with a regular employment contract, even with the same employer.

Originally, these two agreements did not offer much protection in terms of job security and social security payments (and entitlements) because there was no dismissal period and limited or no social contributions were paid from these contracts. In 2013, new regulations required social and healthcare insurance to be paid from these contracts in the same amount as from the regular employment contract. This contributed to a significant decrease in the number of these contracts. There are currently 340,000 employees working under these agreements[16], while in 2012 it was 642,000. The decrease can arguably be attributed to the new regulations that made this type of agreement as expensive as part-time work and increased job security, setting the dismissal period to 15 days under an agreement outside the employment relationship, whilst it amounts to a minimum of one month in part-time contracts.

Bogus self-employment

The government identified bogus self-employment as a source of precariousness in 2007.[17] As a reaction, a new definition of dependent work was introduced to enable labour inspection and courts to identify bogus self-employment in light of the characteristics of dependent work. According to the Labour Code (§ 1(3)), dependent work is understood as salaried work, carried out personally by an employee who is

14 Eurostat, "Full-time and Part-time Employment by Sex, Age, Educational Attainment Level (1,000)", 11 December 2019. http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_epgaed&lang=en

15 Eurostat, "Involuntary Part-time Employment As Percentage of the Total Part-time Employment, by Sex and Age (%)", 11 December 2019. http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_eppgai&lang=en

16 Sociálna Poisťovňa, "V januári Sociálna poisťovňa zaregistrovala 297 422 dohodárov" [In January, the Social Insurance Agency has registered 297,422 agreements], 8 February 2013. https://www.socpoist.sk/aktuality-v-januari-socialna-poistovna-zaregistrovala-297-422-dohodarov/54899c

17 Ján Kováč, "Zákonník práce neprinútil ľudí štandardne sa zamestnať" [Labour Code did not put people to standard employment], *HN* Online, 17 December 2019. https://finweb.hnonline.sk/ekonomika/285869-zakonnik-prace-neprinutil-ludi-standardne-sa-zamestnat

in a relationship of subordination vis-à-vis the employer, upon the employer's instructions, in its name and in the working hours specified by the employer. Bogus self-employment can be identified when the above listed characteristics of dependent work *de facto* apply to the self-employed person. In practice, the National Labour Inspectorate may inspect employers and employees and identify cases of bogus self-employment based on the above definition. The final decision is upon the court, which considers the nature of the relationship in court proceedings.

Given the complicated procedure for identifying bogus self-employment, in practice, this piece of legislation has failed to have a significant impact on the number of bogus self-employment contracts. In 2008, there were 329,000 self-employed people, while in 2009 the number was 363,700. Later, the number remained stable at 357,000 and has grown only recently in 2017 and 2018 to 370,000.[18] Self-employment is mostly influenced by the number of job opportunities in the labour market rather than by legislative measures. While the increase in 2009 can be attributed to the lack of regular workplaces available as a result of the 2008 economic crisis, the recent increase is linked to the economic boom and the general growth of employment opportunities. Despite the limited legislative impact on self-employment, the discussion about bogus self-employment has had a positive impact on raising public awareness around this issue.

Regulation of temporary agency work in the post-crisis period

Temporary agency work was introduced in 2004 in legislation as a triangular relationship that allows workforce "leasing" to third parties. Temporary agency work gained importance in the post-crisis period as a highly flexible form of employment as it was appreciated by employers in need to accommodate swinging production needs. The initially liberal legislation proved to be a significant source of precariousness, especially because of the lower degree of employees' job security – in the form of job termination after the end of the assignment at the user – and due to malpractice in using untaxable travel allowances as part of wage remuneration. As a result, labour costs of temporary agency workers were significantly lower compared to those of regular employees.

In the post-crisis years, several amendments to improve working conditions and eliminate precariousness have been introduced to regulate the number of agencies, the form of contract, limiting the maximum duration of contract and increasing the protection of agency workers through the implementation of the European Council Directive 2008/104/EC of 19 November 2008 on Temporary Agency Work.

