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Reflections on the introduction of Universal Labour Guarantee in selected Central and Eastern European countries

Edited by
Cristina Mihes and Tvisha Shroff

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List of Abbreviations and Acronyms

B2B Business-to-business

CEACR Committee of Experts on the Application of Conventions

CEE Central and Eastern Europe

CEIDG Central Register and Information on Economic Activity of Poland

CJEU Court of Justice of the European Union

ECSR European Committee of Social Rights

EDW Economically dependent workers

ETA Equal Treatment Authority of Hungary

ETUI European Trade Union Institute

EU European Union

FWI Future Work Initiative

HLC Hungarian Labour Code

ILA Individual Learning Account

IT Information Technology

KASZ Trade Union of Commercial Employees of Hungary

LC Labour Code

LCSSE Law on Civil Servants and State Employees of Montenegro

LERO Law on Ensuring Equal Rights and Opportunities for Women and Men of Ukraine

LOSH Law on Occupational Safety and Health of North Macedonia

LPCD Law on Preventing and Combating Discrimination of Ukraine

LPIT Law on Personal Income Tax of North Macedonia

LRL Labour Relations Law of North Macedonia

LSDE Law on Stimulating the Development of the Digital Economy in Ukraine

LSMN Law on Safety of Maritime Navigation of Montenegro

MKDSZ Labour Mediation and Arbitration Service of Hungary (Munkaügyi Közvetítői és Döntőbírói Szolgálat)

MTVSZ Labour Advisory and Dispute Settlement Service of Hungary (Munkaügyi Tanácsadó és Vitarendező Szolgálat)

NGO Nongovernmental organization

NGTT National Economic and Social Council of Hungary

NMH National Labour Office of Hungary

OÉT National Interest Reconciliation Council of Hungary (Országos Érdekegyeztető Tanács)

OMMF National Labour Inspectorate of Hungary

OSH Occupational safety and health

PIT Personal income tax

SE Simplified employment

SER Standard Employment Relationship

SMEs Small and medium-sized enterprises

TAW Temporary agency work

ULG Universal Labour Guarantee

VKF Standing Consultative Forum of Industry and Government (Versenyszféra és a Kormány Állandó Konzultációs Fóruma)

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1. Introduction: Reflections on the introduction of the Universal Labour Guarantee in selected CEE countries

1.1 Introduction

The launch of the ILO's Future of Work Initiative in 2016 led to the establishment of the Global Commission on the Future of Work and the subsequent publication of its innovative report in 2019, "Work for a Brighter Future". This initiative and the Commission's Report have since culminated in the adoption of the Centenary Declaration on the Future of Work at the 108th International Labour Conference in 2019. The Commission, tasked with analysing the means for the delivery of social justice in the twenty-first century, has put forth a *human-centred* agenda for the future of work that "strengthens the social contract by placing people and the work they do at the centre of economic and social policy and business practice" (ILO 2019, 11). It looks to develop both human and institutional capabilities to steer the transformations taking place in the world of work towards the expansion of human freedoms (ILO 2019, 28). In this sense, the human-centred agenda signifies a fundamental shift in the economy towards growth and development that prioritizes the creation of decent work, the formalization of employment and the end of working poverty (ILO 2019, 24).

The ILO Centenary Declaration for the Future of Work stresses the erosion of the social contract in its current form, which excludes from its scope the majority of the world's workers (ILO 2019, 24). In this context, in addition to posing challenges, the future of work also allows opportunity to forge a new social contract, designed on the basis of an inclusive coverage, which respects the rights of all workers in return for their contribution to growth. Renewing the social contract requires new and reinforced guarantees that all workers, including the vulnerable, marginalized and working poor can realize their fundamental labour rights. Ultimately, achieving social justice will not be possible without a concerted action that places all workers, irrespective of their contractual arrangements or employment status, at the centre of economic, labour and social policies.

Three pillars of action that would contribute to such a human-centred future of work agenda have been defined by the Commission: increasing investment in people's capabilities, increasing investment in the institutions of work and increasing investment in decent and sustainable work. The second pillar, that is, increasing investment in the institutions of work, is concerned with "the inherent asymmetry between labour and capital" seeking to ensure that workers may avail of freedom and dignity, equal opportunity and economic security. It therefore concerns regulations, employment contracts, minimum wages, collective agreements, labour inspection systems and representative organizations of workers and employers, the functioning of which are critical to the performance of labour markets and economies overall (ILO 2019, 38).

The first recommendation under the second pillar calls for the establishment of a Universal Labour Guarantee (ULG) that ensures that all workers, *regardless of their contractual arrangement or employment status,* enjoy certain basic guarantees – fundamental workers' rights; an "adequate living wage", maximum limits on hours of work and protection of safety and health at work. The emphasis here is to ensure adequate labour protection and humane working conditions for all those who work – whether they be engaged in full-time, open-ended employment, temporary work, home-based work or micro-tasks performed online (ILO 2019, 39). The proposal of applying the ULG to all workers, no matter their employment status, is indeed a path-breaking one. It is the employment relationship or the employment contract that has been, and continues to be, the main vehicle through which workers gain access to the rights and benefits in the areas of labour law and social security. As matters stand, in most legal systems around the world today, the

employment relationship remains the essential point of reference for determining rights and obligations in the workplace (ILO 2006). The ULG, as a floor of labour protections, may then be raised either by means of the law and regulations, or through collective agreements (ILO 2019, 38–39). Significantly, this extension of labour protection to those outside the purview of an employment relationship or employment contract, extends protection to self-employed persons as well as those in a "grey zone", that is, who are considered neither genuinely self-employed nor genuine employees. Whereas the ILO supervisory bodies have already made clear that fundamental principles and rights at work apply to *all* workers including the self-employed (De Stefano 2021, 387–406), the ULG takes this one step further by including within its basic working conditions as regards, a living wage, limits on working time and protection of health and safety at work.

The ILO has long recognized that guaranteeing labour protection to all workers, regardless of their employment status and contractual arrangements, is the ultimate goal of ensuring decent work (ILO 2019, 3). However, despite recent challenges posed by the organization of work, notably in the gig economy, the statutory or judicial classification of a worker as part to an employment relationship may well continue to be determinative of access to work-related rights and entitlements, thereby playing a significant role in the process of ensuring decent work (Tajman n.d.). In that case, achieving decent work for all and, to this end, implementing the ULG would require re-defining the concept of the employment relationship and its boundaries so that all who work for a wage are covered by labour and social protection regardless of their classification (Tajman n.d., 8).

Thus, the question of how the ULG can be implemented, and moreover, how it can be implemented in a legal and regulatory space in which the written employment contract is the only gateway to labour protection, is a critical one. In this light, the present research looks to explore the legal landscape across seven countries of Central and Eastern Europe (CEE) to understand, in concrete terms, how the ULG might be introduced in the national law and practice of these countries. The CEE region is chosen to study this question in particular, given that many countries in this region are in the process of undergoing labour law reforms to align their national legislations with both international labour standards and EU law (Mihes 2020, 7). This region therefore affords an opportunity to re-examine available national policy and legal solutions for the introduction of the ULG. In addition, the CEE region has seen a significant proliferation of non-standard forms of employment, including work mediated through digital platforms. Specifically, following the 2008 financial crisis non-standard forms of employment have been seen as a flexible solution to labour market demand issues (Mihes 2021, 1).

Beyond this, a particular feature of CEE legal systems is that the employment relationship is legally recognized strictly by virtue of the existence of a formal employment contract in the *written form*. Whereas, contractual arrangements may well be entered into verbally, national legislatures in the CEE region have specifically provided for the written form of the employment contract as a condition for its validity. This was done to curb informal employment but has unfortunately had a negative effect, making it virtually impossible for workers engaged on the basis of informal verbal contracts to claim their labour rights in courts on the basis of the existence of a factual employment relationship. As a consequence, a number of undeclared and informal workers are entirely excluded from the scope of labour protection, making the reflection on how to address the deficit of access to labour justice an urgent need for workers in this region (Mihes 2021, 5).

1.2 The contract of employment and the employment relationship: Two sides of the same coin

The employment relationship has co-evolved over time with the economic organization of work having expressed itself in its dominant or classical form: the Standard Employment Relationship (SER) (Deakin and Wilkinson 2005). The SER is symbolic of full-time, open-ended work in a subordinate relationship to an employer. It was the concentration of work in factory-based production in urban centres that shaped the SER in the form that it takes today. The rise in collective bargaining, as well as the vertical integration of the firm, all contributed to the evolution of the SER, that in turn supported the maintenance of a stable workforce for employers (Deakin 2002, 17–18; see also Fenwich et al. 2016, 2–3).

The SER served as a regulatory tool in the allocation of rights and obligations between employers and employees, as well as their means to agree on conditions of work over and above the minimum legal

requirements. In this sense, the SER emerged as the central legal framework for labour law regulation: it is the worker in an employment relationship or the one who holds an employment contract who has access to protection under labour law, while those outside it remain governed by civil or commercial law and are therefore susceptible to the vagaries of the market (Fenwick et al. 2016, 1–3).

The employment relationship as it exists today is a factual reality in the form of a *contractual* exchange of wages for work personally performed by the worker. However, its social significance extends far beyond this contractual shell (Raday 1989, 77). The contract of employment as the juridical form of the employment relationship has been instrumental to the State for the construct of social insurance systems, as well as for income tax collection.

It is necessary at this juncture to emphasize the factual reality of employment as the basis for the recognition of an employment relationship and consequently – employee status – rather than the conclusion of a formal contract of employment. This factual reality has been distilled broadly into a number of legal tests that have been commonly applied in the process of determining the existence of an employment relationship. Two of them are briefly discussed here. The first is the control or subordination test that looks to determine the extent of control exercised by an employer over the performance of work by an employee. Whereas technological advancements, as well as the rise of highly specialized workers, have made this increasingly difficult to assess, the use of this test has evolved. The second one is the test of "integration". In some cases, courts look to assess whether workers run a business on their own account or whether their work is done for an employer, while in others an assessment is made of whether the worker is "integrated" into the business operations of the used enterprise (Casale 2011, 23). More recent legal thinking has emphasized the need to assess the extent of the degree of economic dependence of the worker on an employer rather than a measure of employer control (Davidov 2002, 368). Irrespective, it remains the case that "the distinction between independent contracting and an employment relationship lies in facts, not in law" (Casale 2011, 24). In this sense, these legal tests are applied on the basis of an number of factual indicators – whether the workers perform tasks exclusively for the employer, whether work is performed on a continuous basis, who pays fiscal or social security contributions, whether the employer invests in training the worker and many more (Casale 2011, 23–24). Emphasizing the fact of the performance of work as more important than the stipulations of the contract of employment allows the determination of employee status to go beyond legal formalism. It allows for judicial discretion to determine on a case-by-case basis whether the circumstances are indicative of an employment relationship between parties irrespective of their contractual arrangements (De Stefano et al. 2021, 8).

This is reflective of the primacy of facts principle enshrined in ILO Recommendation No. 198 that "the determination of the existence of such a relationship (an employment relationship) should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties"(ILO 2006). Despite the emphasis on the primacy of facts principle in Recommendation No. 198, this principle is not observed in all legal systems. Contractual terms have been held to supersede factual circumstances in the determination of employment status in certain contexts and regions.[1] This is also indeed the case in some CEE countries where the conclusion of a written contract of employment is in and of itself considered the primary factor for determining the existence of an employment relationship as noted above. In the context of these countries, it is therefore critical to distinguish the factual existence of an employment relationship from the legal construct of the contract of employment.

1.3 Beyond the employment relationship: Towards universality in the scope of labour protection

Whether the employment relationship – and more specifically, the SER, will continue to serve the same role with regard to access to labour law protection in the future is being increasingly questioned in both academic and policy circles (Deakin 2004, 177). Employment today is no longer a clear relationship between an employer and employee as it once was. Technological developments have facilitated

1 For example, the application of the primacy of facts principle has been inconsistent in courts in the Republic of Korea, Russia and China. See Valerio de Stefano et al. 2021, 7–8.

the outsourcing of business activities through sub-contracting, franchising, outsourcing and third-party management, creating significant confusion as to who bears the responsibility of the employer (Weil 2014). Increasing economic integration and the global regulatory race-to-the-bottom, fast-paced technological progression, the vertical disintegration of the firm and policies that move away from Keynesian governmental policy focussing on "full employment" have all contributed to the mounting pressure on the employment relationship as an appropriate labour market governance mechanism (Deakin 2004, 178).

In this context, there has been an unprecedented surge of work relationships that are factually difficult to categorize as either "employment" or "self-employment" (Countouris 2011, 43). New and emerging types of contractual arrangements for work have meant that businesses are able to conduct operations without directly employing many of the workers involved in their production and service delivery processes (Weil 2014, 8–14). This includes both "disguised" employment relationships, as well as those that are "objectively ambiguous", and hence difficult to classify as employees or independent contractors (ILO 2003). Freelancers, gig/platform workers, casual workers, temporary agency workers, sub-contracted workers and workers engaged in home-based production as part of global value chains are just a few examples of vulnerable workers caught on the margins of this "binary divide" between employment and self-employment.

In this sense, labour law is thought to be facing a "crisis of coverage" – on the one hand, it is framed around the protection of "employees", while on the other, changing realities in the world of work have meant that a large proportion of workers remain outside the narrow definition of an employee and consequently outside the scope of labour law protection itself (Davidov 2014, 548–549). The issue, therefore, is not just whether the law is correctly applied in the process of classifying vulnerable workers as "employees" or "self-employed", but whether such a classification itself is valid at all (Countouris 2011, 43; see also Mangan 2020, 111–116). Whether labour law should continue to protect those who are classified as "employees" or in some sense go "beyond employment" has thus been the centre of intense discussion and debate (see Davidov and Langille 2006; Supiot and Meadows 2001). Indeed, some have argued for abolishing the binary distinction between employment and self-employment entirely, but this is an idea that has not fully been explored as yet (see Davidov and Langille 2006). Specifically, one of the challenges lies in how law and policy might address those who are classified as "self-employed" but are in fact – in a position of economic dependence – similar to that of employees (see Freedland 2007, 3–20).

A number of approaches have been considered to address the dilemma and expand the scope of labour law protection (see Countouris 2019; Tajman n.d.). The potential benefits and pitfalls of each of these approaches is explored here:

1.3.1. Reenforcing and expanding the 'employee' category

The reinforcement and expansion of the "employee" category as means for battling worker misclassification broadly leaves the present application of employee classification intact, that is, relying upon the factual circumstances of the performance of work to determine employee status based on the tests of control or economic dependence. In the case of vulnerable workers in ambiguous or disguised employment relationships discussed above, some element of judicial creativity is required to "fit" such workers into the category of "employee" and hence afford them with labour law protection (Tajman n.d., 14). Such an approach clearly retains and reinforces the employment relationship and its role in applying labour law protection. The conceptual boundaries of the employment relationship are reinforced most commonly, as recommended by ILO Recommendation No. 198 (ILO 2006), through the use of a rebuttable presumption of employment that shifts the burden of proof regarding employment status to the employer (Countouris 2019).[2]

In a similar vein, the European Commission through its recently proposed platform workers directive (European Commission 2021) has introduced a rebuttable presumption of employment for the protection of

2 A prominent recent legislative solution to the issue of disguised employment in the case of platform workers is California Assembly Bill 5 or AB5 introducing a legal presumption of employment. The AB5 codified the so-called "ABC" test in the United States, whereby all workers were presumptively considered to be employees unless the hiring entity is able to establish that: (a) the worker is free from control of the hiring company in fact and under the terms of their contract, (b) the worker performs work other than that in the course of the hiring company's business and (c) the worker is engaged in an independent occupation or business of the same nature as that of the work performed. This move codified the Supreme Court of California's decision in *Dynamex Operations West, Incorporated v. Superior Court of Los Angeles County*. Nevertheless, despite the significant advantage it brings to many workers who benefit from it, the law exempts numerous categories of workers from its provisions. Furthermore, as a result of a public ballot (Proposition 22) sponsored by certain platform-based companies, the law now also exempts from its purview most platform-based drivers.

platform workers. With such a presumption, platforms take on the role of traditional employers, unless such a presumption is challenged and subsequently, rebutted (Kullmann 2021, 66–80).[3]

Indeed, there are significant advantages to the application of such rebuttable presumptions of employment. Most significantly, such a presumption serves to clarify the status of vulnerable workers operating in the grey zone between employment and self-employment, assuring legal certainty to all parties involved in such work relationships. In so far as labour inspection is concerned, it allows for proper monitoring and enforcement of labour laws as applicable to such workers. Additionally, a presumption of employment status facilitates workers joining and forming trade unions and engaging in collective action without issues being raised regarding competition laws, as this is the most common hindrance for independent contractors wishing to engage in collective action (Kullmann 2021, 70–71). More broadly, such an approach to tackling disguised and ambiguous employment relationships is commendable in that it seeks to equalize the rights of workers engaged in non-standard forms of employment with those of employees, and it does so while maintaining the existing legal framework around which labour law revolves.

There are significant drawbacks to this approach. Most importantly, it is akin to "fitting square pegs into round roles" (Sprague 2015: 53–76), meaning that not all work relationships in the "grey zone" can be easily categorized as employment, and it is therefore not a foregone conclusion that a legal presumption can resolve all challenges related to the classification of workers. This is evident from the number of exceptions noted during the application of new regulations concerning re-classification. The exclusion of certain categories of workers that has always accompanied the SER model must not be discounted. Such an approach assumes that the employment relationship model will continue to endure in the face of current challenges to the organization of work. If the employment relationship is to be replaced by an alternate legal instrument, a legal presumption in its favour would serve only as a temporary measure (Countouris 2019, 12).

1.3.2. Developing intermediate categories

In an attempt to resolve the worker misclassification dilemma, a number of countries have experimented with the idea of introducing a "third" category of worker between the notions of employment and self-employment (Cherry and Aliosi 2018). Such a category has been created in most cases with the notion of "economic dependency" in mind in order to protect ostensibly independent persons who are economically dependent on a single client. The intention behind such a legislative move has been to broaden the scope of labour law protection beyond the category of "employee" that has traditionally been narrowly defined by law and/or courts, to those in the same position of economic vulnerability as employees, in most cases, affording them *some but not all* of the protection afforded to traditional employees (Davidov 2005, 61–62). Such categories have been created in Canada, Germany, Italy, South Korea, Spain, and the UK thus far (Cherry and Aliosi 2018).

The persons falling In the "worker" category in the UK are entitled to rights concerning minimum wage, working time, deductions from wages and assistance with grievance procedures (Davidov 2005, 58). In Italy, the "quasi-subordinate" worker category, was created as a subset of self-employed worker, as was the "TRADE" category of workers in Spain (Cherry and Aliosi 2016, 665). In the USA there has been a recent push to create the category of "independent worker" for all gig workers.[4] Such workers as it is proposed may have the right to collective bargaining and the protection of anti-discrimination laws. Intuitively, this is regarded as a common-sense solution to the challenge of pushing workers who do not fit the "employee" mould into that category (that is, the fitting square pegs into round holes problem mentioned above) (Cherry and Aliosi 2016, 647). In the case of Canada (considered to be a successful case of initiation of the third category) for instance, a broad definition of "dependent contractors" was introduced, and they were offered the same rights traditionally reserved for employees. This *de facto* led to an expansion of the "employee" category bringing more workers under the umbrella of labour law protection based on their economic dependence (Cherry and Aliosi 2018, 16).

Nonetheless, the literature broadly points to the significant pitfalls of employing the "third" category worker solution, particularly when the rights and benefits offered to such workers are less favourable

3 Amongst European Union countries, in May 2021, Spain passed a new law called *Ley Rider*, establishing a presumption of employment for activities including delivery and distribution for companies using digital platforms or algorithms for the organization of work. The law clarifies the status of platform workers in Spain and also accords them with the right to information regarding the algorithms that govern their work processes. However, as it is with the AB 5 in California, the scope of this law is limited, excluding crowd workers as well as workers performing services via platforms other than delivery services. See Antonio Aloisi, "Platform work in Europe: Lessons learned, legal developments and challenges ahead", *European Labour Law Journal* 13, No. 1 (2022), 4–29.

4 This was based on the "Hamilton Project" report by former Deputy Secretary of Labor Seth Harris and Princeton economist Alan Krueger. See Seth D. Harris and Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The" Independent Worker"* (Brookings, 2015).

than those offered to employees. Indeed, the most significant downside of creating such intermediate categories is that it prevents the possibility of the higher-level protection that is offered to employees, to workers who fall in the intermediate category (Kullmann 2022, 68). The most prominent aspect in this light has been the abuse of the "quasi-subordinate" category of workers in Italy which has been well documented. In Italy, businesses took significant advantage of the *parasubordinato* category to avoid the payment of social security and other entitlements that were appliable to employees. This led to the unfortunate result of employees being wrongly classified as "quasi-subordinate" workers and thereby having lower worker protection that they would have had if they were correctly classified as "employees" (Cherry 2017).

Additionally, in the case of countries like Germany and Spain, only a limited number of workers fall in the intermediate category on account of the stringent threshold to prove economic dependency. This is also true of South Korea, where in addition to the narrow definition of this category, the benefits provided are meagre, making it a weak source of labour protection (Cherry and Aliosi 2018, 16). Finally, a significant challenge associated with the introduction of an intermediate category is the fragmentation of fiscal and social security regulations. In this sense, workers often need to classify themselves as falling within such intermediate categories to benefit from tax breaks that allow them the means to live on their relatively low earnings. It is therefore an incentive for such workers to resist being categorized as "employees" even in cases where they would require the protection of labour law (Countouris 2019, 13).

1.3.3. 'Retargeting' labour rights: From selective targeting to universally applicable rights and benefits

The third approach to labour rights for all who work for a wage is admittedly where the least amount of policy experimentation has taken place. This involves the extension of labour rights beyond the confines of the employment relationship (Countouris 2019, 13). The scope of such an approach ranges from proposals to extend labour rights to "personal work" relations that maintain the distinction from self-employment (Freedland and Countouris 2011) to more radical reforms ideas that dispense partially or entirely with the distinction between employment and self-employment to extend protection on a universal basis. For instance, proposals for universal basic income and universal health care take such an approach (Tajman n.d., 18). While reinforcing the employment relationship, the Universal Labour Guarantee proposed by the Global Commission on the Future of Work proposes the broadening of its scope of labour protection. In order to understand how it might be implemented, it would be useful to look at other attempts at such "retargeting" of labour protection beyond the employment relationship. Specifically, this means "retargeting" the labour protection specified by the ULG to workers who are currently self-employed – whether they be genuinely in self-employment, disguised employment or classified as such on account of their inability to fit into the "employee" category.