The need to **regulate the number of agencies** stemmed from the number of agencies found in the Slovak labour market. In 2012, the Ministry of Labour had filed more than 1600 agencies,[19] many being small and exposed to bankruptcy and often embarking on unlawful practices. If a small agency bankrupted, the agency was often unable to pay its obligations to employees. This had severe consequences on workers' wages. As a reaction to this problem, since May 2013, temporary agencies have been required to declare to have a capital of at least €30,000 and pay a registration fee of €1000 (5/2004, 31(1 g)). This measure aimed at decreasing the number of agencies in the sector. However, in June 2015, there were still around 1,305 active agencies. In 2019, there are 420 agencies according to the register at the Slovak Labour Office.[20]

18 Eurostat, "Self-employment by Sex, Age and Citizenship", 11 December 2019. http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_esgan&lang=en

19 Ministry of Employment and Social Affairs and Family (Ministerstvo práce, sociálnych vecí a rodiny – MPSVaR), Database of Temporary Agencies, 10 June 2019. https://www.upsvr.gov.sk/sluzby-zamestnanosti/nestatne-sluzby-zamestnanosti/agentury-docasneho-zamestnavania.html?page_id=13034

20 *Ibid.*

Another widespread malpractice was abolished in 2015 with **the prohibition to cover travel costs to agency workers**. The reason for this was that agencies, in order to save on labour costs, paid workers only the minimum wage and the rest was paid as *per diem* compensation not subject to social contributions and tax deductions. In fact, travel reimbursements improve net profits for both employers and employees. For example, we may consider the minimum wage of €520 (in 2019) and assume a travel reimbursement of €25 per day (the legal limit) and compare it to the net income under the minimum wage without the travel reimbursement: under regular minimum wage, the employee receives €412 – with the reimbursement it would be more than €1,000. Indeed, this type of malpractice meant low social contribution payments as well as reduced tax contributions. Travel reimbursements are still applied in the case of posted workers employed through agencies, with the similar purpose to decrease labour costs for employers and increase net wages of employees. Travel compensations are used as a form of "envelope wage", thereby misleading employees about their real wages and social contribution payments.

Together with the abolition of travel reimbursements, **regulation on length, duration and form of contract** was also introduced in 2015. This amendment can be considered a rather significant improvement of working conditions of agency workers in relation to job security. The maximum duration of the temporary agency work contract is currently two years (LC 58(6)). Additionally, there must be a termination date of the assignment to the user so that the employee knows until when he/she will work for the user. Assignment to the same user cannot be prolonged more than four times within the 24-month period. If the period of assignment to the same user is longer than 24 months or if it was prolonged more than four times, the employment relationship between the agency and the employee is considered terminated and the employee becomes employed at the user under a regular full-time relationship. The Labour Code (LC, article 58 (6, 7)) thus stipulates an automatic transformation from agency work to a regular full-time employment contract. The employment relationship between the agency and the employee may not last more than 24 months, even in the case when the assignment of the agency worker is made to several users.

Furthermore, temporary agency work has been subject to regulation in terms of **shared responsibility of the user** (LC 58 (10)). Since 2015, the user is responsible for paying wages to the employee if he/she fails to receive wages from their agency or the wage received is not comparable to the wage of a regular employee on a similar position, upon request of the employee within 15 days from receiving the claim (LC 58 (10)). Thus, users have an incentive to engage reliable agencies to avoid this type of risk.

We summarize various aspects of these regulations in table 3 below.

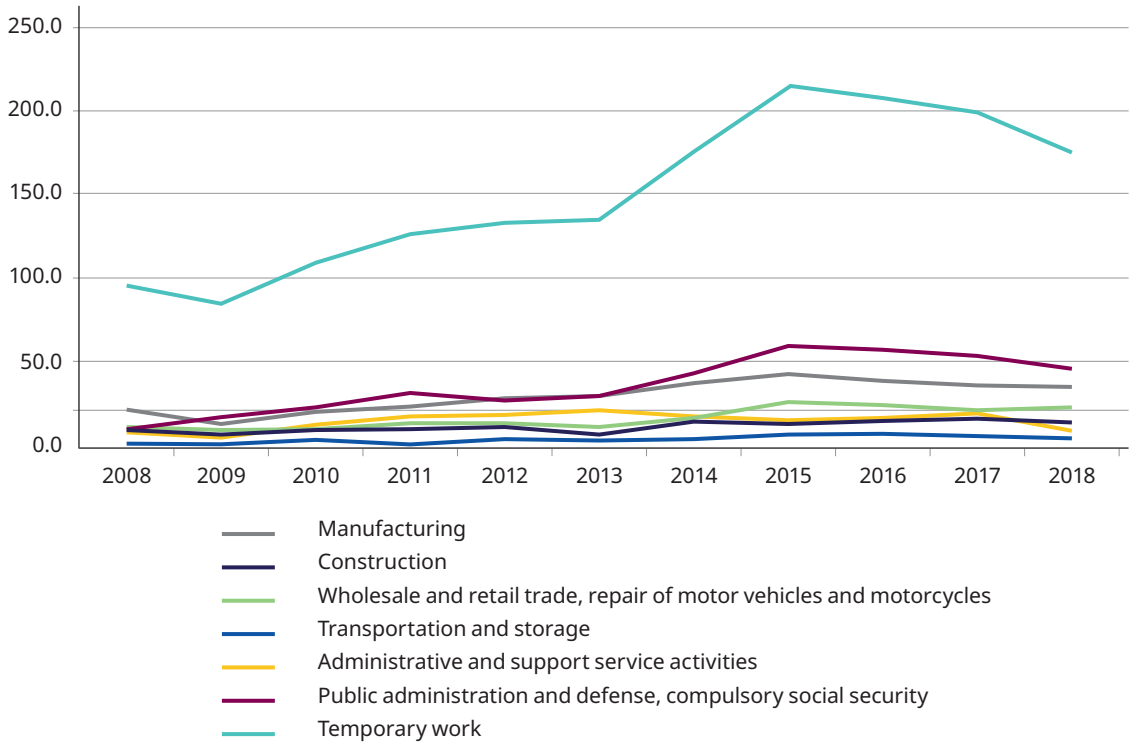
▶ Table 3. Regulation of temporary agency work

Type of regulation	Character and date of regulation introduction
Registration fee	Introduced in 2012
Form of employment	Only standard contracts possible since 2015
Length of duration	Maximum 2 years (24 months), maximum 4 times prolongation within 24 months (if this is exploited, regular open-ended contract between employee and user must be concluded), since 2015
Contract prolongation	Limited since 2015: the end date of the contract must be defined
Multiple contracts	Only one contract can be concluded between agency and employee since 2015
Travel reimbursement	Prohibited since 2015
Shared responsibility of end user	On wage payments, introduced in 2015
Quotas on number of TAW employees	Not introduced in labour legislation, but possible through company level collective agreement

Source: Author's contribution.

Data on temporary agency workers is missing or inaccurate.[21] Nevertheless, data on temporary employment also includes temporary agency workers. As we can see in figure 1 below, Slovakia experienced a rapid growth of temporary work in the post-crisis years when it peaked at 214,000 in 2015 and stabilized at 174,400 in 2018 to which temporary agency work contributed the most. The main sectors where temporary workers are employed are public administration and defence, manufacturing, retail and construction. Arguably, the decrease of temporary work after 2015 may be attributed to the regulatory changes that limited temporary forms of employment in the temporary agency work sector and to the fact that work agreements (i.e. casual work contracts) became subject to the payment of social contributions after 2015.

▶ Figure 1. Temporary agency work in Slovakia



Source: Eurostat (2018).[22]

Despite the above listed changes and improvements of working conditions of temporary workers, several aspects of precariousness persist, although to a lesser extent compared to the period before the legislative changes took place. Job security and social security have considerably improved. However, in terms of working time, the issue of overtime work does arise as a result of the economic boom and labour shortages in recent years. What persists in temporary agency work is the unequal treatment of agency workers, especially migrant workers, and low compliance with regulations. For instance, the majority of illegally employed workers are migrants, of which 43 per cent are from Serbia and Ukraine.[23] One of the

21 Kahancová, "The Rise of the Dual Labour Market", 47.

22 Eurostat, "Temporary Employees by Sex, Age and Economic Activity – 1,000", 11 December 2019. http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_etgan2&lang=en

23 National labour Inspectorate, "Sprava o stave ochrany práce za rok 2018" [Report on the state of work protection in 2018]. https://www.ip.gov.sk/wp-content/uploads/2019/05/Spr%C3%A1va-o-stave-ochrany-pr%C3%A1ce-za-rok-2018.pdf, 14.

reasons for the persistence of precarity in temporary work is the limited control of unlawful practices. The two possible ways how control can be performed are either inspection carried out by the labour inspectorate or trade union activity at the workplace. This should go hand in hand with temporary workers' awareness about their rights. However, there is a significant gap in this regard, especially when it comes to foreign temporary workers. The low level of labour law enforcement is currently the largest cause of precarious working conditions of temporary workers.

In the next section, we devote special attention to social partners' responses to precariousness in temporary agency work and their strategies to combat this issue.