Indeed, there has always been a recognition of the need for assuring the collective bargaining rights of self-employed persons, particularly in European jurisdictions (Waas and Hiessl 2021). Collective rights and the freedom of association should be able to tailor solutions to the needs of precarious workers, including the self-employed (Yun 2018). This is very much in line with the ILO's Committee of Experts on the Application of Conventions (CEACR) interpretation of the personal scope of the Freedom of Association and Protection of the Right to Organize Convention, 1947 (No. 87) and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), which repeatedly have been stressed to apply to workers and employers "without distinction whatsoever" (De Stefano 2021). Indeed, addressing the role that competition law plays, in so far as it poses a significant barrier to realizing the collective rights of self-employed workers in this regard, is a critical first step (see Lianos et al. 2019, 291–333; see also Daskalova 2018: 461–508).

Beyond, collective rights, a review of the literature reveals a number of other legislative and policy measures that have been taken to address the needs of those termed as the "new self-employed".[5] A significant number of the "retargeting" efforts aimed at this class of workers focus on social protection measures.[6] Indeed, such a focus on social protection as opposed to traditional labour law rights that have been accorded to employees, side-steps the issue of the application of competition law (Engblom 2001). The idea here has been to divorce benefits such as unemployment

5 This refers to workers who "are exposed to the same or to even more social risks than dependent employees, but at the same time – because of their employment status – have fewer social and labour rights." See Schulze Buschoff, Karin and Claudia Schmidt, "Adapting labour law and social security to the needs of the" New self-employed": comparing European countries and initiatives at EU level" (2007): 27, p. 1.

6 For example, see Slavina Spasova, Denis Bouget, Dalila Ghailani, and Bart Vanhercke, *Access to social protection for people working on non-standard contracts and as self-employed in Europe. A study of national policies.* (European Commission, 2017); and Slavina Spasova et al, "Non-standard workers and the self-employed in the EU: social protection during the Covid-19 pandemic", ETUI Research Paper-Report (2021).

insurance and health insurance that have typically been tied to employment status "by creating a permanent social safety net that would cover all types of workers" (Rosenblat 2020). The proposal for a "universal basic income" is of course one such idea. Another approach is the provision of social benefits to workers (whether employees or self-employed), for instance, "portable benefits" for workers who frequently move from one job to another. The proposition is for benefits to be tied to a worker rather than an employer, and financed through deductions from workers' pay, contributions of companies engaging such workers or both (Kamdar 2016).

Nevertheless, such measures focusing on social protection benefits fail to address key working conditions such as minimum wages and working time that are indeed covered by the ULG. Undoubtedly, these are among the rights accorded to "employees", and there are few proposals for their extension on a universal basis. So far, the most comprehensive, retargeting of rights beyond employment is proposed in the so-called "Supiot Report" prepared for the European Commission. It looks at the coverage of labour and security law from the perspective of four concentric circles – the first providing universal coverage (such as health care) and the second providing some social security (retirement benefits and accident coverage) for forms of unpaid work such as childcare and volunteering. The third circle is envisaged to address all "occupational activity", providing for health and safety and protection against discrimination for both independent contractors and employees. The fourth circle addresses employment and includes the usual provisions of labour law. In this way, the Report proposes that labour protections should support peoples' transitions over their lifetimes of which the transitions in and out of paid work are a part. This can be done by means of "social drawing rights" that people accumulate over their working lives and use at will (Supiot and Meadowns 2001; see also Davidov 2014, 543–566).

Indeed, the ULG is the first to propose the extension of rights in relation to wages and working time beyond employment, going beyond even the Supiot Report in this respect. Of course, many observers have pointed out the drawback of extending labour protection beyond employment which deserves consideration. Most significant is the concern that such an approach might destabilize the employment relationship model entirely, leading to a general watering down of labour standards for both those within and employment relationship, as well as those outside it. Second is the concern of who will bear the costs related to the social benefits provided to independent contractors when there is no clear employer. This will certainly call for innovative financing mechanisms. Finally, there is the concern often raised with respect to labour standards generally – that the extension of labour rights to employees (and now beyond them) can interfere with the functioning of the labour market. The latest empirical research on labour law and development has shown that this claim is not well founded (Deakin 2016), but there is no empirical evidence about the possible effects of the extension of labour rights *beyond employees*, whether positive or negative.

1.4 Forthcoming chapters

The authors of the next chapters discuss the current division between employees and the self-employed in their respective countries, both in the labour legislation, as well as in fiscal regulations. While examining national law and practice, they reflect on the legal and regulatory space for the introduction of the ULG in these contexts.

The ILO's Centenary Initiative and the concept of ULG is used as an analytical framework to assess Hungarian labour law. The author highlights that individual labour law in Hungary is based on a "binary divide", and Hungarian labour legislation provides for a variety of forms of atypical employment: simplified employment and occasional work relationships, non-standard forms of work via cooperatives and work through Active Labour Market Policies. All these forms of work are regulated outside the Labour Code. With regard to collective labour relations, labour relations in Hungary are characterised by weakening freedom to organise, weakening trade union rights and a contradictory regulatory environment. Interestingly, the author also assesses the labour law "coverage crisis" in Hungary, highlighting how sanctions for unlawful termination of the employment relationship are drastically limited in the new Labour Code. In this sense, the author concludes that the enforcement of labour law suffers from structural deficits in Hungary and a "universal coverage" is illusory.

The employment contract is the only means for delivering labour protection in Montenegro. In the absence of a legal definition of the employment relationship, criteria such as free will, work or service personally performed in exchange of remuneration, integration in the organization and subordination of work are indicative of its existence. The author discusses the typology of employment contracts based on their

duration, working hours and place of work, as well as their purpose. Montenegrin legislation also regulates forms of work outside the employment relationship such as contracts for service and occasional jobs. The author concludes that abuse by employers would be limited significantly if the Labour Law was amended in such a way that, in addition to high fines, it would oblige an employer hiring workers on contracts for service and contracts for occasional work to conclude an employment contract whenever it has the elements of an employment relationship.

The Macedonian Labour Code treats the notions of "employment relationship" and "employment contract" as synonyms, as is the case in other countries in the region. In this sense, the written form of the employment contract is a condition for its validity, narrowing the personal scope of labour protection for workers and making access to justice difficult for informal workers and those in a disguised employment relationship. In Macedonian law, subordination is a key, distinctive criterion for distinguishing the employment relationship from other work relationships, with the control and integration tests being the primary tests of employment status. The chapter discusses various forms of employment and the "grey zone" between employment and self-employment: disguised employment relationships, so-called "special contracts" for the performance of work, which is outside of the employer's main activity, casual work, multiparty work (such as TAW and sub-contracting), and dependent self-employment. The author finds the ongoing process of reforming the national Labour Relations Act as an opportunity for the legislature to address the issue of workers operating at the boundaries of employment and self-employment.

All aspects of labour protection covered by the ULG are in fact ensured by the Polish Constitution. Nevertheless, the personal scope of such protection remains a problem in Polish labour law. The contribution on Poland considers how the ULG might be extended specifically to those who work personally outside the framework of the employment relationship, on the basis of civil law contracts, that is, on agency contracts, contracts of mandate, contracts for the provision of services and contracts for a specific task, as well as the self-employed. The author emphasizes that it is the definition of the employment relationship that is fundamental to determine the scope of the Labour Code's application. In this respect, the factors characteristic of a person's employment status are: performing work in person for an employer; performing work on a continuous basis; performing work under an employer's supervision, performing a specified type of work; performing work for remuneration. In Poland, certain groups of independent contractors have been granted by law the right to minimum statutory remuneration, as well as the right to unionize and to bargain collectively. In the author's opinion, the idea of extending the employment relationship concept to all those who work raises many doubts. Referring to the economic theory of Ronald Coase, the author argues that the application of labour law introduces additional costs to an exchange transaction between an employee and an employer and in the case of Poland the costs incurred on account of tax and social security regulations are a significant factor.

The need to protect the work relationship in its diverse forms, as opposed to only the protection of the employment relationship, is addressed in the Romanian study as a major means of tackling precarious work. While discussing existing forms of precarious work – no matter its contractual form – the author considers specifically how the Romanian legislature has addressed various categories of precarious workers: undeclared or underdeclared work, disguised subordinate work, remote workers, domestic work, multiparty work and probationary workers. Special regulations, outside the Labour Code, govern specific types of precarious workers in Romania such as day-labourers, interns and workers in cooperatives. These types of work are seen as work relationships and the concerned workers benefit from certain labour rights only. The author concludes that the greatest difficulty in Romanian labour legislation lies in addressing the needs of so-called "economically dependent workers" who have concluded genuine civil law contracts but who are economically dependent on a single or a small number of principals or clients/employers for their source of income. In this respect, introducing the ULG in Romania would be most important in terms of the protection it can offer this category of workers.

Work arrangements on digital labour platforms are at the centre of the Serbian chapter. Serbia has one of the highest percentages of workers working through international platforms (programming, translation, language classes, dispatching jobs), making this the most pressing issue in the country. Reportedly, platform workers in Serbia do not enjoy any employment protection, with platforms presenting themselves as intermediaries that only provide IT services to connect service providers to clients. As currently neither the domestic labour law nor the jurisprudence provides for a definition of the employment relationship, the author opines that introducing the ULG in Serbia would depend on filling this legislative and jurisprudential gap. To tackle the issue of bogus self-employment, the author sees extending the notion of the "employee" to such persons as necessary. This may be achieved through a rebuttable presumption of employment, as well as the introduction of the economic reality test in combination with the control test to assess the employment status of a worker. Finally, the author concludes that non-standard workers must have access to all the rights established by international labour standards, such as: minimum wage, limited working time, prohibition of discrimination and harassment at

work, safe and healthy working conditions, much of which will be addressed by the introduction of the ULG.

The Ukrainian Labour Code does not contain a definition of an "employment relationship" and does not disclose its features – it only defines the employment contract, according to which the employment relationship is interpreted. The author explains how legal amendments made during the course of the COVID-19 pandemic removed the element of subordination from the definition of the employment contract, which complicates the possibility of establishing the existence of an employment relationship. Extending rights to all who work, the author argues, has the potential to blur the lines between labour and civil law. As an example of this, the author illustrates the case of the recently adopted Law on Stimulating the Development of the Digital Economy in Ukraine (LSDE). The LSDE applied primarily to digital companies, providing for a new type of contract – a gig contract which is a civil law contract under which an IT specialist undertakes to personally perform work on behalf of a Company and the Company undertakes paying for the services performed and provide the individual with appropriate conditions for the performance of services, as well as social guarantees prescribed by this Law. In this way, the LSDE, ensures that dependent self-employed workers benefit from some labour rights and social security entitlements which are usually guaranteed to employees. Nevertheless, the author cautions that the LSDE does not offer persons working under civil law gig contracts the full scope of basic labour guarantees – specifically, the right to collective bargaining and occupational safety and health.

1.5 Conclusion

The reflections on the application of ULG in the national contexts of CEE countries presented in this research demonstrate the specific challenges involved in its introduction into national law and practice. Each of the chapters highlights the centrality of the employment contract in the delivery of labour law protection. It is therefore clear that an incremental approach to realize the universal dimension of labour protection would be required. National labour law reforms, and a wide policy and legislative consensus on legal and policy measures necessary to fill the current legal and practical gaps, will be further needed. Broad recognition in law and jurisprudence of the primacy of factual reality of the employment relationship over its juridical form – the employment contract – could be a first step. The placement of the paid work relationship – and not subordinated employment relationship – at the centre of protection of fundamental labour rights would be a doctrinal and legislative leap as would be innovative designs of social security and fiscal mechanisms able to provide a universal coverage and the financial means to realize fundamental labour rights for all who perform paid work.

Legislative initiatives to extend occupational health and safety, social security, freedom of association and collective bargaining rights to workers who are not in an employment relationship, as well as some doctrinal interpretation of constitutional protection of work,[7] are encouraging in this sense.[8]

As regards the various potential solutions to the classification problem posed by workers on the boundary between employment and self-employment, different perspectives can be observed among authors of the country chapters. A large majority conclude that the introduction of a universal labour guarantee, assuring rights to workers irrespective of their contractual status (civil or employment contract), would be the best solution to addressing the needs of vulnerable workers who fall between the employee/self-employed categories. The authors broadly agree that there is indeed a legal issue with classifying certain workers genuinely engaged on civil law contracts but who are economically dependent on a single or a few clients. On the other hand, some very much come out in favour of reenforcing the "employee" concept. Regarding the "retargeting" of labour rights, a few examples are seen. The most prominent of these are the Polish recent legislative measures and the example of the LSDE in Ukraine where a special legal regime is introduced for IT-workers. However, in both cases, the protection afforded is partial and incomplete.

In conclusion, this research demonstrates that the introduction of the Universal Labour Guarantee into national law and practice is far from a straightforward process. It will require a conceptual change in terms of how the personal scope of labour law is viewed. The extent to which this may be achieved either through a gradual expansion of the employment relationship concept itself, the "re-targeting" of rights

7 See the chapter on Poland.

8 See the provision on freedom of association for farmers in the draft Labour Relations Act of North Macedonia and the right to organize and to collective bargaining for "persons who perform paid work" in Poland.

beyond employment relationship or the introduction of intermediate categories, is a highly contextual issue. National legal culture, political and economic circumstances, and ongoing global trends will all play a part. Further research on this issue – perhaps in a more diverse set of regions – may serve to shed further light on how the Universal Labour Guarantee might be made a reality for all who work for a wage around the globe.

2. Universal Labour Guarantee – The state of play of Hungarian labour law in view of the ILO's Universal Labour Guarantee, Attila Kun

2.1 Introduction: the ILO's Future of Work Centenary Initiative as a tool to analyse national labour laws – The case of Hungary

The ILO (International Labour Organization) Global Commission on the Future of Work published its landmark report called "Work for a Brighter Future" in 2019, upon the centenary of the Organization[9] (as part of the ILO's Future of Work Centenary Initiative) (ILO 2019). The report examines how to achieve a better future of work for all at a time of unprecedented change and exceptional challenges in the world of work. It calls for a human-centred agenda for the future of work that strengthens the social contract by placing people and the work they do at the centre of economic and social policy and business practice. This multi-dimensional, complex agenda consists of three pillars of action: (1) investment in people's capabilities; (2) investment in the institutions of work; (3) investment in decent and sustainable work. Each pillar contains a set of recommendations. The key issues considered under the first pillar, "investment in people's capabilities", include lifelong learning for all, supporting people through transitions, a transformative agenda for gender equality and strengthening social protection. The second pillar ("investment in the institutions of work") puts forth the following recommendations: establishing a Universal Labour Guarantee (ULG), expanding time sovereignty, revitalizing collective representation and technology for decent work. The third pillar's recommendations ("investment in decent and sustainable work") are formulated as transforming economies and a human-centred business and economic model among others. This scheme and the idea of the ULG are viewed as an appropriate tool to deal with the challenges of the contemporary world of work, and the Commission recommends that the ILO pay urgent attention to the implementation of the agenda (for more detail, see ILO 2019).

This chapter aims to overview the structure, scope, impact and the general state of play of Hungarian labour law in the spirit of the ILO's Future of Work Centenary Initiative and the ULG and to confront the ideas and the jargon of the ILO's agenda with the reality of Hungarian labour law policy. In other words, the chapter uses the Centenary Initiative and the ULG as benchmarks or analytical frameworks to take stock of the overall status quo of Hungarian labour law. In doing so, the chapter points out that, in general, Hungarian labour law is far from providing universal labour guarantees as envisaged by the Centenary Initiative, and there would be a need for a comprehensive – universal, human-centred – paradigm shift in Hungarian labour law policy in order to act in accordance with the idea of the ULG (and to refute the increasing "irrelevance of labour law" (Muszyński 2020, 23), as pointed out in this chapter). The chapter explores the 'universality' of the protective scope of Hungarian labour law on three levels, in line with the three main areas of labour law. Section 2 deals with aspects of individual labour law, Section 3 explores some dimensions of collective labour law, while Section

9 See also ILO Centenary Declaration for the Future of Work, 2019.

4 deals with the public enforcement of labour laws. In each section, the main question is the following (in the spirit of the ILO's Centenary Initiative): how universal and human-centred is Hungarian labour law? Section 5 illustrates a few specific subtopics of the Centenary Initiative as points of reference for the assessment of Hungarian labour law. Namely, the following – in our view, especially progressive – components of the Centenary Initiative are highlighted from a Hungarian perspective: lifelong learning, the institutions of work and time sovereignty. Section 6 will provide some concluding remarks. Obviously, this brief chapter cannot cover all aspects and institutions of Hungarian labour law; therefore, under each subtopic, some illustrative dilemmas are selected in order to present a general impression about the status of Hungarian labour law in light of the ILO's Centenary Initiative. At its core, the chapter advances a fundamental point that it is always necessary to examine and reconsider national labour law policies (Hungarian labour law in this case) through broader, purposive lenses (see Davidov 2016), and the ILO's Centenary Initiative and the ULG offer valid, timely and sophisticated benchmarks for such an investigation.

2.2 Individual labour law: Universal versus selective coverage

The question of who is (and who should be) covered by labour law is an "evergreen" debate in labour law scholarship, and it can be framed aptly along the concepts of universalism and selectivity. On the one hand, as Davidov rightly points out (not explained here in detail), extreme universalism has its dangers too (Davidov 2020, 543–566). On the other hand, in many countries there is a "coverage crisis in labour law" (Davidov 2020, 543–566), mostly because of radical selectivity. Hungary is no exception. Moreover, Petrovics describes Hungarian labour law as a highly segmented, multi-layered, here and there, fragmented system of protection, which contains so-called primary, secondary and even tertiary and further circles of protection (where the level of protection is gradually eroded) (Petrovics 2022, 19). "Employees" undoubtedly belong to the first, standard circle of protection.[10] "Employee means any natural person who works under an employment contract" [article 34 (1) of Act I of 2012 on the Labour Code (hereinafter: HLC)].[11] There is no alternate way to enter the "employee" status, therefore the employment-specific rights and obligations stem only from the employment contract (Zaccaria 2021, 163–177). This formalistic, legal-technical definition of the employee gives rise to various – *de jure* and *de facto* – forms of selectivity/exclusion. It is not the goal of this chapter to analyse in detail the various segments and layers of protection in Hungarian (labour) law. However, for the sake of illustration of the main argument (that is, the segmented nature of protection instead of universalism), some of the most critical legal categories are sketched out, which are – either partially or fully – excluded from the general protective scope of labour law. For instance, in general, some experts calculate that "about 15 per cent of all workers fall outside the scope of the Labour Code (as nonemployees)" (Gyulavári and Kártyás 2022, 115).

There are some unique legal relationships within the broader infrastructure of Hungarian labour law/employment law that are quite similar to the standard employment relationship (SER) in their basic features, but – by some means – still regulated as hybrid, "second-class" (or even "third-class") categories of employment, in as much as they are not fully covered by the protective scope of the HLC (only some selected, partial protection applies to them). In effect, these categories of employment are partially excluded from the protective scope of labour law, and are on the periphery of labour law as tools of employment policy (for further details, see Kun 2020). As an illustration, the three most significant[12] forms are mentioned briefly below (without going into the details of the risks and malpractices these specific forms of employment might trigger, in particular, segmentation, stimulus to evade labour law, contributing to the "in-work poverty/working poor" phenomenon and so on).

First, the construction of simplified employment and occasional work relationships (hereinafter: SE) is partly regulated by Chapter XV of the LC (as a specific form

10 However, it is often pointed out that contractual freedom, flexibility is already rather excessive in standard Hungarian employment contracts law. For example, see Tamas Gyulavari and Dr Gábor Kártyás, "The Hungarian Flexicurity Pathway?: New Labour Code After Twenty Years in the Market Economy", (Budapest: *Pázmány Press*, 2015).

11 The HLC is based on traditional employment and full-time contracts of indefinite duration. Chapter XV of the HLC deals with "Special Provisions Relating to Employment Relationships According to Type." The legislator's aim is to offer a relatively comprehensive, but rather flexible legislation on so-called atypical forms of employment in this Chapter (plus Chapter XVI regulates temporary agency work).

12 These forms of employment fulfil a significant role on the labour market. For some additional relevant statistics, see Attila Kun, "New Employment Forms and Challenges to Industrial Relations", University of Amsterdam, NEWEFIN Project – Hungary Country Report., 2020.

of the employment contract), and partly by Act LXXV of 2010 on Simplified Employment (regarding SE's administrative, public law aspects). Even though SE is formally an – atypical – employment relationship (possibly the most atypical one), it is relatively far from the protective level of the SER. In fact, the SE-system is a kind of "budget/low-cost" or "second-class" employment relationship, partially excluded from the scope of standard labour law (the HLC defines the applicable and the non-applicable labour law rules). In brief, SE provides a cheap,[13] administratively less burdensome and flexible – also less protective – method of occasional employment (with a preferential regime of common charges). It is a form of casual work or marginal part-time employment (for further details, see Gyulavári 2018).

Second, Act X of 2006 on Cooperatives regulates unique non-standard forms of work via cooperatives. By means of these cooperatives, the legislature created specific ("hybrid") frameworks of work for certain well-defined groups of workers (students, the "needy", people working in agriculture, pensioners), in which employment entails substantially lower public charges, and, at the same time – as a "price" of cheap employment – these workers are excluded from the standard umbrella of labour law and are placed in a significantly less favourable, excessively flexible legal position. Members of such cooperatives are "workers" but are not to be considered employees (only some listed provisions of the HLC apply) (for further details, see Kiss 2017; Kun 2018).

Third, since 2010, the government has run a renewed, large-scale, workfare-like public works programme for those who have fewer chances to get a job on the primary labour market. The aim is activation and thus breaking the benefit-dependency of these people. The most important goal of the public works programme 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. The programme continues to be the central and overriding element of the government's employment policy. Social benefits are conditioned to the scheme.[14] From a labour law perspective, public works (Act CVI of 2011) are not only a form of active labour market policy but a special – non-standard – form of employment. The rules of the HLC apply to this form of employment, but with the derogations provided for in Act CVI of 2011 (for further details, see Hungler 2022).