Responses of social partners to precariousness in temporary agency work

As we have discussed in the previous section, Slovak regulation of temporary agency work saw a dynamic development in the last 10 years to a large extent attributed to the activity of social partners – both employers' and employees' representatives in the sector. The reason why social partners were involved in regulating temporary agency work and improving working standards of agency workers is twofold. First, the employment of temporary workers under a regime of marginal protection undermined the working conditions of standard workers. As a response, trade unions aimed at increasing the protection of agency workers. Second, insufficient control of working conditions and the possibility to decrease labour costs through travel reimbursement payments distorted competition in the sector as agencies complying with the law were less competitive vis-à-vis small agencies which, to a large extent, did not conform with the law.[24] Under these circumstances, trade unions and employers' organizations found common ground for discussing changes in regulating temporary agency work. Both parties agreed that agency work should not serve as a labour costs saving form of employment, but its main advantage should be the flexibility of employees, for which they should receive adequate remuneration.[25]

In the post-crisis period, employers were looking for flexible arrangements that would allow them to react flexibly to the changing demands for their products, especially in manufacturing, which was highly volatile to global demand during the crisis. Moreover, hiring through agency workers proved to be a successful strategy to avoid the high costs of the hiring procedure of standard workers. At least up to 2015, most companies in automotive industry were hiring workers only through temporary agencies in Slovakia and Czechia.[26]

Social partners in the temporary agency work sector

When referring to social partners we mean organizations of employers and employees involved in information exchange, consultation and/or collective bargaining in social dialogue and/or approach government representatives to lobby for their interests. On the employers' side, we find the *Association of staffing agencies of Slovakia* (Asociácia personálnych agentúr Slovenska – APAS) which was established

24 Temporary agencies can be divided into two groups: small domestic agencies and large multinational agencies operating in Slovakia. In the post-crisis period, after 2010, the number of agencies began to increase and reached 1,300 in 2015. In 2019, the Ministry of Labour reports only 460 active agencies in Slovakia.

25 Kahancová, "The Rise of the Dual Labour Market", 51.

26 *Ibid.*

in 2002 and associates 10 large international staffing agencies; the *Association of employment services providers* (Asociácia poskytovateľov služieb zamestnanosti – APSZ) with 12 members out of which 7 are temporary agencies; the *HR Alliance* which was established in 2013 and associates 7 members. When compared to hundreds of agencies registered by the Ministry of Labour, the number of affiliates to the employers' organizations seems negligible. Nevertheless, because of their size and market share, they aim to influence sector regulation.

On the employees' side, we find the trade union KOVO (OZ KOVO), representing workers in the manufacturing sector, which took an active stance on behalf of temporary workers. The reason for this was the high concentration of temporary agency workers in the manufacturing industry, especially the automotive sector, which is one of the most important sectors of the Slovak economy. Interestingly, with the advent of temporary agency work, trade unions initially paid little attention to temporary workers. The reason was the limited membership rate of temporary workers and the unions' focus on the interests of "paying" members, i.e. full-time standard workers. Nevertheless, with the rise of temporary agency work in the manufacturing sector in the post-crisis period, trade unions witnessed the unequal treatment of agency workers, which contributed to the segmentation of employees at the workplace. Because of the spreading malpractice of paying only the minimum wage to agency workers, trade unions were confronted with limited possibilities to bargain higher wages as employers could opt for the cheaper agency workers instead of hiring regular employees. Thus, trade unions needed to turn their attention to agency workers and increase agency workers' level of protection and ensure equal treatment in the workplace in order to stop the deterioration of working conditions of regular employees. Therefore, in or around 2011, trade unions argued in favour of better working conditions of agency workers in the sector and addressed requests for better regulation at the tripartite level consultations.

Therefore, the approach of trade unions to temporary workers switched from exclusion to inclusion in the post-crisis period.[27] Interestingly, the inclusion strategy was not accompanied by efforts to organize temporary workers.[28] Indeed, even though trade unions started to represent the interests of agency workers, this was not because this group of workers became union members or because unions were trying to recruit them as members. We devote special attention to this strategy in the next part, studying the example of recruitment of temporary agency worker at the company level.

With regards to social dialogue in relation to temporary agency workers, we did not see the establishment of collective bargaining. However, social partners cooperated and signed a "Memorandum on Cooperation" between OZ KOVO and APSZ, while the other two employers' organizations opposed cooperation on stricter regulation in the sector. After 2015, when the most important regulations of temporary agency work were approved, the cooperation between social partners diminished. Lastly, it is undeniable that the government played an important role in proposing and approving measures to regulate this non-standard form of employment. The aim to regulate agency work was in the agenda of the Social Democratic Party (SMER), which was in power and its representatives were cooperating with trade unions on this issue. The strong ties with the government and the government's willingness to cooperate motivated trade unions and, consequently, also employers to address most issues in relation to temporary agency work through legislation rather than collective bargaining. In the background, the EU Directive 2008/104/EC on equal treatment of agency workers supported trade unions in their efforts to increase the protection of temporary agency workers.

27 *Ibid.*

28 Monika Martišková and Mária Sedláková, "Reinventing the Role of the Czech Trade Unions: Halfway through the Journey", in *Innovative Union Practices in Central-Eastern Europe,* eds. Magdalena Bernaciak and Marta Kahancová (Brussels: ETUI, 2017), 57.

Trade unions' efforts to regulate temporary agency work at the company level: A case study from the automotive industry

As mentioned in the previous section, the automotive industry was and still is one of the biggest users of temporary agency work in Slovakia. The growth of temporary agency work was recorded in the post-crisis years when this form of work allowed for flexibility and, until 2013, also meant lower labour costs – before the introduction of the series of legal restrictions on temporary agency work. While, before the crisis, trade unions paid little attention to working conditions of temporary workers, in the post-crisis years this issue stood at the centre of their agenda. The main reason for this switch in attitude is attributed to company level experiences. While, before the crisis, agency work was a minor phenomenon in companies, in the post-crisis period the numbers of temporary workers increased significantly. With the increasing number of temporary workers, trade unions were losing their membership base, which is one of the strengths they build on when achieving their goals – this is referred to as associational power according to Wright (2000).[29] Moreover, the increased number of flexible workers meant a greater visibility of workers' segmentation at the workplace: temporary agency workers experienced limited access to company social programmes or benefits such as discounted meal prices or any other benefits provided for by collective agreement.

On the other hand, trade unions experienced difficulties in including this group of employees under collective agreements and representing them vis-à-vis the user company. The main reason was the fluctuation of the number of temporary workers: the average length of an assignment is between three and six months, which does not motivate temporary workers to join trade unions at a specific workplace. Moreover, trade unions had difficulties in finding a way to deduce membership fees from workers employed through an agency, and not employed directly by the company.[30] Lastly, union structures based on sector-based representation constituted an obstacle to the recruitment of agency workers due to the flexibility of agency workers, who switch to different sectors. Due to these obstacles, the trade union OZ KOVO failed to find a successful recruitment strategy towards agency workers. Moreover, agency workers failed to form their own trade union.

How did company-level trade unions that wanted to represent agency workers and address the unequal treatment of agency workers at the company level tackle these challenges? In the following case study of Volkswagen (VW) in Slovakia, we address the possibilities open to trade unions to deal with agency work at the workplace.

Volkswagen Slovakia (VW), a subsidiary of German Volkswagen, is the largest automotive producer in Slovakia. The company has been operating in Slovakia since 1991 and currently has locations in Devínská Nová Ves (near Bratislava) and in Martin (north Slovakia). In 2018, VW produced 408,208 passenger vehicles and 263,700 gears. In 2018, the company employed around 14,800 employees of which around 2,000 were agency workers. Since 2016, two trade unions have operated in the company. The newly established TU in VW, formed in October 2016, called Modern trade union VW, took the majority of former members from the OZ KOVO TU organization operating in the company (further referred to as OZ KOVO TU in VW). This was due to a series of disputes and disagreements between the president of OZ KOVO and the president of OZ KOVO TU in VW. In March 2017, the newly established Modern trade union in VW already had 7,556 members (TU density 51 per cent), while TU VW affiliated to OZ KOVO only had 564 members.

29 Erik Olin Wright, "Working-class Power, Capitalist-class Interests, and Class Compromise", *American Journal of Sociology* 105, No. 4 (2000): 957–1002.

30 The most common way of paying membership fees in Slovakia is through direct deductions of one percent of the monthly wage to trade unions' accounts by the employer.