Besides the above-mentioned, partially segmented, excluded forms of employment, there are further forms of employment on the Hungarian labour market that totally reside out of the protective scope of labour law.

First, Hungarian labour law is based on a classic "binary divide" between subordinate and independent workers. Thus, unlike employees with full coverage of labour law, self-employed workers are left without any labour law protection.[15] Self-employment may appear in several scenarios, such as a natural person, solo-entrepreneur or company member. The self-employed might choose from several methods of taxation, and these tax options can further distort the labour law rationale, since some preferential forms of taxation are tempting also for "employees", often motivating an "escape" from labour law (and frequently resulting in bogus self-employment).

First and foremost, the so-called KATA taxation category (introduced in January 2013) will be underlined in this context (the original policy aims of KATA were to stimulate the growth of small businesses and to promote the formalization of some related sectors). KATA is a "Flat-rate tax of low tax-bracket enterprises". Private entrepreneurs, sole proprietorships (as well as limited partnerships and general partnerships where all members are natural persons) may be eligible for the fixed-rate tax on low tax-bracket enterprises. Delimited at an annual income ceiling, the low tax-bracket enterprise must pay only a monthly, preferential itemized tax (instead of normal taxation). Thus, KATA – an itemized, simple, lump-sum tax – substitutes for most of the normal tax and contribution types. In sum, KATA is originally aimed at making life easier for small businesses, but it is obvious that some employers are trying to shift the status of their employees to entrepreneurs (albeit the law contains some targeted clauses to prevent that). This itemised tax for small entrepreneurs (KATA) seems to be successful and popular, but the government continuously acts against the extensive fraudulent use of the scheme.[16] It is also worth mentioning the special status of so-called domestic household work in Hungarian tax law (not described here in detail).[17]

Second, as platform workers are mostly self-employed entrepreneurs in practice, they do not have any employment protection. According to some, "the most widespread form of on-demand platform work is bogus self-employment" (Kahancová, Meszmann and

13 Most strikingly, SE entails option for lower, more flexible minimum wages.

14 See Közfoglalkoztatási portal.

15 The Hungarian labour law has no clear, established definition of self-employment per se, on its own. In practice, self-employed persons are independent contractors who work under a civil law contract. In the Hungarian understanding, the notion if self-employment is rather an abstract term, which has various technical, functional interpretations in various fields of law (for example, social security, anti-discrimination and so on).

16 As of 2023, a comprehensive reform is expected.

17 This unique tax category ("outside" of the tax regime) is regulated by Act 90 of 2010, Chapter I.

Sedláková 2020). The main – open – question is how to incorporate these new forms of work into the overall labour law framework (note that there are neither established case-law, official policies nor regulatory concepts in this regard; the legislature likely will wait for future EU law measures before starting to act) (for further details, see Kun, Rácz and Szabó 2020).

Third, although economically dependent workers represent a significant share on the labour market, their status and protection are unclear under Hungarian labour law. Thus, Hungarian labour law has no intermediary "third" category between employment and self-employment. However, it must be noted that the first draft of the new HLC (July 2011) attempted to extend the scope of the HLC to other forms of employment (in the event of the existence of certain preconditions). The Proposal foresaw the category of "person similar in status to employees" prevalent in an increasing number of countries (that is, 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 HLC (on minimum wage, holidays, notice of termination of employment, severance pay and liability for damages [see Horváth, Kun and Petrovics 2021) to other forms of employment, such as civil (commercial) law relationships aimed at employment (a "person similar to an employee"), which in principle does not fall under the scope of the HLC. This intended legislative method aimed 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 wanted to moderate the circumvention of labour law and to contribute to the legalization of employment. The Proposal was not admitted in 2011, and it is not on the agenda anymore. Many labour lawyers think that new legislation of this kind would not be a desired outcome to manage such classification problems. For instance, a "third" category of workers (for example, in line with the Proposal presented above) probably would not really clarify status of workers rather than multiply chances for abuses.

Finally, through the lens of "universalism", public sector labour law is also in a special position. Public service statuses and employment relationships are formally not considered as an employment relationship per se in Hungary and the overall regulation of employment in the public sector is increasingly – and in our view, rather artificially – detached from the logic and manner of labour law ("civil service law" is arguably a new, independent branch/field of law and not part of existing labour law [see Horváth, Kun and Petrovics 2021). In sum, the regulation of the employment relationship of public sector employees is increasingly driven by the logic of public law and not that of labour law. This regulatory approach has several detrimental side-effects (such as the curtailment of collective bargaining rights[18] and the unfettered unilateral power of the employer/the state in many situations,[19] among others), but it is not the task of the current chapter to go into detail in this regard.

In sum, the coverage of Hungarian (individual) labour law is far from being "universal". One can only agree with Davidov that "a balance must be struck between universalism and selectivity" (Davidov 2014, 543–566), but Hungarian labour still has a long way to go to find this balance, and the ILO's ULG might serve as a driver to combat against extreme segmentation. A "fresh", creative scientific and regulatory discourse on a more dynamic employee (or worker) status would be highly relevant in Hungary, as it is clear that "actors of the labour market are gradually, but firmly, going beyond the legal dogmatic boundaries based on pure theoretical foundations artificially created by the legislature" (Zaccaria 2021).

▸ 2.3 Collective labour law: The increasing irrelevance of collective representation in Hungary

Hungary's collective bargaining system is characterized by fragmented, decentralized, weakly coordinated, predominantly single-employer bargaining, negotiated mainly between a company-level trade union and a single employer. In brief, social partners are weak, collective bargaining coverage is low (around 20 per cent) and sectoral-level negotiations are practically non-existent (Gyulavári and Kártyás

18 For instance, under the main acts of civil service law – Act CXXV. of 2018 on government administration ("Kit." in Hungarian), Act CXCIX of 2011 on Civil Servants of Public Services ("Kttv." in Hungarian) – it is not allowed to conclude collective agreements.

19 For example, it is a main rule in civil service law that the appointment may be amended by the employer by unilateral legal declaration. See § 89 (1) of Act CXXV. of 2018 on government administration ("Kit." in Hungarian) on the issue of amendment of appointment. This rule is absolutely in contradiction with the contractual logic of labour law.

2022, 99–116). Furthermore, not only the quantity but also the quality of existing agreements is puzzling: research carried out on this subject has indicated several weaknesses with regard to the content of collective agreements Gábor, Nacsa and Neumann 2008, 17–19). Collective bargaining agreements often merely repeat the statutory rules,[20] and regularly include illegal or meaningless terms and conditions. Besides, the promotion of collective bargaining has never been a "success story" in Hungary, and several recent international critiques have been formulated in this regard (see ECSR 2011).[21] There is an extension mechanism of the scope of collective agreements but is very rarely used by the government. In sum, collective agreements seem to play a minimal (and declining) role in employment regulation (for further details, see Kun 2019; Gyulavári 2020).[22] In other words, the impact of collective labour law in general is marginal (and certainly far from "universal") in Hungary.

This non-universal impact of collective labour law and collective bargaining is also exemplified by several – rather large – categories of workers on the Hungarian labour market who are largely unaffected by collective labour law in general and collective bargaining more specifically. First, SMEs (small and medium-sized enterprises) employ more than two-thirds of the workforce.[23] In this sector, the reality of collective bargaining is marginal. Second, in the overwhelming majority of various statutes of public sector labour law, the right to collective bargaining is legally excluded. For instance, under the main acts of civil service law – Act CXXV. of 2018 on government administration ("Kit." in Hungarian), Act CXCIX of 2011 on Civil Servants of Public Services ("Kttv." in Hungarian) – the conclusion of collective agreements is disallowed.

The situation is similar, for example, regarding police officers (Act XLII of 2015 on the service relationship of the professional staff of law enforcement organizations), military services, or – even more surprisingly – healthcare workers. (See Act C of 2020 on Healthcare Service Relationship which fundamentally transforms the employment relationships at state-owned healthcare service providers and eliminates the right to bargain collectively.) Third, the right to bargain collectively is provided only for employees; it is only an employee who can be covered by a collective agreement. The "Fundamental Law" (that is, the new constitution from 2011) states that "employees and employers shall cooperate with each other taking into consideration the objective to provide employment and the sustainability of the national economy, as well as other community goals.

In accordance with the relevant legislation, employees, employers and their respective organizations shall have the right to enter into negotiations for the purpose of concluding collective agreements, and to act jointly in order to protect their interests, which covers the right of workers to go on strike.[24] Consequently, non-employee-like "workers" – such as self-employed workers, economically dependent entrepreneurs and so on – cannot be covered by collective agreements.[25] Furthermore, as – practically speaking – most platform workers are formally self-employed in Hungary, "collective agreements simply cannot have a significant part in shaping the working conditions of platform workers" (Gyulavári and Kártyás 2022, 99–116) in Hungary (and there are no such innovative practices either). Fourth, collective bargaining practices are deficient not only in the self-employed sector but also in relation to atypical employment relationships. In general, one might dare to state that non-standard forms of work in general are basically out of the sight of unions and social partners in Hungary. Meszmann points out "the lack of involvement of social partners, especially trade unions, in influencing the regulation and employment policies of the government" and that "industrial relations are poorly utilized in fighting precarious employment" (Meszmann 2016, 1).

It must be noted that workplace-level representation in Hungary is provided by both local trade unions (oriented towards collective bargaining) and elected works councils (oriented towards information and consultation) with the balance between the two varying over time. Not only the impact of collective bargaining is unsatisfactory (as described above), but the system of works councils is also weak. Figures from Eurofound's 2013 European Company Survey show that 16 per cent of establishments in Hungary with at least 10 employees have some form of official employee representation. This may be either through

20 These are the so-called "parrot clauses".

21 In the recent past, both the European Committee of Social Rights (ECSR) and the ILO have criticized Hungary for insufficient promotion of collective bargaining.

22 However, the new Labour Code of 2012 intended to strengthen the parties' collective contractual freedom by reducing the regulatory role of the state. The new Code significantly extends the role of collective agreements for the advancement of a more flexible, more reflexive, more autonomous system of employment regulation. Anyhow, the reformed hierarchy of labour law sources did not manage to strengthen collective bargaining.

23 See A kis- és középvállalkozások jellemzői, 2018.

24 Article 17, sec. (1)-(2) of the Fundamental Law of Hungary (25 April 2011).

25 As for the competition law aspects of this dilemma (not analysed here), see, in Hungarian, Attila Kun, "A szakszervezeti szervezkedés szabadsága versenyjogi kontextusban", in PÁL Lajos–PETROVICS Zoltán, ed. (Visegrád 17, 2020), 205-220. More generally on the topic, see Ioannis Lianos, Nicola Countouris and Valerio de Stefano, "Re-thinking the competition law/labour law interaction: Promoting a fairer labour market", *European Labour Law Journal* 10, No. 3 (2019), 291–333.

the union or through the works council. The Hungarian figure is precisely half the EU28 average of 32 per cent (Fulton 2021). The new Labour Code of 2012 introduced the new right of elected works councils to conclude – under specific conditions[26] – normatively binding works agreements (as a form of non-union bargaining). No official data is available on the number of such quasi collective (works) agreements, but one can estimate that their role is limited.

All in all, labour relations in Hungary are characterised by a weakening freedom to organise, a weakening trade union rights and an increasingly meaningless (national and sectoral) reconciliation of interests in addition to a contradictory regulatory environment (Szilárd 2021). Furthermore, the entire collective bargaining system seems to fade away and struggle with fundamental structural problems (Gyulavári and Kártyás 2022, 114).

2.4 Enforcement of labour law – Gaps between the law in 'words' and the law in 'action'

Contemporary labour law scholarship often raises the overall problem of a compliance/enforcement crisis (see Davidov 2016). Hungary seems to provide a textbook example for such a scenario, as the actual "impact" of labour law seems to be rather unsatisfactory (and it provides by no means "universal" coverage). As mentioned earlier, SMEs employ more than two-thirds of the workforce and compliance with labour laws in this segment of the labour market is highly problematic. On a more general level, it is rightly pointed out by ETUI research that from a strictly formal point of view, employment regulation in Central Eastern European countries including Hungary (with a statist tradition of regulation) provides an acceptable level of protection for employees. "However, workers' formal rights are being violated and circumvented on a massive scale. Because the oversight system is non-effective, employees lack sufficient access to justice; furthermore, the courts and administrative bodies approach regulation in a highly formalised way so that the violations and circumventions become 'normalised' over time, rendering formal regulation ineffective" (Muszyński 2020, 4). Non-enforcement of existing regulation, non-effective oversight mechanisms and deficits in employees' sufficient access to justice are everyday experiences in Hungary. Although obtaining precise and robust data on labour law violations is generally impossible (Muszyński 2020, 16), even available, recent statistics are revealing and alarming. For example, according to the data of labour inspection, 69 per cent of all 14,355 enterprises inspected had violated employment standards in 2021 (meaning that 58 per cent of the employees subject to inspection were affected) (ITM 2022). Another sad statistic is that in 2021, 21,591 accidents at work were reported (an increase of 6 per cent compared to 2020), while the number of fatal accidents at work was 84 in 2021 (an increase of 31.3 per cent compared to 2020).[27] In general, OSH infringements are common (for example, 72.8 per cent of approximately 14,000 enterprises infringed on OSH regulations in Hungary in 2018, affecting two-thirds of all employed workers) (Muszyński 2020, 12).

As noted by Muszyński, "even though violations of labour law are widespread, with only a fraction being remedied by labour inspectorates, they are translated into legal action only sporadically" (Muszyński 2020, 16). Labour courts normally play an important role in the enforcement of labour law. Thus, ensuring effective access to labour judiciary is a crucial factor in the protection of workers' rights. In this context, it is alarming that the number of incoming litigious labour cases at the courts shows a remarkable decline in recent years: for example, it amounted to 13,477 in 2016, 12,667 in 2017, 6,170 in 2018, 4,615 in 2019 and 1,129 in 2020, respectively (Halmos 2021, 148). Nádas and Kiss observe that the significant reduction in the number of claims before the courts cannot be seen as a positive development, as there is no evidence that the number of disputes between the parties has actually decreased, and therefore one can conclude that the latency of abuse and infringements has increased (Nádas and Kiss 2021, 176). There are several – legal, sociological, institutional and other – reasons for this decline in the number of litigious labour cases, and it is not the task of the current chapter to analyse them in detail. However, it seems to be useful to provide at least some examples of crucial labour law institutions, where litigation and access to justice would be highly important, but – for one reason or another – there are serious deficits in enforcement. In sum, "Hungary is a notorious example of extremely limited access for workers to litigation concerning their workplace rights" (Muszyński 2020, 17).

26 If the employer is not covered by a collective agreement, and there is no trade union at the employer with entitlement to conclude a collective agreement. See article 268 of the HLC.

27 See Ministry for Technology and Industry.

Most labour disputes have always been initiated in relation to unlawful dismissals. The former substantive legal rules – based on the former Labour Code[28] – corresponded to the need to ensure that if the employer did not terminate the employment relationship in accordance with the law, the sanction to be faced by the employer was a suitable means to deter the employer from unlawful conduct. The new Labour Code (HLC) has introduced reforms with far-reaching consequences regarding the rules related to the legal protection against unlawful dismissal. In short, the HLC reduces the legal protection against unlawful dismissal. Whereas the "old Labour Code" foresaw that when a court found that an employer had unlawfully terminated an employee's employment, the employee could request to continue being employed in his/her original position ("reinstatement"). According to these "old" rules, the court in such circumstances and at the employer's request could release the employer from having to reinstate the employee in his/her original position, if the continued employment of the employee cannot be expected of the employer. Should the employee not request to be reinstated in his/her original position or should the court release the employer from this obligation, the court was empowered, after weighing all applicable circumstances, to sentence the employer to the payment of not less than two and not more than twelve months' average earnings to the employee (as a kind of punitive sanction). In such cases, the employment relationship is deemed to have terminated on the day the court handed down its ruling on the unlawfulness of the action. In the case of unlawful dismissal, the employee was to be – sort of automatically – reimbursed for lost wages (and other emoluments) and compensated for any damages arising from such loss. The portion of wages (and other emoluments) or damages recovered otherwise was neither to be reimbursed nor compensated (based on Kun 2014).

Under the *new provisions*, there are no more general obligations for reinstatement (that is, reinstatement becomes a very exceptional possibility). In the old system, compensation of lost wages was quasi-automatic and without limits, and it was due for the whole duration of the lawsuit (which, without doubt, was not fully fair for employers). Furthermore, legally speaking, the employee was not obliged to mitigate the costs. In the new system the employer is to provide financial compensation for all losses caused through the unlawful dismissal with a view to the rules on liability for damages (consequently, justification becomes more difficult and complex as the employee needs to show that he/she has suffered a real damage in relation to unjust dismissal). Moreover, there is a statutory limit on the most typical share of damages: the damages – as lost earnings – thus paid may not exceed the total amount of the employee's twelve-month absence pay. Furthermore, and most importantly, the "punitive sanction" (2–12 months 'salary in the former scheme) is completely ruled out from the system. Accordingly, the gravity of the breach of law is irrelevant in the current system, and the legal consequences of unjust dismissal (if any) are determined solely by the proven actual harm suffered by the employee (in line with the logic of liability for damages). In lieu of being able or eager to show the actual damage, the employee may demand a lump-sum payment equal to the sum of absentee pay due for the notice period when his/her employment is terminated by the employer (in practice, this lump-sum payment is usually relatively low and offers little motivation to initiate a lawsuit). All in all, sanctions for unlawful termination of the employment relationship are drastically limited in the new Code. The overall purpose of the reform was to reduce an extremely large number of litigious proceedings (which is, in our opinion, a very debatable regulatory idea). As a result, the legal consequences of unlawful terminations are revised and "lightened" in order to avoid solutions which enforced the employers to pay excessive, disproportionately high amounts. As Gyulavári and Kártyás describe, "the new rules shifted the emphasis from punishing the employer and full reparation of damages to recovering only a very limited part of the damages incurred by the employee in case of wrongful dismissal." They continue by stating that it is questionable whether the employee receives appropriate reparation and whether the employer is efficiently restrained from introducing similar unlawful measures (Gyulavári and Kártyás 2015, 233–245). All in all, a large number of unlawful terminations can remain without any sanction (for further details, see Petrovics 2022), as employees will not be motivated to file a case. The tentative normalization of unlawful practices can have the potential to undermine legal culture and compliance in general.

Besides unlawful dismissal-related cases, employers' liability for damages (for example, in cases of work-related accidents) is another classic field of labour law where litigation is common. Within the existing infrastructure of Hungarian labour law, employer's

28 Act XXII of 1992.

liability for damages reflects a dominant civil law approach.[29] This means that liability is court-based, that is, it necessitates litigation (with a typically cumbersome, protracted and rather volatile justification procedure). Thus, compensation is not at all automatic, and usually not efficient. In sum, this civil law inclined, court-based system of liability proves to be dysfunctional in dealing with mass (structural) enforcement of liability as well as with new risks and challenges (such as psychosocial risks). All in all, enforcement of employers' liability is cumbersome and difficult for employees. Experts more or less agree that a brand new, more automatic, more predictable, more prevention-oriented, more stable, more effective, more complex, more risk-based compensation system would be necessary in Hungary for the sake of better institutionalization of employer's liability for damages (Kun 2014, 64–81). In this regard, for example, the National Occupational Safety and Health Policy for the period of 2016–2022[30] foresees the formation of a concept for a separate accident insurance branch within the scope of social security, which could form the basis of an effective employer incentive system for the development of working conditions to reduce the occurrence of work-related accidents and occupational diseases. It must be noted that this is not the first proposal of this kind in Hungary over the last three decades,[31] however, these progressive reform ideas have not resulted in concrete legislative actions so far. Another alternative would be to render it compulsory for employers to take out liability insurance for the benefit of the employee (György 2018, 1–16). Whichever insurance model (either social security-based or mandatory private liability insurance-based) would be contemplated for potential endorsement in the future, a new accident insurance scheme should embody a complex, comprehensive tool for the prevention of accidents and occupational diseases, the improvement of working conditions (based on systematic and targeted risk evaluation), the financing of complex rehabilitation and reintegration measures, the improvement of safety-related education and the support to employers' prevention-conscious health and safety activities.

Furthermore, it is not only the two above-mentioned landmark areas of labour law (unlawful dismissals and employers' liability) that suffer from an enforcement crisis/deficit in Hungary. There are several so-called 'lex imperfecta' – that is, rules that exist but are not enforced or have no way of being enforced – in Hungarian labour law (and in the HLC). Hereby, only a few are identified as illustrative examples. For example, if the employer breaches the information and consultation rights of employees' representatives, the employer's action cannot be annulled, a court decision can only be limited to establishing the violation of consultation obligation. Therefore, it seems that the HLC does not specify effective sanction in this regard, in other words, these rules of consultation can be considered as a kind of "lex imperfecta" in Hungarian labour law.[32] Another example could be the so-called "equitable assessment" obligation of employers, which is one of the general principles or "common rules of conduct" of the HLC. Accordingly, employers shall consider the interests of employees under the principle of "equitable assessment" (Kun 2018, 23–51); where the mode of performance is defined by unilateral act, it shall be done so as not to cause unreasonable disadvantage to the employee affected (article 6 (3) HLC). This broad standard or "open norm" is very hard and unrealistic to be effectively, promptly and pragmatically enforced via litigation, especially in so-called "micro-cases" (for instance, when the employer is exercising its unilateral power to allocate working time, to order overtime, among others).

Based on the examples presented above, it is obvious that the enforcement of labour law suffers from structural deficits in Hungary and "universal" coverage is illusory.

29 Article 166 of the HLC:

"(1) The employer shall be liable to provide compensation for damages to the employee caused in connection with the employment relationship.

(2) The employer shall be relieved of liability if able to prove:

a) that the damage occurred in consequence of unforeseen circumstances beyond his control, and there had been no reasonable cause to take action for preventing or mitigating the damage; or

b) that the damage was caused solely by the unavoidable conduct of the aggrieved party."