The Modern trade union also associate around 250 temporary agency workers, which is around 10 per cent of all temporary workers in VW Bratislava (out of 1,800 agency workers).[31]

Organizing temporary agency workers at the company level is very difficult. First, temporary workers have limited motivation to enter company-level trade unions given the workers' short-term assignment. Second, cooperation with the agency is even more challenging when it comes to union contribution payments as most often payments are deducted from worker"s wages by the employer. In the case of agencies, they prefer to avoid this type of payment administration. Third, when it comes to workers organizing at their employer, i.e. establishing trade unions at work agencies, this rarely happens because the vast majority of workers hope to obtain permanent job positions at the user.

Nevertheless, the case of VW shows that these obstacles can be overcome and agency workers can be successfully organized. In VW, trade unions approached agencies and agreed with them on deductions of membership fees from agency workers who joined trade unions in VW. The main factor which contributed to the agencies' willingness to agree with this was the prospect of a long-term cooperation between the agencies and the user (in this case VW). At the same time, TU in VW needed to convince agency workers' to join the trade union. This was possible if agency workers had a prospective of attaining permanent employment at the user after the end of the temporary assignment, making it reasonable for agency workers to become TU members in VW. Finally, the approach of the union towards agency workers was also important, especially TU's ability to guarantee equal working conditions and benefits rooted in collective agreement.

To sum, social dialogue at the company level may help mitigate precarious working conditions of temporary agency workers. However, legal provisions covering the whole economy facilitate much better protection. Aware of this, social partners found common interest in regulating working conditions of temporary agency workers through legal measures. Even though not all employers agreed with the agency work regulations, trade unions defended their proposals through cooperation with the government. The common interest of trade unions and government representatives contributed to the increased protection of agency workers through legal regulation. Interestingly, trade unions advocated on behalf of agency workers but they did not attempt to recruit agency workers, beyond some isolated company level experiments, such as the case of VW. This is an interesting development because trade unions mostly engage in policies that involve their members, while agency workers rarely join trade unions. The reason behind this development is that trade unions addressed the protection of agency workers to protect their own members. The example of VW shows that long-term cooperation between the agency and the user, and workers' prospects to get a stable job at the user, best facilitate agency workers organizing.

Foreign temporary workers and their protection

With an economic boom, temporary agency work became a vehicle for employment of foreign temporary workers in Slovakia. Despite efforts to increase the protection of agency workers, foreign workers in Slovak companies have struggled to obtain full legal protection.

The rapid increase of foreign workers between 2015 and 2017 opened the debate on their working conditions as cases of unlawful employment or exploitation started to appear more frequently (e.g. the case of

31 VW Company in Slovakia, "Annual Report 2018". https://sk.volkswagen.sk/content/dam/companies/sk_vw_slovakia/podnik/Vyrocna_sprava_2018.pdf

Serbian workers' exploitation in Samsung in Trnava[32]). This was connected to an increased labour demand for both qualified and non-qualified positions, predominantly in the automotive and related industries but also in construction. The government tried to satisfy both sides. On the one hand, Slovakia facilitated the inflow of foreigners, mostly from third countries through a less strict visa regime (e.g. seasonal works or maintenance works regimes). On the other hand, the government called for equal working conditions and protection of labour standards: "We are not interested in the arrival of a cheap labour force that would break down the growth of wages," claimed the Minister of Labour in May 2017.[33] Connected to this, the controls of the Labour Inspectorate focused on the employment of foreign workers.

Unsurprisingly, trade unions expressed fears of social dumping in relation to the facilitated access for foreigners to the Slovak labour market. In their statement, trade unions called for measures to narrow the skill mismatch affecting the labour market rather than accepting more foreigners from third countries. Employers, on the contrary, argued in favour of the inflow of foreigners. In a study by the Entrepreneurs' Alliance of Slovakia (Podnikatelská aliancia Slovenska, PAS) and think-tank INESS,[34] it was argued that third country nationals should firstly be accepted by "culturally close" countries such as Bosnia and Herzegovina, North Macedonia, Serbia and Ukraine. Another argument was made in relation to the lack of available workforce and the growth of economic activities in Slovakia. In 2016, PAS had already suggested four measures to ease the inflow of foreigners:

1. facilitate short-term and long-term employment of non-EU nationals, especially candidate countries, and improving the special status and regime for ethnic Slovaks (through positive discrimination);
2. design a special scheme for priority sectors (IT and shared services centres, industrial production, health and social services, science and research);
3. allow for temporary and seasonal employment: increase the flexibility of labour and production capacity, especially in seasonal production and seasonal fluctuations;
4. reduction of the time taken to verify whether a job can be filled by the unemployed in Slovakia.