30 See National Occupational Safety and Health Policy 2016–2022.

31 In addition, see the decision of the Parliament No. 20/2001 on the countrywide program of work safety. One of the most important goals of this program was to make the employers economically interested in work safety and this goal was thought to be achieved by establishing an independent branch of work accident insurance separating this scheme from other insurance branches and using differentiated contribution-rates proportionate to the risks of the given job and to the (potential) accident-record of the employer (experience rating). The 2084/2002 (III.25) Government Decision spelled out the details of short-term duties in order to establish the separate accident insurance.

32 Article 289 of the HLC:

(1) The employer, the works council or the trade union may bring an action within five days in the event of any violation of the provisions on information or consultation.

(2) The court shall hear such cases within fifteen days in non-contentious civil action. The decision of the court may be appealed within five days from the date of delivery of the decision. The court of the second instance shall deliver its decision within fifteen days.

2.5 Further subtopics of the Initiative as reflected in Hungarian labour law

One may have the impression that most components of the ILO's Centenary Initiative (as sketched in the introduction) seem to be rather underdeveloped in Hungary and in Hungarian labour law. For illustrative purposes, three such selected – especially advanced, forward-looking – aspects (that is, "recommendations" of the agenda) are reflected upon below: lifelong learning, the institutions of work and time sovereignty.

2.5.1 Lifelong learning

Apart from indicating the – fully voluntary – option for the employer and the employee to conclude a "study contract" (article 229 HLC)[33], the currently effective HLC does not really deal with the topic of training (and lifelong learning). This also means that employees shall be exempted from the requirement of availability and from work duty only for the duration of those trainings which are based on the agreement of the parties (article 55 (1) (g) HLC). Therefore, Hungarian labour law, among others, does not provide for study-related specific leave (or for any kind of sabbatical), and it also does not provide employees with a genuine individual right for further training. Furthermore, meaningful collective bargaining on this matter is also very scarce in Hungary. However, it should be noted that many authoritative, contemporary international documents perceive the right to training as a fundamental pillar of modern employment policies (see, among others, the European Pillar of Social Rights,[34] the ILO's Centenary Declaration for the Future of Work[35] and so forth).

Pertaining to the performance of employment contracts, the HLC defines the fundamental obligations of the parties. In this regard, "employers shall employ their employees in accordance with the rules and regulations pertaining to contracts of employment and employment regulations and – unless otherwise agreed by the parties – provide the necessary working conditions" (article 51 (1) HLC). Thus, as a main rule, employers need to provide the necessary working conditions, but the parties can deviate from this rule by individual agreement. It is notable that according to the official ministerial reasoning of the HLC, it can be deduced from the employer's managerial obligation that the employer is obliged to provide the employee with all the knowledge and, where appropriate, training that is relevant to and necessary for the performance of the work. Thus, only those trainings are included, which are relevant to and necessary for the performance of the work. Furthermore, this general obligation of the employer does not alter the right to employ another employee for a given job in the future. Judicial practice (EBH 2003, 968) reveals that in the case of ordinary dismissal of an employer justified by a "quality change" ("*minőségi csere*" in Hungarian), it is within the employer's discretion to determine the criteria on the basis of which the different (higher) quality of care of the relevant job will be provided. It must be kept in mind that is a default rule of the HLC that "employers shall be liable to compensate their employees for justified expenses incurred in connection with fulfilment of the employment relationship" (article 51 (2) HLC), which applies for employer-mandated trainings (as described above) as well.

It must be noted that the previous Labour Code (Act XXII of 1992, in force till the entry into force of the HLC in 2012) contained some more specific training-related rights. The Code prescribed, as a general rule, that employers shall allow sufficient "time off" for studies necessary for employees participating in studies within the school system. Furthermore, it also prescribed specific study-related leaves (four working days leave of absence for each exam, ten working days leave for the completion of diploma work).[36] Moreover, the previous Labour Code also regulated some specific training-related paid-leave schemes for the sake of training courses organized by trade unions.[37] Even though these rules were rather rigid and old-fashioned, they were still better than almost nothing (as the case with the current HLC).

33 In a study contract, the employer undertakes to provide support for the duration of the studies while the employee undertakes to complete the studies as agreed and to refrain from terminating his employment by way of notice following graduation for a period of time commensurate with the amount of support, not exceeding five years.

34 EPSR Principle 1: "Everyone has the right to quality and inclusive education, training and life-long learning in order to maintain and acquire skills that enable them to participate fully in society and manage successfully transitions in the labour market."

35 The ILO's Centenary Declaration for the Future of Work (2019) aims to promote the acquisition of skills, competencies and qualifications for all workers throughout their working lives as a joint responsibility of governments and social partners, as part of the concept of the "human-centred approach to the future of work" in order to address existing and anticipated skills gaps and to pay particular attention to ensuring that education and training systems are responsive to labour market needs, taking into account the evolution of work.

36 Article 115 of Act XXII of 1992.

37 Article 25 (4) of Act XXII of 1992.

All in all, a comprehensive and forward-looking reform of Hungarian labour law (and related employment policy) seems to be a reasonable and timely expectation in terms of training and lifelong learning (see Kun 2017) (including upskilling, reskilling), especially with a view to the growing importance of the individual right to training of employees (particularly in the context of Industry 4.0) and to the possible introduction of an Individual Learning Account, or "career account" (see De Vos 2018) scheme in Hungary.[38]

The idea of an Individual Learning Account (ILA) arises repeatedly in Hungary because it relates to education's reform (for instance, Szalai 2005 or Udvardi-Lakos n.d.). Theoretically, ILA could be a suitable way to manage training challenges of digitization and Industry 4.0. The creation of ILA would increase individuals' liability in adult training, especially because digitization and Industry 4.0 brings new needs for new competencies. In addition, ILA would give opportunity to others than individuals (that is, the state and private undertakings) to support the training development of workers (on the basis of the idea of cost-sharing) (see Rácz 2017, 56–76). But as experience shows, nothing concrete has happened in this regard, and only some professional proposals have been prepared to encourage research and steps to regulatory and development work to begin as soon as possible. The application of ILA assumes a shared liability among the state, individuals and undertakings. The tentative introduction of ILA – at the first sight – might be seen as a fairly simple procedural or organizational issue. However, this is clearly not the case: there would be a need to build a comprehensively new training system based on a new kind of perception, a new way of thinking unusual to the Hungarian mind-set. The Centre for Digital Pedagogy and Methodology (*Digitális Pedagógia Módszertani Központ*)[39] suggests in its Proposal[40] to examine the possibilities and conditions to construct a yet-to-be-introduced ILA system. It also emphasizes that beneficiaries/workers must be given a real choice in the system, *inter alia*, regarding trainings and training institutions.[41] In our view, the future tentative institutionalization of ILA[42] in Hungary would not be complete without associated labour law reforms (see above about the right to training, study leaves/working-time allowances and so forth).

2.5.2 The institutions of work

One can have the impression that the formal, public institutions of the world of work in Hungary are weak if not invisible even if the ILO's above-described Centenary Initiative calls for well-designed and operational institutions of work as they carry the mandate to help labour markets and economies perform better. As noted by the ILO, "the development of these institutional capabilities is necessary to give full effect to people's capabilities." Furthermore, "the delivery of the social contract depends on them" (ILO 2019, 38). One may – rather reasonably – claim that the institutional, formal structure of institutions is not the most crucial matter and related policies might still function well within various institutional settings. Certainly, institutions only are no guarantee for efficient policymaking. However, it is still symbolic and revealing how visible, accessible, transparent and strong are the institutions governing the world of work in a given country. In Hungary, a kind of institutional "vacuum" can be identified in this regard, as illustrated by the examples below.

First, for more than a decade, there has been no self-standing, separate ministry of labour (or employment, social policy and so forth) in Hungary. Governmental responsibilities related to employment, labour law and so on have been (and still are) integrated into various ministries responsible for Hungary's economic portfolio. Due to the organizational changes within the governmental structure, employment policy and labour law have belonged to various ministries over the last decade (including the Ministry for National Economy, Ministry of Finance, Ministry for Innovation and Technology). As of May 2022, the newly established Ministry of Technology and Industry is responsible for employment policy. This organizational setting clearly demonstrates that economic (and competitiveness-oriented) factors dominate over social ones when dealing with labour law policy in Hungary. In general, labour law is currently perceived in Hungary not primarily as "social law" but rather as one instrument of economic and employment policy.

Second, regarding national-level, cross-sectoral tripartite social dialogue, in 2011, during the preliminary drafting of the new Labour Code, the National Interest Reconciliation Council (*Országos Érdekegyeztető Tanács*, OÉT), the former, standing, cross-sectoral

38 For a similar reasoning, see the conclusions of a research project carried out by the Trade Union of Commercial Employees (KASZ): Kereskedelmi Alkalmazottak Szakszervezete, *Munkajogi kihívások az ipari forradalomban — Esettanulmány a kiskereskedelmi ágazatban*, 2021.

39 Digitális Pedagógia Módszertani Központ

40 Digitális Pedagógia Módszertani Központ, *A magyar digitális munkaerőpiac helyzetelemzésének, valamint a digitális és hagyományos munkaerőpiac nyomon követésére és előrejelzésére szolgáló rendszer koncepciójának kidolgozása*, 2018.

41 Digitális Pedagógia Módszertani Központ, *A magyar digitális munkaerőpiac helyzetelemzésének, valamint a digitális és hagyományos munkaerőpiac nyomon követésére és előrejelzésére szolgáló rendszer koncepciójának kidolgozása*, 2018, p. 8.

42 For the recent EU-level developments in this regard, see European Commission, *Proposal for a Council Recommendation on individual learning accounts*, COM/2021/773 final, 202.

tripartite body was disbanded. Instead of OÉT, a new, larger (multi-partite) and merely consultative body, the National Economic and Social Council (NGTT) was created.[43] Owing to pressure from certain social partners and international fora, the Government had started to acknowledge that the re-establishment of some form of genuine tripartite social dialogue in the private sector is unavoidable. As of February 2012, the newly set up Standing Consultative Forum of Industry and Government (*Versenyszféra és a Kormány Állandó Konzultációs Fóruma,* VKF) is intended to fulfil, to some extent, the previous functions of OÉT, but it is rather doubtful how meaningful is the real impact of the VKF. VKF is independent from the NGTT. It is only an "informal" forum without an institutionalized legislative background, without transparent criteria for representativeness, operation, and fixed rights of real participation.

Third, as for labour inspection, on 31 December 2011, the former, self-standing National Labour Inspectorate (OMMF) was integrated into the organization of the National Labour Office (NMH). Soon after, Government Decree No. 320/2014 (XII.13) on the designation of Public Employment Services and labour authorities and on the exercise of their official authority and the performance of their other duties designated the Minister responsible for employment policy and the metropolitan and county government offices as the "labour authority". Accordingly, labour inspectorates are integrated into the general system of government offices. On 1 March 2021, Act 135 of 2020 on Services, Assistance and Inspection of Employment entered into force. The new act aims at widening the authority of the labour inspectorate in terms of labour law enforcement and the fight against undeclared work. Under this Act, the labour inspectorate has been renamed as the "employment supervisory authority". This new Act repeals Act 75 of 1996 on Labour Inspection. It mainly repeats the provisions of the previous Act but at the same time introduces flexibility tools by focusing on framework rules, to be supplemented by government decrees. Organizationally speaking, the "employment supervisory authority" is still not an autonomous organ, but the civil servants of the relevant department of the government offices will continue to act as the new "employment supervisory authority". Thus, the labour inspectorate is neither an autonomous, strong nor visible state organ in Hungary, but part of the general governmental administration.

Fourth, the former, specialised administrative and labour courts ("KMB" in Hungarian) ceased to exist in Hungary as of 31 March 2020. Since then, there are no specialised "labour courts" in an organizational sense in Hungary. First instance labour disputes are heard by the general courts located in each county seat (19) and in the capital. It varies from county to county whether separate labour law departments deal with labour cases within the general courts or if these cases are arranged by other departments acting in miscellaneous fields of law. Appeals against first instance decisions can be lodged with regional appellate courts (5), which have separate labour law departments. A petition for judicial review against the final decision of a regional appellate court can be submitted to the Kúria of Hungary, which is the single supreme judicial forum in the country. The Kúria currently has one specialised panel for labour cases (Halmos 2021, 149). In sum, the tradition and professionalism of a robust, specialised labour court has been ended. The lack of a specialist court dealing with labour law issues can limit the specialization of judges and, furthermore, can lower the quality of the procedure (Muszyński 2020, 17).

Fifth, as regards the amicable resolution of collective labour disputes of interests, the state and social partners once established the Labour Mediation and Arbitration Service (*Munkaügyi Közvetítői és Döntőbírói Szolgálat* – MKDSZ) in 1996, but it has been out of operation since 2015. A renewed independent service, the Labour Advisory and Dispute Settlement Service (*Munkaügyi Tanácsadó és Vitarendező Szolgálat* – MTVSZ[44]), was created in 2016 (in the framework of a so-called "GINOP" EU-funded project) to promote an effective and quick resolution of industrial disputes of interests. The MTVSZ was available for trade unions, works councils and employers (without restrictions for private sector, public sector, small and medium-sized employers) and offered wide-ranging – rather popular – services (including consultancy, conciliation, negotiation, mediation and arbitration) with a strong labour law expertise. The MTVSZ was operated by a consortium of social partners[45] in the framework of a nationwide network of leading labour law academics and experts. However, the operation of the MTVSZ stopped as of January 2022, because the underlying EU-project expired. At the time of writing in June 2022, the future of MTVSZ – and the whole culture of amicable resolution of collective labour disputes in Hungary – is unpredictable (see Kun 2022, 61–67).

Sixth, on 1 December 2020 the Hungarian Parliament decided that as of 1 January 2021, one of the most effective bodies in the fight against discrimination, the formerly autonomous Equal Treatment Authority (ETA) will be abolished. As of 1 January 2021, the responsibilities of the ETA have been taken over by the Commissioner for Fundamental Rights.[46] In cases concerning equal treatment and the promotion of equal

43 Act 93 of 2011 on the National Economic and Social Council.

44 The legal background of the MTVSZ is the Government Decree 320/2014 (XII.13).

45 Munkaügyi Tanácsadó és Vitarendező Szolgálat.

46 Office of the Commissioner for Fundamental Rights of Hungary.

opportunities, the "Ombudsman" proceeds now within the framework of administrative authority procedures, in accordance with the relevant procedural rules. The reform was explained by the fact that the prohibition of discrimination and the right to equal treatment are derived from the Constitution, and fundamental rights are mainly protected by the "Ombudsman", thus it is appropriate to direct all related functions to the Commissioner for Fundamental Rights. According to the legislature, the integration of the Ombudsman and ETA may possibly create a legal institution that could ensure more effective enforcement of equal treatment.

However, there were no public consultations or impact assessment carried out about the reform, and one might also argue that the professionalism, visibility, power and so forth of the former structure might be curtailed because of the integration.[47]

In sum, the above-mentioned examples show that the main public institutions governing the world of work in Hungary hold certain serious institutional deficits and they are not as "visible" and "strong" as might be expected (especially in the desired run-up to the ILO's above-described Centenary Initiative).

2.5.3 Time sovereignty

Within the context of working time regulation, the idea of "time sovereignty" seems to be gaining more ground, partly driven by Industry 4.0-related developments (for instance, because the growing need for more creative jobs to protect workers from being replaced by new technologies and automation). The concept of "time sovereignty", for instance, is reflected in the key recommendations outlined in the report of the ILO's Global Commission on the Future of Work published in January 2019. The report's "human-centred approach", among others, stresses that workers need greater autonomy over their working time, while meeting enterprise needs (ILO 2019).

Generally, the attitude of Hungarian labour law seems to be rather misdirected and immature in this regard. For example, in December 2018, the Hungarian Parliament adopted the modification of certain rules on scheduling working time specified by the HLC. The rules entered into force on 1 January 2019. The modifications have been branded – rather unduly – as a "slave law" by critics and are still much debated. Among others, in brief, the amendment raises the yearly maximum of overtime to 400 hours from 250. More precisely, employers can demand overtime of up to 250 hours in a calendar year. If a collective bargaining agreement is in force at the employer, then the parties can agree in the collective agreement that a maximum 300 hours of overtime can be ordered in a calendar year. According to the amendment, if the employee and the employer agree in writing, an additional 150 hours of overtime can be ordered by the employer beyond the 250 hours cap. If a collective bargaining agreement is in force at the employer, then the employee and the employer can agree in writing that a maximum extra 100 hours of overtime can be ordered in addition to the 300 hours cap. The HLC calls this "voluntarily undertaken overtime".[48] This legal institution seems to be an apparent misuse of the above-described concept of "time sovereignty", and it is far from genuinely expanding employees' choice to create a balance between work and private life. It does not require in-depth explanation that within the context of an employment relationship the employee's freely given consent is rather illusory due to the imbalance of power (Tarján and Laribi 2019). In practice, employees might be compelled to sign such agreements. Although employees are entitled to terminate such agreements on increased overtime by the end of a calendar year and the HLC also stipulates that the termination of such agreement by the employee cannot result in the termination of employment by the employer, these guarantees seem to be shallow.

In sum, instead of the above described – rather flawed – concept of "voluntarily undertaken overtime", genuine and innovative measures would be needed in Hungarian labour law as well, in order to meaningfully support the concept of "time sovereignty", among others with respect to Industry 4.0 developments. For instance, some experts argue for the potential, justified introduction of the legal institution of some kind of a "partially flexible work pattern" between the traditional dual categorization of the HLC (that is, fixed and flexible work schedules) (György 2018, 1–16).

47 For some NGOs' opposing opinion on this matter, see Magyar Helsinki Bizottság.

48 See article 109(2) and 135(3) of the HLC.

2.6 Conclusion

The main goal of this chapter has been to apply the ILO's Centenary Initiative and the idea of the Universal Labour Guarantee as a benchmark to examine the main features of Hungarian labour law from a "bird's-eye view". The goal of the chapter was not to offer a comprehensive assessment but rather to explore the potentials and pitfalls of Hungarian labour law in the spirit of the ILO's Centenary Initiative. In doing so, the chapter pointed out that the main structural pillars of labour law – first, the coverage of individual labour law (section 2); second, the impact of collective labour law (section 3) and third, compliance with labour laws (section 4) – are far from being "universal" in Hungary, and the protection offered by Hungarian labour law is rather "patchy" and weak. Furthermore, some innovative elements of the ILO's Centenary Initiative (such as lifelong learning, the institutions of work, time sovereignty, as described in section 5) are rather immature in Hungary. Thus, the current state of play of Hungarian labour law is distant in its philosophy from the ILO's Centenary Initiative and the idea of the ULG.

Given the segmented and competitiveness-oriented nature of Hungarian labour law policy today, room for improvement is paramount. One can only hope that a much desired, more universal, and human-centred paradigm-change of Hungarian labour law policy could be promoted and driven by the ILO's Centenary Initiative as well. To contest the potentially increasing "irrelevance of labour law" in terms of regulating labour markets and employment conditions in Hungary, this paradigm-shift is absolutely vital. The next step for Hungarian labour law should take in line with the spirit of the ILO's Centenary Initiative is to interiorise the universal and human-centred approach promoted by the Future of Work agenda.

3. Applicability of universal labour standards to persons engaged in flexible forms of work in Montenegro, *Vesna Simovic*

3.1 Basic terms

3.1.1 Employment relationship: Basic definition

Montenegrin labour law[49] does not provide a definition of the employment contract, but it does provide a definition of an employment relationship. Under article 4 of Montenegro's Labour Law, the "employment relationship is a relationship based on employment between an employee and an employer *that is established by a contract of employment*, in accordance with the law and collective agreement." The Law contains a rather poor definition of the employment relationship, from which only its legal construct (employment contract) and parties (employee and employer) can be derived. However, other provisions of the Law indicate the elements that are essential for the recognition of the existence of an employment relationship, such as consensuality, paid work (remuneration) and involvement (integration) in the organization and subordination (see Simović-Zvicer 2020, 48).

Consensuality, as an essential element of the employment relationship, is not explicitly stated in the Labour Law but is inferred from the contractual nature of employment. Specifically, it stems from the Law on Obligations,[50] which applies to the employment relationship insofar as nullifying the contract and disputes are concerned.[51] This also means that any lack of will on the part of any of the contracting parties will result in the cancellation of the employment contract.[52]

The employment relationship has the character of an *inter partes* relation. The employee is a person who performs work for another, that is, for the employer in exchange for remuneration. This definition emphasizes the *subjects* of employment (that is, the employer and employee) and the employment contract as an *instrument* for establishing an employment relationship. Although it is not contained explicitly in this definition, consensuality is assumed as an important element of the notion of the employment relationship. It is assumed on the basis of the very fact that the employment relationship is a *contractual* relationship, which, like all other contractual relationships, is based on the consent of the contracting parties. It follows that an employment relationship implies a *personal relationship* between the employee and the employer, which distinguishes it from other forms of work where the personal characteristics of the one who performs the work are not crucial for establishing a contractual relationship (for example, a temporary service contract).

In addition to the above, important elements to determine the existence of an employment relationship

49 See Montenegrin Labour Law, *Official Gazette of Montenegro*, No. 74/2019, 08/2021, 59/2021, 68/2021 and 145/2021.

50 *Official Gazette of Montenegro*, No. 47/2008 of 07 August 2008.

51 Thus, under article 19 of the Law on Obligations, the contract shall be deemed concluded when the parties have agreed on the essential elements of the contract.

52 In terms of the Law on Obligations, lack of will, such as: coercion and threat, misconceptions about the essential elements of the contract and fraud are the reasons for termination of the contract. See articles 53–59 of the Law on Obligations.

are inclusion in the organization, paid work and subordination. The provisions of the Labour Law and General Collective Agreement governing the liabilities of an employee indicate the existence of subordination between the subjects of an employment relationship. This implies, among others, respect for the organization of work and operations of the employer, as well as the terms and conditions of the employer in relation to the fulfilment of contractual and other obligations of the employment relationship. The degree of subordination in the relationship between the employer and the employee depends on the nature of the activities of the employer, or the description of the duties and tasks undertaken by the employee. Thus, as a general rule, subordination is less pronounced in an employment relationship where employees perform specialized professional activities (such as doctors, professors, artists and so on). However, the provisions relating to disciplinary liability indicate the existence of subordination in employment. Thus, under article 144, paragraph 2, the Labour Law provides that an employee who does not meet his/her working duties or fails to comply with a decision made by the employer shall be responsible for any violation of a duty in accordance with the law, collective agreement or employment contract. The working hours and duration of employment, according to Montenegrin legislation, constitute relatively unimportant elements of the terms of employment, even though the employment contract specifies the duration of employment and working hours of the employee. On the other hand, the duration of working hours is essential for the exercise of rights arising from employment, given that they are exercised in proportion to the time spent at work. However, article 62 of the Law provides a lower limit of the duration of working hours: an employment contract cannot be concluded for working hours that are less than one quarter of full-time hours or 10 hours per week. Part-time work should be distinguished, however, from reduced working hours. The latter may be applied due to challenging working conditions (such as work that is arduous and detrimental to health). In such cases, working hours are reduced in proportion to the harmful effects on human health or the working ability of the employee, but not less than 36 hours per week.[53]

3.1.2 Employee: Basic definition

The category of "worker" does not exist in Montenegro. The term "employee" is used instead for those persons to whom Labour Law applies, while the terms "civil servant" and "state employee" are used for those persons to whom the Law on Civil Servants and State Employees (LCSSE) applies.[54]

According to the Labour Law, an employee is a natural person who has established an employment relationship with an employer. It follows that the employment relationship has the character of an *inter partes* relationship and that the employee is a person who performs work for another, that is, for the employer. From other provisions of the Labour Law, it can be concluded that a person that has signed an employment contract and started working for an employer – that is, he/she joined the organized work process – is an employee. In addition, later provisions of the Labour Law affirm that the term "employee" implies a person who performs work under the supervision of the employer and who has been paid accordingly. The Labour Law also contains the definition of a mobile employee who fulfil any of two criteria: (1) being a member of staff that travel or fly in the course of performing their duties; (2) working for an employer that provides the transport of goods or other services (air, road, rail or inland maritime transport). Specific employment and legal status are also characteristic of seafarers who travel internationally and who conclude an employment contract with the shipowner, ship operator or company. Their rights and obligations are regulated by international conventions in addition to the Law on Safety of Maritime Navigation (LSMN).[55]

Employees serving the church also form a distinct category. In principle, Montenegrin employment law is fully applicable to them; however, churches can fix specific loyalty duties due to their right to self-determination, which is guaranteed under the Constitution in article 14.56

A specific legal status for athletes is also detailed in the Law. They conclude an employment contract with a sports organization, and the type of contract depends on whether they are hired as professional athletes or amateurs. Professional athletes conclude an employment contract with a sports organization

53 Jobs with reduced working hours shall be determined by the systematization act in accordance with a collective agreement, and employees who are assigned to them shall have the same rights based on employment as an employee with full-time engagement. In addition, the Law envisages the restriction that they cannot work overtime, or may conclude an employment contract for such jobs with another employer. See article 63 of the Labour Law.

54 In terms of article 2 of the LCSSE (*Official Gazette of Montenegro*, No. 02/2018 and 34/2019), a civil servant is a person who has been employed in the state body to perform the duties for determination of the jurisdiction of that authority by the Constitution, law and other regulations, as well as a person in a state body who performs information, material and financial, accounting and other administrative tasks. A state employee is a person who has been employed in the state body to perform administrative, technical and auxiliary tasks.

55 See Law on Safety of Maritime Navigation of 27 December 2013 (*Official Gazette of Montenegro*, No. 62/2013 of 31 December 2013).

56 Religious communities are separated from the State. Religious communities are equal and free to perform religious rites and religious affairs.

and exercise all rights deriving from employment, while in the case of amateurs, a scholarship agreement or contract of sports activities without an employment contract is made (Simović-Zvicer 2020, 125).

3.1.3 Employer: Basic definition

The Labour Law in article 5 (1) clearly defines an employer as a national or foreign legal person, a part of a foreign legal person, or a physical person concluding a contract of employment with an employee. It should be noted that it is of no importance whether the employee performs tasks within the employer's business premises. However, it is important that the employee is subordinate to the employer in terms of compliance with obligations under the employment contract, as well as those arising from the Labour Law and other legal documents. A good example of this constitutes temporary work agencies. The temporary assignment of employees implies the existence of the following subjects:

- An agency for temporary assignment, which appears as an employer;
- Employees; and
- Another employer – the beneficiary, to whom employees shall be assigned – which is typical of employers who perform cyclical activities and who will assign employees only for a specific job.

The assignment of employees is based on two documents: an agreement governing the relationship between the agency and the employer – beneficiary[57] – and the employment contract that the employee signs with the temporary work agency. In this arrangement, the assigned employee is employed by the agency with which he/she concludes an employment contract, for a fixed or indefinite period. However, although the agency is treated as an employer in relation to its employees who shall be assigned (temporary agency workers), in order to effectively protect their rights, the Law provides certain exceptions. Specifically, it is envisaged that the salary of an assigned employee cannot be lower than the salary earned by employees of the beneficiary, for the same or similar jobs requiring the same qualifications or level of education. It is worth noting that the earnings of assigned employees shall be paid by the agency, which has that obligation even when the beneficiary does not submit a calculation of the contracted salary to the agency or fails to settle obligations to the agency. Also, during the time that he/she is not assigned to the beneficiary, an employee is entitled to remuneration in accordance with article 55 (5) of the Law and employment contract.

3.2 Characteristics and types of employment contracts

The classification of employment contracts in the Labour Law is made according to four key criteria: validity period (indefinite and fixed-term); duration of working hours (full-time, part-time and shortened); the place of performance of work (outside the employer's premises, work from home, domestic household work or special conditions); and the purpose for which it was concluded (for example, probationary or trainee employment contracts).

The employment contract, as a general rule, is concluded for an **indefinite period**. Pursuant to article 36 of the Labour Law, an employment contract for an indefinite period binds the contracting parties until one of them terminates the contract or it ceases to be valid in any other way stipulated by law.

One of the essential elements of an employment contract is the period for which the contract is concluded (definite or indefinite) specified in article 31, paragraph 1, item 7. In order to prevent possible misuse, it is envisaged that if the employment contract does not specify the duration of employment, it shall be assumed that it is concluded for an indefinite period.

A **fixed-term employment contract** is a non-standard (or flexible) form of employment. This is also confirmed in article 37 (1) of the Labour Law, in which a fixed-term employment contract is defined as an *exception* to the rules on employment for an indefinite period. For this reason, the employment contract may be defined for a certain period in order to meet temporary, specific needs of an employer like project plans, deadlines or events. Concluding a fixed-term employment contract is limited in such a way by article 37 that an employer cannot conclude one or more fixed-term employment contracts with the same employee if the duration of the fixed-term employment contract is continuous or intermittent for more than 36 months, which shall also

57 This agreement contains the following elements: the number of employees who are assigned to the beneficiary; period in which the employee is assigned; place of work; jobs that will be performed by an employee; applicability of safety at work measures in workplaces where employee perform tasks; the manner and time in which the beneficiary is required to provide the Agency with the calculation for the payment of earnings, as well as regulations that will be applied by the beneficiary to determine the earnings; responsibility of the Agency if an employee, who is assigned to work, does not meet the obligations.

include the period during which the employee was referred to the employer through the temporary work agency (TAW). In doing so, the law does not limit the number of successive contracts that can be concluded within a period of 36 months. In order to deter any misuse, it is stated in article 37, paragraph 3 that if the gap is less than 70 (calendar) days, then the employee will be deemed as employed continuously by the employer. Another rule arises from the interpretation of these provisions: if, after the expiration of the 36-month time limit, the employee's employment is terminated, the next employment contract to be concluded at any time in the future (even after a year, two or more) must be concluded for an *indefinite period* of time. This rule applies unless the employment contract is concluded for any of the reasons stated in paragraph 6 covering the replacement of absent employee, seasonal jobs and project work and paragraph 7 covering contracts for directors, athletes and temporary work) of article 37.

Notably, internships are excluded from the above-mentioned maximum period of 36 months, as are contract extensions due to pregnancy, maternity or parental leave, or adoptive and foster leave. In these cases, there is no transformation of the employment relationship, because the employment contract has been extended "by force of law" and not "by the will of the employer".

An exception to the restriction regarding the maximum duration of a fixed-term employment contract is also provided in case it is necessary due to the following circumstances:

– *Replacement of an absent employee*:[58] (for example, an employee on maternity leave, parental leave[59] or suspension,[60] among others). This particular exception is a question of replacing a specific employee, which must be specified in the employment contract. This means that an employment contract could not be concluded stating, in generic terms, that an employment relationship is being established to replace any employees who are (or will be) absent from work.[61] There is no obstacle for an employee to conclude a new employment contract, after the expiration of a contract concluded due to the replacement of one employee, for replacement of another employee (respecting the obligations to state accurately the name of the replaced employee and type of work to be performed).

– *Seasonal work:* This is another exception in terms of the duration of fixed-term employment contracts. From the definition of seasonal work, which is contained in article 37, paragraph 9 of the Labour Law, it follows that seasonal work has two significant characteristics, namely: (1) jobs performed in seasonal activities, in which the performance of work is related to one period during the year, and (2) jobs for which the duration during the year does not exceed eight months. The Labour Law lists some of these activities, such as: agriculture, tourism and forestry, but leaves open the possibility of applying this definition to other activities, wherein jobs are performed in one period during the year, lasting up to eight months.

– Project *work:* This is also envisaged as an exception in terms of concluding fixed-term employment contracts. The Labour Law stipulates that the employment contract in the case of project work can last until the end of the project. The justification for this exception lies in the fact that it covers employees who are engaged in projects that are limited in time, usually with a predetermined budget, whether in construction, scientific research, theatre, television or so on. However, this contract is most prevalent in the NGO sector where operations and funding are predominantly project-based.

In addition, it is envisaged that the 36-month limit on the duration of an employment contract does not apply to the following types of contracts:

– *Director's employment contract*: This exception applies if the contract is concluded for a fixed-term. Because the period for which the director is elected is generally specified in the internal legislation of the employer, and given that this is a managerial contract, this exception is justified.

– *Contracts concluded by temporary work agencies*: agencies have two categories of employees (Simović-Zvicer 2020, 125), namely: (1) employees who perform administrative and other tasks in the agency itself, which the agency does not assign to a beneficiary employer. They are subject to all restrictions regarding the maximum duration of a fixed-term employment contract. (2) Employees who have concluded an employment contract with the agency for the purpose of a temporary assignment. They are not subject to restrictions regarding the duration of the employment contract due to the fact that this meets the interests of both the agency and the employees themselves. Namely, after the expiration of 24 months (the

58 It should be noted here that, in the case of a legal strike, the employer could not conclude fixed-term employment contracts to replace striking employees because such a solution would be contrary to the constitutionally guaranteed right to strike, as well as solutions contained in the Law on Industrial Action.

59 It should be noted here that, for example, the employment relationship does not have to end with the expiration of parental leave, if thereafter the employee uses the right to annual leave in accordance with article 85, paragraph 5 of the Labour Law, but only after his/her return to work.

60 For cases in which the rights and obligations of an employee derived from employment can be suspended, see article 91 of the Labour Law.

61 For example, it is not possible to conclude an employment contract in which it would be stated that an employment relationship is established for the purpose of replacing employees who are absent from work, but it must be stated exactly which employees are replaced and for what jobs.

maximum period that an employee can be engaged through an agency with the beneficiary employer, in accordance with article 54, paragraph 4, item 3 of the Labour Law), and if the employer does not want to conclude an employment contract with him/her, a temporary employee has the possibility to be engaged through the same agency with another employer. Otherwise, he/she would be forced to look for another agency that could only hire him/her with another beneficiary employer.

– *Employment contracts with athletes*: The employment of natural persons in sports is regulated by article 68 of the Law on Sports. Namely, the sports organization is obliged to conclude an employment contract or some other contract with a natural person in sports which regulates mutual rights and obligations, and which is concluded for a definite period, up to a maximum of three years. After the expiration of the period of three years, the athlete may re-conclude the contract that regulates mutual rights and obligations with the same or another sports organization.

In accordance with article 47, paragraph 1, item 4 of the Labour Law, the transformation of the employment contract from a definite to indefinite period can be done by attaching an annex to the employment contract. However, in order for this transformation to take place, a fixed-term employment relationship must be based on an official procedure prescribed by the Law. For instance, if a public announcement has not been conducted in cases when the employer is obliged to announce a vacancy,[62] such employment will be considered illegal or invalid. The case law treats this situation as actual work, and therefore if a person worked on the basis of a fixed-term employment contract concluded without a prior public announcement (in the case of jobs requiring a mandatory public announcement), then the conditions for the transformation of such a contract into an indefinite period will not have been met.[63]

Depending on the duration of working hours, the employment contract can be full-time or part-time. A **part-time employment contract** may be concluded for an indefinite or definite period. By its nature, a part-time employment contract is concluded based on the needs of the work process and arises from the managerial powers of the employer, which through flexible organization of working hours, can reduce labour costs and increase competitiveness. A part-time employment contract can also be beneficial to the employee, as it allows a better balance between his/her private and business obligations. In order to prevent abuse by the employer, the employment contract must define whether it is full-time or part-time. If it is a part-time contract, the contract must specify the number of hours per week for which the employee is hired. However, article 62 of the Labour Law provides the minimum number of hours per week that qualify as part-time employment, that is, one quarter of full-time work hours (10 hours).

Paragraphs 2 and 3 of article 62 contain provisions that aim to ensure equal treatment of part-time employees in relation to employees with so-called 'standard' working hours. In that sense, prohibition of discrimination in terms of the exercise of rights is envisaged, that is, part-time employees share the same employment rights (individual and collective) as well as rights based on work (pension and disability insurance, health and unemployment insurance) as full-time employees. Paragraph 2 of this article defines a comparable employee as an employee who performs the same work or work of the same value as a part-time employee. If such an employee is not with the employer, then, in accordance with paragraph 5 of this article, the employer is obliged to provide the rights from work on the basis of the work of an employee who is in a part-time employment relationship, in accordance with the Law and the collective agreement that apply to the employer, or in accordance with practice. It is important to note here that, for the first time in the Law, the term "practice" is used as a reference term, but this term does not mean case law (which is not a direct source of law in the Montenegrin legal system). In this case "practice" refers to the rights which comparable employees usually have in a certain type of activity, if there are no comparable employees with that employer.[64]

It is important to emphasize that here the equal treatment of employees who are in part-time employment means equality in terms of exercising the type but not the scope of employment rights. When it comes to the scope of rights, then the principle of *pro rata temporis* (in proportion to the time spent at work) is applied in relation to the exercise of certain individual rights stemming from the employment relationship (due to the very nature of those rights). However, the application of the principle of proportionality in relation to the scope of rights for part-time employees is not absolute, as this principle applies only in relation to the exercise of the right to earnings and compensation,

62 In accordance with article 24, paragraphs 3 and 4 of the Labour Law, the obligation of public advertising is provided in a company, public institution and other public service whose founder or majority owner is the state or local self-government unit.

63 Decision of the Supreme Court of Montenegro, Rev. No. 240/2015 of 6 May 2015.

64 According to article 3, paragraph 2 of Council Directive 97/81/EC on the Framework Agreement on part-time work, the term "comparable full-time employee" means a full-time employee in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills. Where there is no comparable full-time employee in the same establishment, the comparison shall be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.

as well as the exercise of the right to leave and some labour rights, such as the right to a pension.[65] In this sense, the right to earnings is exercised in proportion to the time spent at work. Proportionality in the exercise of rights is also expressed in the exercise of the right to rest during work. Namely, full-time employees have the right to rest for 30 minutes during the workday, while part-time employees, or those who work longer than four and shorter than six hours during the day, have the right to rest for 15 minutes during the workday. It follows from such a legal provision that some categories of part-time employees do not have the right to rest during the work day, such as those employees who have an employment contract with working hours shorter than 20 hours during the week, if those hours are spread over five working days.[66] However, paragraph 2 of article 73 leaves open the possibility for a special law or collective agreement to provide for solutions that are more favourable, that is, the exercise of these rights in full. The intention of the legislator in this case is to leave open the possibility for some divisible rights stemming from the employment relationship to be exercised in full, regardless of the duration of the employee's working hours. However, employment rights that are indivisible by nature (such as safety and health at work, suspension of rights and obligations, absence from work, collective employment rights) are exercised by part-time employees in full.

The Labour Law stipulates the obligation of the employer to consider the offer of the employee for concluding an annex to the employment contract from part-time to full-time, and vice versa, should the opportunity arise for such type of work.[67] In this particular case the employer has an obligation to consider the employee's request but does not have to accept it. However, the Law does not say whether the employer has an obligation to inform the employee about the outcome of the submitted request, but it follows from this wording that the employer should inform the employee whether his/her offer has been accepted. In addition, article 41, paragraph 6 of the Labour Law supports the principle of equal access to part-time work at all levels (including managerial positions), establishing an obligation for the employer who employs part-time workers to provide appropriate measures to facilitate access to this type of work. The Labour Law does not specify these measures and leaves the choice to the employer to arrange any measures to make part-time work available to all employees. Furthermore, paragraph 6 of article 41 stipulates the obligation of the employer to take measures that facilitate access to vocational training to part-time employees in order to increase their opportunities for career development and professional mobility. Unlike the first part of paragraph 6, which refers to the obligation to take measures to facilitate access to part-time work at all levels, leaving no room for exemptions, the second part of this provision states that the obligation to take measures to facilitate access to vocational training by part-time workers is only applicable "where appropriate". In practice, when the employer organizes professional training of employees, this program should include both full-time and part-time employees.

An **employment contract for performing work outside the employer's premises** differs from a traditional employment relationship that implies physical presence of the employee in the employer's business premises as a condition for his/her inclusion in the work process. Modern business conditions are such that the need for inclusion of the employee in the work process can occur in a more flexible way outside the premises of the employer. Thus, the specificity of this type of employment contract is reflected in the employee's place of work, which in this case can be any place outside the employer's business premises and which is available to employees, if the nature of work allows. Within the framework of this contract, jobs that belong to the main activity of the employer, as well as jobs that are directly related to that activity, can be performed.

Two modalities are envisaged here: teleworking and working from home. The difference between these two types of work is reflected in the fact that working from home means that the employee performs work tasks from the space in which he/she lives (regardless of whether he/she is the owner or tenant), while in teleworking the employee can be involved in the work process from any other space. This type of contract usually implies the execution of work tasks with the use of information technology,[68] but it can also be work that implies that the employee is constantly on the move, on the road or similar.

When performing work outside the employer's premises, employees have a greater degree of

65 Thus, the LPDI (*Official Gazette of the Republic of Montenegro*), Nos. 54/2003, 39/2004, 61/2004, 79/2004, 81/2004, 29/2005, 14/2007 and 47/2007 and *Official Gazette of Montenegro*, Nos. 12/2007, 13/2007, 79/2008, 14/2010, 78/2010, 34/2011, 40/2011, 66/2012, 39/2011 and 36/2013) in article 62, paragraph 2 stipulates that the length of insurance is calculated in proportion to the realized working time for an employee who works part-time.

66 On the other hand, the principle of proportionality is not provided for in the exercise of the right to annual leave when it comes to exercising this right for part-time employees (but the duration of annual leave is determined only on the basis of the employment relationship), which will be discussed more within the Comments on article 79 of the Labour Law.

67 This obligation is also provided for in article 5, paragraph 3, item (a) of Council Directive 97/81/EC on the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

68 This is confirmed by the European Union Framework Agreement on Telework, which in item 2, paragraph 1 defines the teleworking agreement as "a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis".

autonomy in performing work tasks, exercising the right to vacation and the like, because they are not under constant (physical) supervision by the employer or an authorized person. However, employees who perform this type of work should not be equated with the self-employed or persons engaged in so-called "free professions" (such as artists). This is because one of the important characteristics of every employment contract, including contracts for performing work outside the employer's premises, is legal subordination, that is, the obligation of the employee to continuously execute the employer's orders since he/she performs these tasks in the name of and on behalf of the employer.

Keeping in mind the specifics of the contract for performing work outside the premises of the employer, article 42 of the Labour Law stipulates that, in addition to the mandatory elements included in each employment contract, this contract must specify information relating to:

1) the type of work (the employer's activity or directly related to it) and the manner of work organization (the work method: for example, how employees will receive and execute orders);

2) working conditions and manner of work supervision. It is important to note that employees who perform work on the basis of this contract are fully equated, in terms of employment rights, with employees who perform work within the employer's business premises;

3) use of own means for work and reimbursement of costs for their use – specific to this type of contract. For example, the employee can use his/her computer, car, telephone and so on to perform work tasks, which in this case must be specified in the contract. In this regard, the reimbursement of costs for the use of own means for work includes costs for installation, maintenance, insurance, replacement of parts and the like;

4) reimbursement of other costs related to the performance of work activities and the manner of their determination. These can be the costs of electricity, internet use, and so on;

5) other rights and obligations of employees, which may arise from the specifics of performing a particular job.

An employment contract for performing work outside the employer's premises may be concluded only for performing jobs that are not harmful to the employee's health and safety and if such jobs do not endanger the environment. The Law stipulates the obligation of the employer to keep records of employment contracts for work from home. In addition, the employer has the obligation to notify the Labour Inspectorate of these contracts; it has the power to prohibit the work if it finds there to be an imminent danger to the safety and health of employees, and if such work endangers the environment.

Domestic work (such as the work of domestic and support staff) in terms of the Labour Law can be performed on the basis of a special employment contract. This contract has several specificities, and they relate to the following:

- Subjects of the employment relationship: in this contract, there are employees and a natural person who appears in the role of employer. For that reason, a natural person who is not engaged in economic activity is obliged to submit the necessary documentation to the competent tax administration in order to register the employed person. This is due to the fact that the LCCSI[69] in article 4, paragraph 1, item 9 stipulates that an employer is also a natural person who does not perform economic activity if he/she concludes an employment contract with another natural person to perform certain tasks.[70]
- The place of work: the employee performs the jobs and tasks arising from this contract in the household (house or apartment) of his or her employer.
- The type of work: the Labour Law does not define which jobs can be performed on the basis of this employment contract but based on practice these jobs are primarily: (1) related to food preparation and hygiene (cleaning, ironing, yard maintenance and so on) and (2) babysitting children and caring for the elderly, people with disabilities or other household members who need care and assistance.
- In-kind payment: Article 45 of the Labour Law defines some restrictions regarding in-kind payments:

1) The portion of the salary paid in kind must be fair and reasonable, and it should be contracted on the initiative of the employee and in his/her favour, in order to achieve social security of the employee;

2) If the employee lives in the household in which he/she performs work on the basis of an employment contract, the employer may not reduce his/her salary on the basis of accommodation costs. An exception is allowed if the employee and the employer have

69 *Official Gazette of Montenegro*, No. 13/2007, 79/2008, 86/2009, 78/2010, 40/2011, 14/2012, 62/2013, 8/2015, 22/2017 and 42/2019.