As a result, most of the measures taken by the government in 2017 and 2018 were in line with the PAS proposals.

In 2016, it was the first time since the EU accession when more foreigners came to Slovakia than Slovaks who moved abroad. Given the fact that Slovakia has only recently slowly changed from being a sending country to becoming a receiving country, there are no relevant studies on the economic effects of increased immigration. What one can observe, however, is the uneven spread of foreigners in the country, as the majority reside in regions with already low unemployment rates and where job opportunities exceed local labour demand. According to available statistics provided by the Labour Office (UPSVaR), in May 2019, the most numerous groups among non-EU nationals are Serbians (13,600), followed by

32 As shown by the investigation, 680 Serbians were given fake Hungarian documents on their social security insurance in Hungary to satisfy posted workers documentation in Slovakia, while their working conditions in Samsung were in violation of the Slovak Labour Code. See Lukáš Kvašňák, "600 eur za tri mesiace: Ako Srbi pracujú v našich fabrikách" [€600 per three months: How Serbians work in our plants?]. https://www.etrend.sk/trend-archiv/rok-2017/cislo-8/srbi-vo-fabrikach-su-zrazu-politicka-tema.html

33 *The Slovak Spectator*, "Shortage of Qualified Labour Hits Slovakia", 2 May 2017. https://spectator.sme.sk/c/20470071/shortage-of-qualified-labour-hits-slovakia.html

34 *PAS*, "The Slovak Economy Needs New Blood for its Growth". http://alianciapas.sk/slovenska-ekonomika-potrebuje-na-svoj-rast-novu-krv/

35 Labour Office, "Employment of Foreigners in the Slovak Republic in 2018", June 2018. https://www.upsvr.gov.sk/statistiky/zamestnavanie-cudzincov-statistiky/zamestnavanie-cudzincov-na-uzemi-slovenskej-republiky-za-rok-2018.html?page_id=772215

Ukrainians (7,200); amongst EU nationals, there are 9,600 Romanians and 5,300 Hungarians.[35] The number of Serbians has grown by 7,900 since 2017.[36]

The impact of foreign workers' inflow on social dialogue at the company level has not been analysed in-depth yet. However, similarly to the unregulated sector of agency workers before 2013, we might expect a deterioration of employment standards. Thus, trade unions face a challenge similar to that related to temporary agency work a few years ago, although this time this is amplified by the difficulties related to approaching foreign workers due to language barriers, foreigners' vulnerability and their even lower interest to organize compared to agency workers. Taking an example from the automotive industry, in PSA Trnava, out of the total 3,000 employees, 850 are foreigners, mostly from Serbia and Ukraine[37] (this is around one third of all employees). Trade unions in PSA Trnava accept foreign workers as members and translate some materials into Serbian language. The biggest car producer in Slovakia, Volkswagen (VW), has only recently embarked on foreigners' employment in greater volumes: in March 2018, management together with the trade union announced a plan to employ 500 new employees "of which part will be from Serbia and Ukraine".[38] The agreement between TU representatives and management provides that the number of foreigners will not exceed five per cent of 13,000 employees in VW. In KIA in Žilina the share of foreigners is low: in 2017, there were 70 foreigners out of 3,800 employees.[39]

From this rather limited evidence, it is difficult to deduce the impact of foreigners' inflow on social dialogue and wage levels. Nevertheless, it is clear that trade unions or NGOs will need to monitor working conditions and provide foreigners with assistance if they experience exploitation. However, this might take same time as Slovak trade unions have little experience with migrants' union organizing at the workplace.

Conclusion

In this chapter, we have presented an overview of recent changes to the legal framework of non-standard forms of work in Slovakia, offering a broader context of the drivers of regulation and their impact on the labour market. In the post-crisis period, Slovakia has initiated an important process of addressing and combating precarious work, especially in causal work and in temporary agency work.

Slovak labour legislation still contributes to labour market dualization as the highest protection is reserved to full-time standard employment, while offering several opt-outs for various forms of non-standard contracts. In recent years, however, several amendments contributed to narrowing these differences. While in some cases regulation resulted in significant decreases in the incidence of non-standard forms of work, especially casual work and temporary agency work, in other cases legal regulation did not have the same impact on the labour market, e.g. bogus self-employment. Special attention was paid to temporary agency work as this was previously an important source of precarious practices, addressed by a series of amendments to the law with the aim to increase employees' protection and reduce precariousness.