70 In these cases, it is necessary that the natural person-employer, when registering this category of employees, submits to the competent regional unit of the Tax Administration (according to the residence of the employer), application for registration of taxpayers, Annex B and employment contract certified by the basic court or notary, as well as a photocopy of proof of completed schooling. This natural person-employer, considering that he/she does not perform economic activity, does not submit the application for registration of taxpayers for entry in the general tax register, that is, the tax administration does not issue a decision on registration (Tax ID No). See Opinion of the Ministry of Finance-Tax Administration, No. 03/2 of 30 September 2015.

mutually agreed to such costs, and in such a case the salary reduction based on accommodation costs should be stated in the employment contract. The amount of the reduction can be stated either in the employment contract or in the subsequent agreement between the employer and the employee;

3) The monetary value of the in-kind salary should be stated in the employment contract. In addition, any in-kind salary is included in the total salary amount on which the employee's taxes and contributions are paid;

4) The monetary part of the employee's salary cannot be less than 50 per cent of the total amount of the employee's salary;

5) During paid leave from work (for example, annual leave, illness, maternity, parental or foster leave and so on), the employer is obliged to take the employee's entire amount of salary (including the value of part of the salary in kind) as a basis for calculation of salary compensation.

In addition to the above, the Labour Law limits those persons with whom this contract can be concluded, such that kinship is an obstacle to the conclusion of this contract. In fact, in accordance with article 21, paragraphs 4 and 5, an employment contract for performing domestic work cannot be concluded with a spouse, parent or guardian.

3.3 Work outside the employment relationship

In addition to the employment contract, the Labour Law also regulates forms of work such as seasonal and casual jobs. The employer may conclude a contract for performance of temporary and occasional jobs with persons registered in the unemployment records of the Employment Agency for the performance of certain activities that are not prescribed in the employer's act on internal organization and systematization of posts,[71] that do not require particular knowledge and expertise, and due to their nature are such that they do not last longer than 120 working days in a calendar year (temporary and occasional jobs). The contract for the performance of temporary and occasional jobs shall be concluded in writing and contain: the name and head office of the employer, personal data of the employee (name, surname, and Personal ID Number), the type and description of jobs that are subject to the contract, the period of validity of the contract, the place and manner of performance of the job and the amount of compensation for the work performed. This contract may define the reasons that the contracting parties may terminate the contract prior to the expiry of its validity period. A person who has concluded this type of contract shall be entitled to health and pension insurance, in accordance with the law.

The Law on Prohibition of Harassment at Work also applies to persons performing work outside the scope of an employment relationship, such as persons attending professional training; pupils and students attending practical training; volunteers; persons performing certain tasks while serving a sentence of imprisonment or corrective measures; persons in voluntary and public works, works organized in the common interest, employment competitions, and any other person taking part in the work of the employer.[72]

3.4 Invalidity of the employment contract

Montenegrin Labour Law does not provide a definition of the employment contract. However, it does include provisions concerning its mandatory written form and content. Thus, article 31 provides that the employment contract shall be considered to be concluded upon signature by the employee and the employer, or a person authorized by the employer. It is the obligation of the employer to conclude an employment contract with an employee before beginning work. According to article 30, paragraphs 1 and 2, if an employee does begin work without having concluded an employment contract, then it shall be considered that he/she has commenced employment for an indefinite period as of the date of commencement of work and the employer shall be obliged to conclude an open labour contract within five days from that date. In case the employee

71 According to article 19, paragraph 2 of the Labour Law "an employer shall have an act of internal organization and systematization of posts".

72 See the Law on Prohibition of Harassment at Work, article 3.

does not meet the requirements for a specific job stipulated in the act on internal organization and systematization of posts, the employer is obliged to either engage him/her in the forms foreseen in the Labour Law, in case he/she ceases to be required or pay severance.[73]

3.5 Conclusion

The Labour Law does not contain a definition of employment but only provisions that specify the moment of establishing an employment relationship, that is, when the labour contract is concluded and work commences. Also, the Labour Law contains provisions aimed at suppressing so-called "undeclared work" by obliging the employer to conclude an employment contract with a person who is employed without a legal basis, that is, with a person whose employment contract has expired and who has continued to work for the employer. However, these provisions are insufficient to provide full protection for persons engaged outside an employment contract. Namely, employers often abuse the provisions that enable the conclusion of contracts for temporary and occasional jobs, which are concluded not only for the simplest jobs outside the act on systematization but also with persons with university degrees for jobs recognized within the act on systematization of the employer. The disadvantage of the Labour Law is that it only provides for a sanction in the form of a fine in the case when the employer does not keep records of concluded contracts on temporary and occasional jobs. There is no obligation to "transform" a contract of temporary and occasional jobs or another contract concluded with an engaged person into an employment contract – if that contract has all the elements of an employment contract or if on the basis of such a contract a person was engaged outside employment.

Therefore, we believe that abuse by employers would be significantly limited if the Labour Law was amended such that, in addition to high fines, it would oblige an employer who has not concluded an employment contract but some other contract (for example, service contract, casual labour contract), to "transform that contract into an employment contract" by order of the labour inspector or a court decision if that work relationship has the elements of an employment relationship (for example, established for the performance of work arising from the nature of the employer's activity or for activities that are the subject of the contract provided for in the act on systematization). In other words, such an employer would be obliged to conclude an employment contract with the person hired on the basis of such a contract.

A huge challenge, when it comes to the protection of employees, are persons who are hired to do work through digital platforms. Although the Labour Law provides for remote work, as a type of employment relationship, the current provisions of the Law do not provide protection for persons engaged through digital platforms. Namely, the Labour Law, under the term "employee", envisages only a person who has concluded an employment contract with an employer. However, persons who are hired through digital platforms usually do not have an employment contract, and therefore do not enjoy labour law protection. Therefore, in addition to the term 'employee', the term "worker" should be introduced into labour legislation, which would include all persons who are engaged in work that arise from the nature of the employer's activities. In addition, these persons should be guaranteed basic employment rights such as: salaries, limited working hours, the right to rest and protection at work as well as collective rights like freedom of association, the right to collective bargaining and the right to strike.

Particularly vulnerable categories of employees in the period of the COVID-19 pandemic included employees with fixed-term contracts because in the Montenegrin legal system there is no obligation for the employer to extend the duration of such contracts in times of exceptional circumstances such as pandemics. In fixed-term contracts the employment relationship is terminated by virtue of the law. An exception is envisaged in the Labour Law only for women during pregnancy and during maternity and parental leave.

In addition to employees with fixed-term contracts, another vulnerable category includes persons hired on the basis of contracts on an occasional basis (casual workers). This form of contractual relation does not come within the purview of classic labour relations and can last 120 workdays at most during a year. Casual workers fall outside labour law protection.

One type of abuse noticed during the period of the COVID-19 pandemic was the unilateral amendment by the employer of full-time contracts into part-time contracts, especially in cases where the volume of

73 In relation to the engagement of employees who cease to be required and severance pay, see the rights referred to in article 167, paragraph 2, item 6, and article 169 of the Labour Law, as stated in article 30, paragraph 3.

work was reduced. These employers used an avenue envisaged in the Labour Law to offer their employees an annex to the contract "reducing" full-time working hours, although such an outcome was not envisaged in their enactments on systematization.

The above legal and practical challenges to the actual realization of fundamental labour rights for all who work in Montenegro indicate an urgent need for national policymakers to devise, through social dialogue, innovative solutions for the implementation of the concept of Universal Labour Guarantee in the Montenegrin law and practice.

4. The 'grey' area between employment and self-employment and the development of non-standard forms of work: Today's context in Macedonian labour law, *Aleksandar Ristovski*

4.1 Introduction

Traditionally, the legal regimes that regulate personal work relations are built upon a so-called "binary divide" – a concept aimed at distinguishing between "the employment relationship/employment contract/dependent (subordinate) labour" on one side, and "the other personal work relations/contracts for services as a generic category/independent (not subordinate) labour" on the other (Freedland and Countouris 2011, 104–120). While the impregnable application of the "binary divide" as a consequence of the industrial socio-economic regulatory model (hierarchical systems of production, legal subordination and dominance of the so-called archetypal model of the standard employment relationship) (see McCann 2008, 4–5)[74] marked a large part of the twentieth century, the contemporary world of work has been facing profound changes caused by globalization, changes in the organization of production, an increasing importance and share of service-related jobs in total employment and recent waves of digitalization and robotization (see Blanplain 1997, 187–194; Hendrickx 2018, 195–205). Such changes have increased the pressure to redefine the boundaries of the binary system, and thus to reconsider the personal scope (whether a person is "within" or "outside" of the employment relationship) and the material scope (what rights are generated by different employment statuses) of labour law (see ILO and ELLN 2013, 5). At the same time, changes in the world of work are leading to new, non-standard forms of employment that are a deviation from the standard employment relationship model. The ILO classifies the following four types of non-standard forms of employment: forms that are not "open ended" (temporary employment); forms that are not full time (part-time and on-call work); forms that are not direct subordinate relationships with the end-user (multi-party employment relationships) and forms that are not part of an employment relationship (disguised employment and dependent self-employment) (ILO 2016, 8).

To describe the space that is created between "dependent" work (employment) and "autonomous" work (self-employment), the term "grey area" is used in the literature (Perulli 2011, 140). The first meaning of the term "grey area" refers to certain forms of work that appear as self-employment but in fact are "subordinated" employment, that is, an employment relationship. This includes so-called "bogus self-

74 The standard employment relationship can be defined as a working arrangement where: the worker concludes a contract of an indefinite duration; the contract is concluded between two contractual parties (bilateral); for a full-time work (covering standard duration – typically 40 hours per week and a standard organization – typically distributed across five working days, eight hours each) and the work is performed on the employer's premises.

employment" or *disguised employment relationships*. The second meaning of the grey area primarily refers to the "objectively ambiguous" forms of work that do not fit into either of the two existing models (employment relationship vs. self-employment). This includes "intermediate" forms of work or "*tertium genus*" employment statuses, which have the features of both "dependent" and "autonomous" labour, and for which the generic term "*dependent self-employment*" or "economically dependent work" is used. In principle, the grey area entails *forms of work that involve multiple parties*, where it is not disputed whether there is an employment relationship or not, but questions who is the genuine employer of the employees (Countouris 2007, 163): for example, some forms of contracting-out, that is, labour dispatch, or so-called "*casualization*" of work whereby many workers are left without any labour law protection (Hendrickx 2018, 203). The extension of the grey area is not only a problem for workers (who are exposed to poor legal and social protection and precarious working conditions) and trade unions, but also for employers who adhere to legal regulations, as well as for the state, because it causes unfair competition and generates market uncertainty and encourages tax evasion (Thörnquist 2015, 412). Hence, to address such problems arising from the grey area between employment and self-employment, a new, doctrinal but also regulatory approach to labour law is needed, primarily because the conventional understanding of subordination as a concept based on "formal" rather than "substantial" criteria (such as the unequal bargaining capacity between employer and employee), is no longer able to cover all forms of dependent labour and economic activity in today's world of work (Ameglio and Humberto Villasmil 2011, 84).

After more than 15 years since the adoption of the Labour Relations Law of 200575 and more than 30 amendments to the basic text of the law, North Macedonia is on the verge of adopting a new Labour Relations Law. In that regard, some of the dilemmas that are becoming increasingly relevant are: What steps are being taken by the Macedonian labour law system concerning the global debate on redefining the boundaries of the traditional binary system and expanding the protective framework of labour legislation? What types of non-standard forms of work that occupy the grey area between employment and self-employment can be recognized in the Macedonian legislation and practice? What regulatory measures should be taken to address the disguised and objectively ambiguous forms of work and what are the prospects for introducing new non-standard forms of work intended to formalize informal employment and reduce precariousness? Keeping in mind these questions, this chapter aims to analyse the current situation in North Macedonia and present the trends in Macedonian labour legislation.

4.2 The personal scope of the application of labour law

The rigid boundaries between employment and self-employment arising from the binary divide are being re-examined at the international, regional and national levels. There is also an obvious need to introduce a new and more comprehensive taxonomy of employment statuses in order to provide more adequate protection to workers lacking in labour law protection.

The International Labour Organization has anticipated the phenomenon of persons short of adequate labour law protection since the 1950s (Marin 2006, 339). The ILO's activities concerning the regulation of the employment relationship intensified at the end of the 1990s,[76] but they did not receive their normative expression until 2006, with the adoption of the Employment Relationship Recommendation (No. 198). Paragraph 13 of Recommendation No. 198 establishes two types of *indicators* for the existence of an employment relationship (indicators related to the performance of work and indicators related to the payment of remuneration to the workers). It provides for the *primacy of facts* and establishes general guidelines for the purpose of facilitating the determination of the existence of an employment relationship in paragraph 9, such as the introduction of a *legal presumption* that an employment relationship exists in paragraph 11 (b). A document of paramount importance here is the Report of the ILO Global Commission on the Future of Work, which, *inter alia*, provides for the establishment of a *Universal Labour Guarantee* aimed at affording adequate protection to all "workers". Although the ILO supervisory bodies,

75 Labour Relations Law of the Republic of Macedonia (*Official Gazette*, No. 62/2005).

76 The agenda of the 85th session of the International Labour Conference in June 1997 foresaw a first discussion on the question of "contract labour" and respectively on the proposed Convention and Recommendation concerning contract labour. The Proposed Convention provided for two separate forms in which contract labour shall be performed. The *first* referred to work performed pursuant to a direct contractual arrangement other than a contract of employment between the contract worker and the user enterprise, while the *second* envisaged work provided for the user enterprises by a subcontractor or intermediary.

even prior to the adoption of the Global Commission Report, considered the application of fundamental principles and rights at work (freedom of association and effective recognition of the right to collective bargaining and freedom from forced labour, child labour and discrimination) to *all workers* (including the self-employed) (Stefano and Countouris 2019, 58), the Universal Labour Guarantee establishes an additional set of universal "basic working conditions" (adequate living wage, limits on hours of work and safe and healthy workplaces) applicable to *all workers regardless of their contractual arrangement or employment status*.

In EU law, the notion of "worker" is usually placed in the context of several different regulatory domains, which in principle refers to three meanings of this term (Giubboni 2018, 225). According to the first and sole meaning that falls within the exclusive competence of EU law, the term "worker" is defined in the context of freedom of movement in the common (internal) market. It is a product of the long-standing practice of the European Court of Justice/Court of Justice of the EU, and as such is defined broadly enough to cover not only persons in an employment relationship (standard subordinated employees [CJEU 1986], [77]) but also those in atypical forms of employment,[78] professional athletes,[79] as well as jobseekers.[80] The broad scope of the term "worker" as defined for the purpose of equalizing the conditions for freedom of movement is also reflected in the domains of equal treatment and anti-discrimination legislation, as well as of health and safety at work. According to the second meaning, the definition of the term "worker", that is, migrant worker, is intended for the purposes of social security and the coordination of national social security systems. Finally, the third meaning, which is most relevant in terms of the personal scope of application of the EU labour law directives, actually refers to the subsidiary application of national labour law and the definition of the term "worker" in accordance with national legislation and practice. In effect, the recent Directive (EU) 2019/1152 on predictable and transparent working conditions has made a significant contribution to help resolve the "classification" problems of labour law, and thus to determine its personal scope of application. Referring to the practice of the Court of Justice of the EU in establishing criteria for determining the status of "worker", the Directive covers a wide scope of workers (domestic workers, on-demand workers, occasional workers, voucher based-workers, platform workers, trainees and apprentices) provided that they fulfil those criteria. The only workers excluded from the personal scope of application of the Directive are genuinely self-employed persons (EU Directive 2019/1152 (6)).

Of great importance for determining the personal scope of the application of labour law are the legal approaches taken in the national labour law systems of certain countries. In the United Kingdom, an employment status of "worker" has been introduced which, in addition to "employees", also includes individuals who undertake to do or perform work *personally* or services for another party to the contract whose status is n*ot by virtue of the contract that of a client or customer of any profession or business undertaking,*[81] or so-called "*semi-dependent self-employed workers*". The reflection of this regulatory technique on a doctrinal level is mirrored in the establishment of the concept of the so-called "*personal work contract*", which in addition to contracts of employment includes so-called other personal work contracts, which in turn are further divided into two groups – "other personal work contracts concluded by genuinely self-employed persons" (contracts that almost entirely belong in the field of civil and commercial law) and "other personal work contracts concluded by semi-dependent, self-employed persons" (contracts that are partially regulated by labour law) (Freedland 2009, 25). Certain countries of continental Europe may apply a "positive" categorization in their legal approaches to regulating the grey area between employment and self-employment (for example, "employee-like persons" in Germany; "para-subordinated workers" in Italy; "economically dependent autonomous workers" in Spain; and so on). Although the introduction of "intermediate" employment statuses is not immune to criticism (for example, because it might incite employers to increase the use of contractual arrangements different from the employment contracts, or even to disguise employment relationships with "quasi-subordinated" ones [Stefano and Countouris 2019, 60]), it seems that the new theoretical and regulatory methods and approaches concur with the idea that a single and comprehensive category of "worker" that will meet the needs for an expanded personal scope of labour protection is not the most appropriate solution. Hence, in theory, there are different typologies for classifying persons who perform work personally, such as: subordinate workers, autonomous workers, the dependent self-employed and the free self-employed (Hendrickx 2018, 205) or "standard employees", "public officials", "liberal professions", "individual

77 See CJEU, *Lawrie-Blum v Land Baden-Wiirttemberg*. Case C-66/85, 3 July 1986.

78 For instance, see the judgments in the following cases: CJEU, *Levin v Staatssecretaris van Justitie*, C-53/81, 23 March 1982; CJEU, *Kempf v Staatssecretaris van Justitie*, C-139/85, 3 June 1986; CJEU, *Raulin v Minister van Onderwijs en Wetenschappen*, C-357/89, 26 February 1992; and CJEU, *Brown v Secretary of State for Scotland*, C-197/86, 21 June 1988.

79 See CJEU, *Union Royale Belge des Societes de Football Association (ASBL)* v *Bosman,* Case C-415/93, 1996; CJEU, *Jyri Lehtonen and Another* v *FRBSB,* Case C-176/96, 2000.

80 See CJEU, *The Queen v Immigration Appeal Tribunal*, Case C-292/89, 26 February 1991.

81 Employment Rights Act, 22 May 1996, article 230 (1).

entrepreneurial workers (for example, freelance workers and consultants)", "marginal workers (for example, casual workers, volunteers and so on)" and "labour market entrants (for example, trainees and apprentices)" (Freedland 2007, 6) and the like.

The Labour Relations Law of North Macedonia (LRL), defines the terms "employment relationship" and "worker", while the definition of the term "employment contract" is left to the domestic labour law theory (see Starova and Beličanec 1996, 128; Kalamatiev 1996, 242). The employment relationship, pursuant to LRL, article 5, paragraph 1, item 1, is defined as "a contractual relationship between the worker and the employer whereby the worker voluntarily joins the work process organized by the employer, for salary and other remuneration, and performs the work in person and continuously according to the instructions and under the supervision of the employer." The normative "anatomy" of this definition refers to the existence of several significant elements of the employment relationship, among which the most significant is the element of subordination.82 Similar to many comparative labour law systems of European countries, the notions "employment relationship" and "employment contract" are also considered equal in terms of Macedonian labour law (Waas and Van Voss 2017, xxiii). Although, historically viewed, the relationship between the employment contract and the employment relationship, may figuratively be treated as a relationship of "which came first – the chicken or the egg", it could be concluded that the employment relationship had emerged as a result of statutory intervention on the employment contract (Ravnič 2004, 372), that is, as a result of the influence of extra-contractual factors on the exchange of labour for wages (Frimerman and Nikolič 1980, 50). However, the key difference between the Macedonian and labour law systems of many European countries is that, in those labour law systems, the employment contract is not "confined" to a strict formality as a condition for its validity.83 Conversely, in the Macedonian labour legislation, the employment contract is defined as a strictly formal contract entered into in writing in article 15, paragraph 1. A contract that is not entered into in writing does not produce a legal effect, since the written form is its primary constitutive element and the condition for its validity (ad solemnitatem). Concomitantly, it is the written contract that is proof of the existence of the employment relationship (ad probationem). Pursuant to the LRL in article 13, paragraph 1, the employment relationship shall be established by the signing of an employment contract, and the worker cannot start with work before concluding an employment contract and before the employer registers the worker for social insurance in article 13, paragraph 7. Moreover, the Law provides for detailed content which must be stipulated in every employment contract.84 In practice, it is typically considered that an employment relationship is non-existent unless the employer and worker have entered into a formal employment contract (in writing) and/or the employer has failed to register the worker for mandatory social insurance, regardless if both contractual parties have entered into a "factual" relationship that might be equated to an employment relationship. Equating the employment relationship to the employment contract, when the written form is a condition for the validity of the employment contract, leads to a significant narrowing of the personal scope of labour legislation and protection of workers, primarily to the detriment of undeclared (informal) workers and workers in disguised employment relationships. Additional confirmation of the formal equation between the terms "employment relationship" and "employment contract", can be found in the existing definition of the term "worker", which, is defined in the LRL, article 5, paragraph 1, item 2, as "any natural person employed on the basis of a concluded employment contract". Despite the fact that the LRL nominally provides for a broader understanding of the term "worker", it can be inferred that in fact the narrow notion of "employee" (as a subordinated worker in an employment relationship) is applied. In addition to workers in a standard employment relationship (in permanent and full-time work), the term "workers" in Macedonian labour legislation is also applicable to individuals who personally perform certain non-standard (atypical) form of work (fixed-term workers, seasonal workers, part-time workers, home-based workers, domestic workers, temporary agency workers). Persons who conclude contracts to "enter" the labour market (such as trainees [article 56, paragraph 2] and workers on probation [article 60, paragraph 2]) are also included in the category of "workers". The legislation also leaves room for different interpretations of the status of members of the management bodies of the companies and other persons with special authorizations and responsibilities – both of them, commonly labelled "managers". The status, rights and obligations of these persons are regulated by the Law on Trade

82 Subordination is discussed in more detail in section 4.3.2. of this paper.

83 In many European countries (Cyprus, Denmark, Finland, France, Greece, Iceland, Ireland, Italy, Malta, Portugal, Switzerland and so on), there is no formal obligation for the employment contract to be concluded in writing. Even in countries where the contracting parties are obliged to conclude an employment contract in writing (Croatia, Estonia, Latvia, Luxembourg, Norway, Poland, Russia, Slovakia, Slovenia, Turkey and so on), the legal consequences for non-compliance with such an obligation is limited and the contract is deemed to exist if the employee started working in exchange for pay. See Bernd Waas and Guus Heerma van Voss, eds., *Restatement of Labour Law in Europe* (Hart Publishing, 2017), p. xxix–xxx.

84 For example, the existing Labour Relations Law, in article 28, paragraph 1, provides for 12 mandatory elements (clauses) that should be contained in each employment contract. Among them, there are provisions, which are considered to have no status of essential elements of the contract (essentialia negotii), such as the obligation of the employer to inform the employee about dangerous jobs and so on

Companies85 (LTC) and the Labour Relations Law. LTC implicitly stipulates in article 366, paragraph 2 that the members of management bodies of companies (executive members of the bodies of the board of directors, members of the executive body and the administrator), as persons performing a function on the basis of election, may or may not enter into an employment relationship with the company. If they enter into an employment relationship, LTC's article 366, paragraph 4 provides for several exceptions to the LRL (establishment and termination of the employment relationship, disciplinary responsibility, salary and other remuneration and protection of employees' rights), while they are also excluded from the scope of collective agreements. On the other hand, the other persons with special authorizations and responsibilities as persons appointed by a decision of the management body, are formally employed by the management body of the company, but they are subject to the same exceptions from the regime of labour legislation and collective agreements according to LTC's article 366, paragraphs 3 and 4. The LRL, without making clear the distinction between these two categories of members of management bodies, that is, treating both categories of persons as "managers", qualifies them as persons in an employment relationship. In doing so, the LRL's articles 54 and 55 permit certain derogations from specific aspects of the employment relationship of the "managers" (for example, concerning conditions and limitations of fixed-term employment; working hours; daily rest periods and annual leave; remuneration of work and termination of the employment contract). De lege ferenda, it is necessary to differentiate and clarify the status and rights of the "managers", so that those who are essentially subordinated to the management body, that is, the company (as an employer) should have an unambiguous status of employees. It is also necessary to harmonize the scope of rights stemming from an employment relationship applied to these employee managers, given that the two laws governing their position (LTC and LRL) provide for a different set of "exceptions" compared to other employees. Finally, the group of "workers" who may conclude employment contracts (but may also be engaged as self-employed) includes professional athletes, journalists, accountants, artists and so on, while the employment status of church employees is unclear, despite the fact that in practice, they are treated as self-employed, both in terms of labour legislation and social security and tax regulations (Kalamatiev and Ristovski 2017, 232).

▸ 4.3 Regulation of the employment relationship and self-employment

4.3.1 Criteria and indicators for determining an employment relationship

Although the Labour Relations Law, in the definition of the term employment relationship, provides for several essential elements (contractuality, bilateralism, remuneration, personal performance of work and subordination), subordination is a key, distinctive criterion for distinguishing the employment relationship from other working relationships, while the other essential elements have a secondary (subsidiary) role compared to subordination (see Kalamatiev and Ristovski 2015, 307–320). LRL refers to two main subordination criteria: *the performance of the work according to the instructions and under the supervision of the employer* and *the participation of the employee in the employer's organised working process*. The first criterion (which in comparative labour law is called "control of work and instructions" [European Labour Law Network n.d.] or "control test" [Deakin and Morris 2009, 133–135]) is regulated by the LRL in article 31 with additional provisions. In this regard, the Law stipulates that the employee shall be obliged to observe the *requirements and the instructions* of the employer in relation to the fulfilment of the work duties under the employment relationship. Furthermore, the LRL's article 30, paragraph 1 provides that the employee shall be obliged to conscientiously carry out the work for which he or she has concluded the employment contract, during the *working hours and at the place* set down for carrying out the work, respecting the *organization of the work and the business activity of the employer*. This statutory provision is closely related to the second subordination criteria (which in comparative law is termed "*integration of the worker in the enterprise*" [European Labour Law Network n.d.] or "*integration test*" [Deakin and Morris 2009, 133–136]).

In addition to the main criteria for determining the existence of an employment relationship, there are other significant indicators for differentiating between employment contracts and contracts for services in

85 Law on Trade Companies, *Official Gazette*, No. 28/2004.

the Macedonian labour law system. In this regard, one of the relevant indicators refers to the question of whether the work is performed *within or outside of the employer's scope of activities,* where the performance of work within the scope of activities of the employer, refers to the existence of an employment relationship/ employment contract according to article 252 of the LRL. Other indicators distinguishing employment contracts from contracts for services are the following: *performance of the work in person* (in the case of employment contracts, only the worker and nobody else could perform the work on his/her behalf, while in the case of contracts for service, the person performing the work may entrust a third party with the performance of the work); *continuity* (the employment contract usually assumes an uninterrupted and relatively enduring performance of the work, as opposed the contract for service); *bearing the risks associated with the work* (under employment contracts, the employer bears fully the risks associated with the work, while under contracts for service the risk is borne by the performer of the work); *the manner of payment* (under employment contracts, the worker acquires the right to salary, which is paid periodically, at specific intervals, while under contracts for service, the performer of work usually receives a single monetary compensation after the completion of the work) and so on (Kalamatiev and Ristovski 2015, 19–27).

Apart from statutory provisions defining the term "employment relationship" and their interpretation in theory, there is no specific case law in North Macedonia through which the criteria and indicators relevant for labour law judges in the process of distinguishing between employment and service contracts can be analysed, nor is there any document or other form of soft law adopted by the State Labour Inspectorate or the Ministry of Labour and Social Policy. All of this may also be a consequence of the fact that North Macedonia has still not incorporated the ILO Employment Relationship Recommendation, 2006 (No. 198) into its national law.

4.3.2 The notion of self-employment and the determination of the employment status of self-employed persons

Defining the term "self-employment" and identifying persons who can fall into this category is a complex legal, economic and statistical operation. From a legal point of view, additional difficulties are caused by the regulatory context in which this term is defined (labour legislation, social security, company law and tax law). The legal regime governing self-employment in North Macedonia may be defined using two methods, in particular: the indirect (residual) method and the direct (immediate) method. Based on the indirect method, self-employment may be defined as the antipode of the employment relationship, and self-employed persons as the antipodes of persons having the employment status of employees. Defining the term "self-employed persons" under the direct method arises from the definitions used in several different regulations in the field of social security. Thus, the Law on Mandatory Social Insurance Contributions provides that a "self-employed person" is a *natural person* performing an *autonomous economic activity* or *professional or other intellectual services* to earn an *income*, on his or her *own account*, under conditions laid down in the law.[86]

Identical definitions are also stipulated by the Law on Pension and Disability Insurance[87] and the Law on Employment and Insurance against Unemployment.[88]

Self-employed persons are also expressly included in the personal scope of the Law on Health Insurance[89] and the Law on Occupational Safety and Health.[90] Several elements can be drawn from the definition of the term "self-employed persons" and used to determine the employment status of these persons that distinguish them employees. A self-employed person is always a *natural person who performs particular work personally or mostly personally.* This person, *independently* (without receiving any instructions from and working under the supervision, control and disciplinary authority of the employer) pursues an economic activity or provides professional or other intellectual services to earn an income, *for his or her own account* (and not on behalf of and on the account of an employer). The self-employed person performs the *economic activity* or *the professional and other intellectual service* professionally, that is, as an occupation. The business of the self-employed person is carried out with the aim of *generating income* (rather than earning a salary).

Despite this solid definitional base, self-employment in North Macedonia causes many quandaries, primarily from the aspect of company law and tax law. The term self-employment is not explicitly mentioned either in the context of the Law on Trade Companies or the Law

86 Law on Mandatory Social Insurance Contributions, *Official Gazette*, No. 142/2008, article 4, paragraph 1, item 10.

87 Law on Pension and Disability Insurance, *Official Gazette,* No. 98/2012, article 7, paragraph 1, item 7.

88 Law on Employment and Insurance against Unemployment, *Official Gazette*, No. 37/1997, article 2, paragraph 1, item 2.

89 Law on Health Insurance, *Official Gazette*, No. 65/2012, article 5, paragraph 1, item 3.

90 Law on Occupational Safety and Health, *Official Gazette*, No. 92/2007, article 3, paragraph 1, item 1.

on Personal Income Tax (hereinafter, LPIT).91 Yet, two categories of persons that are commonly considered to be self-employed persons are: sole proprietors and independent performers of activities. Pursuant to the LTC, *a sole proprietor*, shall be a natural person, who as a profession performs some of the trade activities determined by the Law's article 12, paragraph 1, while being personally and unlimitedly liable for his/her liabilities with his/her entire assets according to article 12, paragraph 2. The category independent performer of activity is not explicitly defined in either the LTC or the LPIT, but it is determined by exclusion or deduction. Thus, according to the LTC's article 8, the independent performers of activity can be determined as natural persons who are not considered as commercial entities. These include natural persons performing an agricultural or forestry activity (individual farmers); craftsmen and natural persons performing services; natural persons performing hospitality services by renting rooms in their place of residence and natural persons engaged in freelance professions (attorneys at law, notary publics, medical doctors and others). On the other hand, the term independent performer of activity, according to the LPIT's articles 19 and 20, has a slightly broader scope, including both natural persons engaged in economic activities (sole proprietors), as well as other groups of independent performers of activities such as: natural persons performing agricultural activity (individual farmers), natural persons performing craft activity (craftworker) and natural persons performing professional and other intellectual services (accounting, appraising, architecture, auditing, consulting, cultural, dental, engineering, health, journalism, law, notary, , sports, veterinary and other intellectual activity).

Although the legal regimes of company and tax law provide a relatively broad framework for the coverage of self-employed persons, this framework usually includes "traditional" forms of "regulated" self-employment (craftworker, independent performers of activities, individual farmers, and sole proprietors) which presupposes mandatory registration in the Central Register of the Republic of North Macedonia, and where necessary prior mandatory registration in an appropriate special register in accordance with the rules governing the respective activity, that is, profession. The options of other "self-employed" persons (freelancers) who independently perform an activity or profession, which can be treated as "new" or "modern", or which are not regulated (for example, in the IT sector, graphic design and multimedia, entertainment, various types of freelancers, consultants and so on), are usually limited to registering an "unincorporated" (for example, sole proprietor) or "incorporated" enterprise (for example, a single-member limited liability company). According to the existing regulations, freelancers do not have the possibility to register in the form that corresponds to their preferences to be regarded as persons who are closer to the concept of "self-employment" than "entrepreneurship" (see Perulli 2003, 10)92 and to the contracts they are concluding in the capacity of self-employed persons, which are of a civil-law nature (contracts for services) and as such are different from the contracts that are considered as commercial contracts.93 This situation is contrary to the public interest, that is, to bring these persons under the regime of insurance holders of a mandatory social insurance, but also their individual interest to acquire social security rights. Hence, the self-employed "freelancers" most often operate in the domain of the informal economy. In our view, the regulatory framework of social insurance, should de lege ferenda, provide space for the introduction of an adequate category of payers of social security contributions, that is, insured persons, which will include self-employed freelancers.

91 *Official Gazette*, No. 241/18.

92 In theory, a main criterion for distinguishing between entrepreneurial activity and self-employment is the way in which work and the means of production are organized. If the economic activity is carried out without an organizational base, then it is considered self-employment. Otherwise, it is usually considered that the performance of the activity, that is, profession, is organized in the form of an "enterprise". However, it is worth mentioning that in practice, entrepreneurial activities can often be very small (that is, they are referred to as micro-enterprises), where the organizational factor is of minor importance compared to the personal efforts put in by the person running the enterprise.

93 According to the Law on Obligations (*Official Gazette*. No. 18/2001), commercial contracts shall be considered contracts which trade companies and other legal persons performing economic activity, shop owners and other individuals that as a registered profession perform a certain economic activity, conclude between themselves, for carrying out the activities which represent the subject of their work or are related to those activities. See article 17, paragraph 2.

4.4 Non-standard forms of work in the 'grey' area between employment and self-employment (legal framework, practices and perspectives for future regulation)

4.4.1 Disguised employment relationship

Traditionally, Macedonian labour law theory, under the influence of labour law theory from the period of socialism, considered the disguised employment relationship as a subspecies of the so-called "factual employment relationship" (see also Baltič and Despotovič 1970, 41).[94] The "factual employment relationship" theory, emphasized the illegal character of the *de facto* employment, at the expense of introducing legal mechanisms for its requalification into "legal" employment relationship (Kalamatiev and Ristovski 2015, 7–10). More recent theoretical approaches in North Macedonia, inspired by the ILO classification, define disguised employment relationship as a non-standard form of work, emphasizing the need to introduce appropriate legal mechanisms to combat it and the precariousness it causes in relation to the position and rights of workers ranging from employment to social security (Ristovski 2021). Forms of disguised employment in North Macedonia can be found in various activities of the private sector, both in the "more traditional" ones (catering, construction, transport) and in modern activities and professions (consulting services, marketing, media, information and communication technologies and so on). Surprisingly, the disguised employment relationship is particularly present in the public sector (education, health care, social protection, state administration bodies and so on) (see Ministry of Information Society and Administration 2016).[95] A disguised employment relationship is concluded under the "veil" of various designated or undesignated contracts which only by their title, legal qualification or content (that usually does not reflect the genuine relationship between the parties) constitute civil law contracts, that is, contracts which are not treated as employment contracts (for example, contracts for services, copyright contracts, but also temporary and occasional work contracts, volunteer contracts and so on). Despite this practice, North Macedonia lacks a systematic approach to identifying, regulating and combating disguised employment. The single, more significant "normative response" stipulated by the LRL, aimed against the abuse of contracts for services as a substitution of employment contracts, was the introduction of the indicator "performance of the work within or outside the registered activity or profession of the employer", the purpose of which was to differentiate contracts of employment from the so-called "special contract", that is, contracts for services.[96] As a measure to combat disguised employment in the public sector, in 2015, the Assembly of the Republic of Macedonia adopted the so-called Law on Transformation into Permanent Employment Relationship.[97] This Law provides for persons who shall be entitled to transformation of their working relationships into permanent employment relationships (those are the persons who had been working on the basis of a contract that lasted at least three months up to 30 November 2014 and who had valid contracts at the time the Law was introduced), the dynamics and the manner of the transformation, restrictions on future hiring of workers under volunteering contracts and service contracts and so on [98] It seems that the positive effects of the Law had a one-time effect and application, since despite the regulation of the true employment status of a large number of persons in the public sector, there are still many others who continuously work under contracts different than employment contracts and are in disguised employment relationships.

In the forthcoming period one should expect that the legislature would consider the solutions incorporated in ILO Employment Relationship Recommendation (No. 198), in particular those relating to the introduction of the principles of "primacy of facts"

94 Under the term "factual employment relationship", in addition to "disguised employment" (concluding a contract for service in order to conceal the true employment status of the employee under an employment contract), the following situations could also be included: (1) practices of entering into an employment relationship with an employee who does not meet the stipulated or prescribed conditions for employment; without publicly a job vacancy or without adhering to the form of the contract; (2) undeclared, that is, unregistered employment; (3) situations in which the employment relationship continued to exist despite the absence of a legal basis (for example, the employee continued to work for the employer after the expiration of the fixed-term employment contract or after the termination of the employment with the employer).

95 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.

96 For more on "special contracts", see Section 4.2.

97 Law on Transformation into Permanent Employment Relationship (*Official Gazette*, No. 20/2015).

98 Law on Transformation into Permanent Employment Relationship, articles 2–7.

and "legal presumption for the existence of an employment relationship". The legal presumption for the existence of employment relationship should serve as legal ground to reclassify false service contracts (disguised employment relationship) into contracts of employment (genuine employment relationship) with a possibility for claiming retroactive exercise of labour and social security rights. This should apply provided that the contractual relationship between the employer and the worker meets the requirements for the existence of employment relationship and the employer fails to prove otherwise. In this regard, the extension of the scope of competencies of the State Labour Inspectorate, as well as the review of its current competencies, would also be of relevance.

4.4.2 Special contracts as forms of work outside the employment relationship

In the period before the adoption of the LRL of 2005, many employers, unable or unwilling to employ persons with employment contracts, frequently engaged workers by means of contracts for services which had somehow started to be "identified" as contracts of employment or to substitute them (Starova 2005, 274). Hence, the LRL of 2005, in its article 252, paragraph 1, introduced the so-called "special contract" defining them as contracts for the performance of work which is *outside of the employer's activity*, and that have as their subject matter, an independent manufacture or repair of certain things, the independent performance of certain manual or intellectual work. Special contracts may also be concluded for artistic and cultural work with a person who carries out artistic and cultural activities as mentioned in article 252, paragraph 2. By their legal nature, special contracts are typical contracts for services, with the difference that, they can be concluded for the performance of work/services that do not lie within the scope (that is, they are outside the scope) of the employer's activity. In the contemporary forms of organization of business and production activities, there is often a loose and blurred border between "core" and "other" activities of employers. Moreover, when inscribing in the trade register, employers usually apply the so-called "general business clause", which is an indication that the commercial entity can perform all activities according to the National Classification of Activities.[99] This situation calls into question the application of the indicator "*performance of work/services within or outside the employer's activity*" as an indicator for distinguishing employment contracts from contracts for services, and thus, in a sense, undermines the true significance of the special contracts. Although at first glance, special contracts may act as a legal basis for concluding various contractual arrangements (for example, subcontracting, temporary agency employment and so on), we believe that the intention of the Law is under special contracts to subsume only civil contracts (contracts for services in generic form), on the basis of which, the agreed work, that is, services shall be performed personally, by self-employed persons in the capacity of freelancers. These primarily include contracts for services that are concluded through the so-called "copyright agencies",[100] where, in addition to the remuneration paid to the worker, a personal income tax is also paid, or in cases where the worker is engaged informally and paid in cash, without using the services of the copyright agency. Special contracts are not subject to any formal registration, and persons engaged exclusively in this way are usually not covered by the mandatory social insurance system and appear as "formally" unemployed persons. The period in which workers are hired under a special contract is not counted in their length of service with the employer, and workers have virtually no employment rights except for certain benefits (such as occupational health and safety protection; protection against discrimination and protection against harassment at the workplace) that are acquired as a result of the extension of the personal scope of application of several special laws (Kalamatiev and Ristovski 2020, 385–386). With the amendments in five separate laws on which the foundations of labour and social security legislation of 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), and that entered into force at the beginning of 2015, an attempt was made to regulate freelance work. The basic goal of the legislature was to determine the legal position

99 See Law on the One-Stop-Shop System and Keeping a Trade Register and a Register of Other Legal Entities, Official Gazette, No. 84/2005), article 7.

100 In the 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*, No. 115/2010). 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 workers (external providers of services) already recruited 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 (for example, 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 (including contracts for temporary and occasional work) that are not considered copyright contracts (for example, 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).

of so-called "freelance workers" and to subsume this category of persons within the social security regime. In that regard, the then amendments to the Labour Relations Law concerning the "special contracts", stipulated that the remuneration received by the worker for the work/services carried out on the basis of a concluded special contract, is 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 Macedonia) as well as the inadequate financial burden on persons who had generated incomes performing certain physical and intellectual work resulted in the repealing of the regulations on freelance work after only seven months from their introduction.

4.4.3 Casual work

Casual work can be defined as work that is executed for a very short period, or occasionally and intermittently, often for a specific number of hours, days or weeks (ILO and ELLN 2013). Its constituent elements are the "short duration" and the "intermittent" character of the work (Stefano 2016, 424). A casual worker, can be defined as a worker who carries out temporary and occasional work for an employer, either on a one-off basis (for a very short period of time, even if it is full-time) or occasionally (on an *ad-hoc* basis), "if" and "when" the employer requests the worker to perform such work (Macdonald 2009, 215–216). Although casual work in different variants (as temporary and occasional; weekly, daily or hourly) is primarily associated with the labour law systems and practices of developing countries, it is increasingly regulated in developed countries as well. In developed countries there are other, similar non-standard forms of work, the main features of which are the uncertain quantity and distribution of delegated work (as in on-call work or zero-hour contracts), rather than the "duration" of the engagement itself (as in casual work). However, unlike casual work, where there is usually a lack of so-called "mutuality of obligations" (as a test for determining an individual's employment status applicable in common law) (see Deakin and Morris 2009; Countouris 2015, 174)[101] or "continuity" (as an indicator applicable in continental law), in on-call/zero-hours work, mutuality of obligations/continuity is commonly considered to be existent, thus leading to a qualification of this form of working relationship as an employment relationship.