36 Labour Office, "Employment of Foreigners – Statistics". http://www.upsvr.gov.sk/statistiky/zamestnavanie-cudzincov-statistiky.html?page_id=10803

37 Interview with the TU representative in PSA Trnava in July 2018.

38 Branislav Toma, "Volkswagen Will Start Recruiting Serbs and Ukrainians", *Pravda* Newspaper, 16 March 2018. https://spravy.pravda.sk/ekonomika/clanok/462497-volkswagen-zacne-s-nabormi-srbov-a-ukrajincov/

39 KIA, "KIA Annual Report". https://www.kia.sk/sk/o-nas/vyrocne-spravy

Admittedly, labour legislation can be viewed as only one of the explanatory variables for understanding labour market dynamics. In the case of Slovakia, tightening the rules and increasing protection of workers arguably resulted in a decrease of fixed-term (temporary) contracts within and outside agency work, and in casual work (work agreements). The legislative changes which contributed to increased protection occurred at the beginning of economic growth period and, thus, did not have a negative impact on employment levels. On the contrary, many of those working in NSFW were transferred to regular employment contracts. Nevertheless, regulation of self-employment did not prove to be efficient enough to decrease the number of bogus self-employment contracts. In this case, despite the fact that there is a definition of dependent work, it is still not easy to uncover and prove cases of bogus self-employment. Thus, the incidence of this type of non-standard contracts reflects economic cycles rather than legislative intervention.

In terms of legislative developments in the last few years, internal flexibilization decreased in importance, except with the increase of overtime work, while external flexibilization was partially reduced through regulatory changes to temporary agency work and work agreements. We summarize our findings in table 4 below from the perspective of the effects of regulations on the incidence of different types of contracts in the labour market.

▶ Table 4. Summary of changes in labour legislation and impact on NSFW incidence

Regime	Form	Regulation	Incidence
Internal flexibilization	Working time accounts	no changes in recent years	decrease
	Overtime work	no changes in recent years	increase
External flexibilization	Part-time work	no changes in recent years	increase
	Fixed-term work	stricter regulation (limited prolongations and duration of contracts)	decrease
	Casual work	stricter regulation (payment of social contributions)	decrease
	Bogus self-employment	stricter regulation (definition and social contributions increase)	increase
	Temporary agency work	stricter regulations (employment security, duration of contract, social protection)	decrease

Source: Author's compilation.

Behind the increased regulation of NSFW, we find the efforts of social partners together with the government to tackle the dualization of the labour market through increasing legal protection of employment forms outside full-time standard employment. Nevertheless, the decreased incidence of NSFW can also be attributed to recent economic developments characterized by labour shortages and wage increases. Social partners have addressed precarious working practices primarily through national level consultations with the government and through lobbying, whilst not attempting to organize workers in NSFW. However, at the company level, trade unions managed to organize agency workers. However, this trend is not sufficiently spread to allow us to conclude that this practice is effective in rising labour protection of precarious workers. Rather, legislative changes still prove to be the most effective way to protect workers, even though, as shown in our analysis, not every legal change has had a real impact on the labour market. Lastly, EU regulations of temporary agency work also empowered trade union representatives in their demands to achieve equal treatment of all employees at the workplace.

When it comes to future challenges, foreign workers, largely recruited through temporary agencies, represent one of the biggest challenges for social partners and the government. While foreigners are more vulnerable to unlawful practices to a greater extent, trade unions might experience difficulties

in approaching them and protecting them. For now, trade unions have mostly addressed this issue at the national level by trying to limit the inflow of foreigners, especially in the segment of low qualified industrial jobs. This might prove to be insufficient in the near future.

This volume aims to offer a retrospective look into the implementation of some non-standard forms of employment (NSFE) in selected Central and Eastern European countries. It captures independent critical views on national regulations and their enforcement of temporary and part-time work, temporary agency work, disguised employment relationships and "simplified" employment.

The chapters examine the level and adequacy of legal and social protection of workers in NSFE, good practice in regulating NSFE through collective bargaining, legal and case law tests for determining the existence of the employment relationship and the link between NSFE and informality, among others.

A number of conclusions are drawn on how national policy and regulatory efforts have materialized into good practice and the extent to which they fulfilled the stated policy goals.

ilo.org/budapest

ILO Office for Central and Eastern Europe
14 Mozsár utca
H–1066 Budapest
Hungary