In North Macedonia, casual work is not separately regulated in the labour nor the social security legislation. It is explicitly mentioned only in the context of tax law, through the *contracts for temporary and occasional performance of services*,[102] provided by the Law on Personal Income Tax, without, however, the Law providing a definition that will more substantially define these contracts. As a consequence, contracts for temporary and occasional performance of services are considered civil contracts, which are usually expected to be concluded through a "copyright agency" where a personal income tax will be paid. In practice, temporary and occasional work is often performed informally, without concluding any written contract, while payment is often made on a "cash-in-hand" basis. Contractual arrangements that correspond to the characteristics of temporary and occasional work (short duration and discontinuity) are found in the performance of low-skilled jobs in agricultural, catering, construction, cultural activities, IT services, sales, tourism and so on. Non-standard forms of employment in the Macedonian labour legislation, which by their characteristics, perhaps, are closest to temporary and occasional work, are fixed-term and seasonal employment. Yet, it seems that the key difference between these forms of employment on the one hand, and occasional work on the other, is that, in fixed-term and seasonal employment, there is, or at least is expected to be, some "continuity" and relative "stability" in the performance of the work.[103] It is important to note that the continuity or "uninterrupted performance of work" is also an element, that is, a criterion for the existence of an employment relationship, stipulated in the definition of the employment relationship in the LRL, and as such, it might appear as a kind of an "obstacle" for qualifying occasional working relationships as employment relationships. Hence, if the Macedonian legislature decides to regulate occasional work in the context of labour law, it could be expected to qualify as work "outside" the employment relationship or work performed on the

101 The emergence of the "mutuality of obligations" doctrine, for example, test is associated with the seminal work by Mark Freedland (The Contract of Employment of 1976) and the 1980s cases of *O'Kelly* and *Nethermere*. According to Deakin and Morris, a "mutuality of obligations" can be understood as a presence of mutual commitments to maintain the employment relationship in being over a period of time, for example. to make work available in the future (on the part of the employer) and to be available for work (on the part of the worker). See Simon Deakin and Gillian S. Morris (N 51) 138.

102 See LPIT, article 14, paragraph 1.

103 For example, seasonal work is defined as a work carried out during particular periods – seasons, which does not last *more than eight months in a period of 12 consecutive months* (LRL, article 47, paragraph 1). The new LRL is expected to introduce the so-called "employment contract for permanent seasonal work", which would serve as a legal ground for renewable seasonal employment, that would oblige the contracting parties to continue the employment relationship in the next season, after the expiration of the employment contract due to the end of the work in the previous season.

basis of a "mixed contract" (between an employment contract and a contract for services) by extending certain, selected employment rights (for example, occupational health and safety, limited working hours, daily and weekly rest, minimum hourly or daily wage, collective labour rights, dismissal protection and so on) to occasional workers, and of course, by adding adequate social security protection. The reasons for "legalization" of occasional work in North Macedonia should be sought in the need to fight informal employment as well as to reduce precariousness of "de facto" occasional workers. Macedonian legislation, *de lege ferenda*, could apply some of the regulatory techniques familiar to comparable labour law systems. Those are, in particular: limits on the maximum duration of occasional work (on a weekly, monthly and/or annual basis) and transformation of this "very" atypical form into a "less" atypical form (such as fixed-term work) if the worker works longer or contrary to the maximum duration; restricting its application only to work/services outside the employer's main activity; determining the scope of persons who could be engaged in occasional work (for example, part-time employees, pensioners, students, unemployed and so on); extension of eligibility qualifications, primarily for acquiring social security entitlements (for example, allowance during maternity and parental leave, during temporary incapacity for work due to sickness and injury or unemployment benefits) in order to cover the periods of "interruption" in the total qualification period for exercising the specific entitlements and so on. A good basis for modelling temporary and occasional work in the Macedonian labour legislation can be the legal frameworks of several EU countries such as: Romania (which has regulated day labour for the performance of "unskilled working activities of an occasional nature"); Hungary (regulating so-called "simplified employment" which can be entered into to carry out seasonal work in agriculture and tourism or causal work in other sectors); Slovakia (where three different schemes of "agreements of work performed outside the employment relationship" exist such as: work performance agreements, with the aim of regulating work that is limited by obtaining expected results; agreements on work activities, with the aim of regulating occasional activities limited by the type of work and agreements on temporary work for students); Netherlands (where three types of intermittent work arrangements exist such as: on-call or stand-by work; zero-hours contracts and minimum-maximum contracts); Italy (where two types of contracts for intermittent work exist, namely: the first, in which, the worker is not bound to accept calls and the employer offer of a minimum amount of work, and the second, in which, the worker undertakes to accept the calls) and so on (Stefano 2016, 438).

4.4.4 Contractual arrangements involving multiple parties (subcontracting)

Commonly, the first association for a working relationship involving multiple parties is temporary agency work. Besides temporary agency work, there are also other forms of work involving multiple parties. They usually take the form of "*subcontracting*", where the economic operator who has been awarded the contract to provide certain tasks or services, entrusts another entity (subcontractor) with the execution of part of the tasks or services that fall within the scope of the awarded contract and are provided to a specific client. The tasks or services provided by the subcontractor include manufacture of specific goods or rendering specific services for the client. For the purposes of providing them, the subcontractor hires workers and supervises and directs their work, even in the cases where the work process is carried out on the premises of the client (the so-called principal employer). Another form similar to subcontracting is so-called "externalization" or "outsourcing" of work (see Bronstein 2009, 61).[104] which may be defined as an assignment of certain business activities (functions and processes) of the enterprises to external service providers who, based on (often) a long-term (civil or commercial) contract, undertake to render specific services for the enterprises that engaged them (Chamberland 2003).

The labour legislation of North Macedonia does not regulate forms of work involving multiple parties other than temporary agency work.[105] Private Employment Agencies are established in a procedure and under terms and conditions provided by the Law on Private Employment Agencies, and they are licensed to perform temporary employment services (Kalamatiev and Ristovski 2019, 32). In contrast, other forms of work involving multiple parties usually fall within the scope of the general civil, that is, commercial law, and entail entering into various civil, that is, commercial contracts. In the context of *subcontracting* (primarily in the construction sector), it is particularly important to identify the principal employer of the workers for the purposes of determining the obligations arising from the occupational safety and health system and establishing the liability in cases of occupational injuries and accidents. In this regard, despite the

104 While the term "outsourcing" is more frequently used in English, "externalization" appears in French, and in Spanish, this phenomenon is described variously as "outsourcing", "externación" and "terciarización".

105 Temporary agency work has been a subject of regulation in the Macedonian legal system since 2006: first, by the 2006 Law on Agencies for Temporary Employment (no longer in force) and then by the 2018 Law on Private Employment Agencies (*Official Gazette*, No. 113/2018), which is currently in force.

dismal definition it provides, the Law on Occupational Safety and Health (LOSH) expands the meaning of the term "employer" so as to include other natural or legal persons who use the services of workers on any legal ground other than employment contract according to article 3, paragraph 1, indent 2. Furthermore, article 15 of the LOSH provides that whenever two or more employers undertake activities simultaneously at one site, they have to agree in writing on the issues relating to workers' safety and health. In practice there is no unified manner of application of this provision. In some cases, each subcontractor is responsible for the occupational safety and health of its own workers, while in others there is a general occupational safety and health plan that integrates the plans of individual subcontractors. In practice there are also cases where an employer, despite not having either a status of a subcontractor or a license to operate as a temporary employment agency, based on a contract, assigns the workers it employs to perform work for another beneficiary employer. Macedonian legislation neither contains an adequate legal ground for such form of contracting out workers nor does it provide the relevant rules on establishing the liability for damages.

4.4.5 Dependent self-employment

According to the ILO definition, dependent self-employment is defined as a working relationship where the worker (formally a self-employed person) performs certain tasks, that is, services for another contracting party (client) under a contract different from a contract of employment but *depends on one or a small number of clients for the income and receives guidelines regarding how the work is to be done* (ILO 2016, 36). Despite the authoritative source of the previous definition, it does not, however, ultimately display the contribution of economic versus "certain" legal indicators of subordination (for example, giving guidance on time, place and content of work [Böheim and Muehlberger 2006, 2]) in defining a working relationship as dependent self-employment. In dependent self-employment, it is usually considered that the decisive factor is the existence of economic dependence of the economically weaker party in relation to the economically stronger party (economic subordination), rather than the fact of whether the person is technically subordinated to the orders and instructions of another person (legal subordination) (Supiot 2001, 14). The very fact that the client gives certain technical instructions, or "dictates" the way the contractor will organize his/her work (given that the contractor does not have access to an open market and puts his/her work equipment and materials to the function of the client), does not mean that the criteria for the existence of "legal subordination" are met, and that the employment status of the contractor is that of an employee. A lack of clarity about the extent of contribution and interdependence of the indicators of economic and legal subordination in determining the definition of dependent self-employment, contributes to uncertainty and a potential risk of confusion with another closely associated non-standard form, namely, the disguised employment relationship (Rosioru 2014, 287). Hence, the way in which dependent self-employment is defined, in many respects, depends on the national policy approaches and practices applied in the various countries that regulate this non-standard form of employment. While in certain countries (for example, Germany, Spain and so on), "quantitative" criteria – or criteria arising from the economic dependence of the person in relation to the client (for example, the minimum threshold of income depending on the same client or a limited number of clients) – are prevailing, other countries (for example, Austria, Italy and so on) focus instead on criteria based on the "personal link of coordination" of the worker with the client's organization (De Stefano and Countouris 2019, 23). As individuals who are "halfway" between the self-employed and the employed, dependent self-employed workers share similarities and differences with both. Despite their formal status as self-employed persons, dependent self-employed workers are in a position of economic dependence on a single employer (principal, client) for a great portion of their income and under a certain degree of control or coordination in the performance of the activities by such employer or employers (principals, clients) (Countouris 2007, 72). This distinguishes them from genuinely self-employed persons and makes them similar to the genuinely employed. Dependent self-employed workers are not entering into employment contracts but contracts for services, and they retain some discretion in terms of the manner of performance of the work and the time when the work is performed (Muehlburger 2007, 5). In this sense, they are similar to genuinely self-employed persons and different from the genuinely employed. Nevertheless, unlike the employed, the dependent self-employed workers do not generally benefit from the protections granted to employees both by law and collective agreements (Bronstein 2009, 54). In any case, certain countries that recognize this form of work are extending rights arising from employment and social insurance to dependent self-employed persons (see ILO 2016, 37–38).[106]

106 For instance, in Germany, where they are called *employee-like persons*, they have rights to access to labour courts, annual leave, protection against discrimination and collective bargaining, but they have no protection against unfair dismissal; in Italy, where they are called *para-subordinate workers*, they have the rights to access labour courts, limited social security rights, OSH regulation coverage, limited maternity and sickness protection, collective bargaining and minimum compensation rights and restrictions on early termination of contracts, but they do not have rights to protection against dismissals, limited working hours and rest periods; In the United Kingdom, where they are included in the definition of "workers", they have the right to minimum wages and limited working hours, but no right to protection against dismissal and so on.

Dependent self-employment as an "intermediate" form of work between employment and self-employment is still not significantly present in the legislation of Central and Eastern European countries (see Vodovnik and Korpič-Horvat 2015, 88).[107] One of the main reasons is a common socialist past and a long tradition and impact of the binary model on the national labour law systems (Gyulavári 2014, 245). The situation is similar in North Macedonia, where not only dependent self-employment is not subject to regulation in labour legislation and social security, but, with rare exceptions among theorists (see Kalamatiev and Ristovski 2016), it is also not adequately recognized by the expert community, including Macedonian social partners. This is due to the fact that, in the Macedonian labour law system, "economic dependence" (as one of the main and prevailing elements in determining dependent self-employment) has no particular significance, both in the context of determining the essential elements of the employment relationship and in the context of expanding labour law protection over persons who do not have the status of workers (employees) while at the same time being in a need of adequate protection (see Tičar 2020, 520). However, it is worth noting that with the mentioned amendments to several laws in the field of labour relations and social security that were in force in the period from early January to late July 2015 (the so-called Laws on Freelancers), an attempt was made to regulate the status and position of persons earning income from the performance of physical and/or intellectual work, on the basis of one or more contracts for services, copyright contracts or other contracts which set a compensation for the performed work (see Kalamatiev and Ristovski 2015, 19). Individuals belonging to this category constituted an exceptionally heterogeneous group. This group, on the one hand, included individuals performing physical and/or intellectual work who lacked the status of insurance holders of mandatory social insurance in the form of employed or self-employed persons, that is, they were treated as "*formally unemployed*", while, on the other hand, it included the *employed, self-employed and pensioners* earning income under civil law contracts in addition to regular salaries/pensions/income from carrying out their registered activity. Given the definitions of dependent self-employment in the literature, the manner of regulation of the status and position of the so-called "*unemployed freelancers*" (as natural persons who can enter into a *single* contract, that is, a contract with *a single client*, which sets compensation for the performed work) created certain similarities between them and the dependent self-employed workers. However, due to several legal deficiencies and public criticism, especially of the Law on Freelancers, led to its revocation. The absence of a regulatory framework for governing dependent self-employment in North Macedonia does not mean that, in practice, no forms of work can be found which to a greater or lesser extent meet the elements of dependent self-employment. Examples of dependent self-employment can be found in various activities such as: catering, certain types of legal representation, construction, crafts, distribution, education and training, entertainment, insurance, media, marketing, telemarketing, tourism, transport and so on (Kalamatiev and Ristovski 2016, 53).

4.5 Conclusion

The grey area between employment and self-employment and the emergence of specific non-standard forms of work aimed at filling this area does not occur incidentally or by accident. They are a consequence of tectonic changes in the world of work. Labour law (as a regulatory framework but also as a scientific discipline) faces the challenge of finding an appropriate way to address such changes in order to maintain its basic and essential function – regulating the position and rights of workers in need of protection. The theory identifies various approaches to achieving the mentioned goal of labour law, ranging from maintaining the "status quo" and leaving a flexible boundary between labour and civil law, to redefinition (enlargement) of the notion of subordinate work, to creating an intermediate category (that is, an employment status) between subordinate work and self-employment and to setting forth a "hard core" of social rights which shall be applicable to all workers irrespective of their contractual arrangement (Rosioru 2014, 304). The latter is most in line with the ILO approach in determining the personal and material scope of worker protection at the universal level. A genuine confirmation is the establishment of the

107 Slovenia can be singled out as an exclusion from this group, since as of 2013, it began to regulate "economically dependent self-employed persons". Slovene labour legislation defines economically dependent self-employed person as a self-employed person who, on the basis of a civil law contract, performs work in person, independently, and for remuneration for a longer period of time in circumstances of economic dependency and does not employ workers (article 213 of the ERA-1). Economic dependency means that a person receives at least 80 per cent of his or her annual income from the same contracting entity. As such self-employed persons perform their work for the most part for one client, and the legislature enacted limited labour law protection also for them. The protection that labour legislation assigns to economically dependent self-employed persons consists of: prohibition of discrimination, minimum notice periods, the prohibition of the termination of a contract in cases of unfounded reasons for termination, payment for contractually agreed work appropriate for the type, scope, and quality of the undertaken work, and liability for damage.

Universal Labour Guarantee, which guarantees *to all workers* (regardless of their contractual arrangement or employment status) the enjoyment of *fundamental principles and rights of work* and *basic working conditions* (adequate living wage, limits on hours of work and safe and healthy workplaces).

There is a long and ongoing process to adopt a new Labour Relations Law in North Macedonia. Hence, the great expectations about the new Law focus on its normative responses to the contemporary challenges faced by the Macedonian "worker" and the labour market. In this context, it is expected that appropriate legal mechanisms will be introduced to address undeclared (informal) work and disguised employment in order to protect "*de facto*" employees and "bogus self-employed persons" who are excluded from the protective framework of labour legislation and social security. The grey area covering the space between subordinated work (employment) and independent work (self-employment) require appropriate regulatory measures, but the Macedonian legislation still has difficulties in recognizing and properly regulating self-employment. Attempts to regulate so-called "freelance work" in 2015 ended in failure and the issue of the status and rights (primarily of social security) of freelancers (as *de facto* self-employed persons concluding civil law contracts) still remains unresolved. Casual work is subject to regulation by tax legislation and is occurring in practice, but it is still not regulated in the context of labour and social security law. Meanwhile, dependent self-employment is still considered an "abstract" notion, not only for the general community but also to a large extent for the expert community in the country, including the social partners. Let us hope that the issues analysed in this chapter will attract the attention of the "stakeholders" participating in the process of shaping labour legislation and will contribute to finding the most adequate solutions in the purview of the adoption of a new, long-awaited Labour Relations Law.

5. Introduction of the Universal Labour Guarantee in national labour law and practice: A Polish perspective, *Agnieszka Zwolińska*

5.1 The Universal Labour Guarantee from the perspective of Polish constitutional and statutory law

The Universal Labour Guarantee (ULG) includes a balance between fundamental workers' rights – freedom of association, effective recognition of the right to collective bargaining, freedom from forced labour, child labour and discrimination – and humane working conditions – adequate living wage, limits on working hours and a safe and healthy workplace (ILO 2019, 38–39). The assumption that all workers, regardless of their contractual arrangement or employment status, should enjoy labour protection is reflected by specifying the labour guarantee to be a *universal* one. Laws, regulations and collective agreements are all potential methods for raising the protection floor for all who work, in particular at the national level.

In the case of the Polish labour market, the employment relationship constitutes the centrepiece of labour law protection. All elements of the ULG are applicable to an employee (a party to the employment relationship). The problematic issue is how to afford adequate legal protection, both on paper and in practice, to people who work outside the framework of the employment relationship. These may be people who work on the basis of civil law contracts, that is, an agency contract, a contract of mandate (*umowa zlecenia)*, a contract for the provision of services (*umowa o świadczenie usług*) or a contract for a specific task (*umowa o dzieło*), including the self-employed. There is no legal definition of a self-employed person in Polish labour law. For the purpose of this research, having regard to the existing practice, a self-employed person may be defined as an individual (a natural person) who is registered as an entrepreneur in the Central Register and Information on Economic Activity (CEIDG) and who pursues an economic activity in which he/she provides services personally under civil law contracts mainly for one employing entity.

An analysis of the Constitution of the Republic of Poland of 2 April 1997,[108] the provisions of which, in principle, apply directly,[109] leads to the conclusion that all the aspects of labour protection covered by the ULG are ensured by the Constitution. A more complex issue is the one of the personal scope of that protection.

Starting with freedom of association and the right to collective bargaining – both are guaranteed by article 59 of the Constitution – which refers to the freedom of association in trade unions and a trade union's right to bargain collectively. Thus, a significant question concerning the personal scope of the constitutional guarantee set by article 59 is who has the right to set up and join trade unions. The answer to this question, from the perspective of article 59 (1), is provided in the Constitutional Court's Judgment of 2 June 2015, Case No. K 1/13.[110] This judgment is ground-breaking because previously only employees hired on the basis of an employment relationship were entitled to form and join trade unions. The Court held that it was a

108 J.L., No. 78, item 483, with further changes, 1997.

109 In accordance with article 8(2) of the Constitution its provisions apply directly unless the Constitution provides otherwise.

110 J.L. item 791, 2015.

restriction of freedom of association, violating Polish constitutional and international law, as the right to form and join trade unions must be enjoyed by all workers, including those performing work outside of the employment relationship, including the self-employed. It is worth noting the Court's interpretation of the notion of "an employee" within the meaning of article 59 (1) of the Constitution. First, the Court assumed that constitutional provisions should be interpreted autonomously, without any restrictions resulting from statutory laws that are situated below the Constitution in the hierarchy of legal sources. Thus, "an employee" in the meaning of article 59 (1) of the Constitution may be understood differently to "an employee" in the meaning of article 2 and 22 (1) of the Labour Code.[111] Second, it was emphasised that "an employee" in the meaning of article 59 (1) of the Constitution should not be identified solely by the legal relationship that links him/her with an employer. The decisive criterion for classifying a person as an employee, according to the Court, is the performance of paid work. So as, "an employee" in the meaning of article 59 (1) of the Constitution is an individual (a natural person) who performs paid work for an entity with whom he/she has a legal relationship and who has such professional interests relating to the performance of that work that might be represented collectively. The judgement of 2 June 2015 resulted in changes to the statutory collective labour laws[112] (see more in section 3).

Both freedom from forced labour and child labour are ensured by the Constitution. In accordance with article 65 (1) of the Constitution, everyone has the freedom to choose and pursue his/her occupation and to choose his/her place of work, and exceptions to this need to be specified by statute. article 65 (3) of the Constitution, in turn, prohibits the permanent employment of children under 16 years of age, requiring that the type and nature of employment admissible for children be specified by statute. It is clear from the literal wording of these articles (the use of the word "everyone") that the personal scope of both constitutional guarantees goes beyond employment under an employment relationship. A similar conclusion concerns the prohibition of discrimination. According to article 32 of the Constitution, all persons should be equal before the law and have the right to equal treatment by public authorities, and no one should be discriminated against in political, social or economic life for any reason whatsoever.

Moving on to constitutional guarantees of humane working conditions, article 65 (4) of the Constitution obliges the legislature to regulate the minimum level of remuneration for work or the manner of setting its levels by statute. Obviously, this provision has no direct legal effect. Thus, to determine the personal scope of this legal protection of remuneration for work, it is necessary to expand the analysis to statutory legal provisions. At this point, the Act of 10 October 2002 on Minimum Wage[113] needs to be mentioned, which has been analysed further in section 3. The Act defines the minimum monthly wage of an employee (a party to an employment relationship) and the minimum hourly rate that applies, with exceptions, to persons working under a civil contract of a mandate or a civil contract for the provision of services. So, generally speaking, not all persons who work are covered by the statutory legal protection of a minimum wage. For instance, there is no statutory guarantee of a minimum wage in the case of a self-employed person who works in return for a compensation fee[114] on the basis of a civil contract, when he/she is the one who decides on the place and time of work. Further, the Act on Minimum Wage does not apply to a person working on the basis of an agency contract or a contract for performing a specific task. Moreover, it has to be emphasised that we are talking here about a statutory minimum wage applied at the national level. The comparison of the amount of the statutory minimum wage with the cost of living in various places in Polish territory (in particular in Warsaw), may lead to the conclusion that the statutory minimum wage is insufficient to be regarded as an adequate living wage.

In reference to working hours limits covered by the ULG concept, article 66 (2) of the Constitution specifies that an employee has the right to statutorily specified days free from work, as well as annual paid holidays, and that the maximum hours of work should be determined by statute. This provision refers to "an employee" without defining its meaning. Coming back to arguments presented by the Constitutional Court in its judgment of 2 June 2015, the constitutional notion of "an employee" has its autonomous meaning. However, it would not be justified to apply the definition of "an employee" formulated in the context of freedoms and rights declared in article 59 (1) of the Constitution to article 66 (2). There is room for discussion about whether the meaning of "an employee" in article 66 (2) of the Constitution is limited to persons working on the basis of the employment relationship. Nevertheless, the reference to statutory laws (provisions of the

111 According to Act of Labour Code, 26 June 1974 (consolidated text, J.L., item 1320, with further changes, 18 June 2020, – hereinafter LC), "an employee" is a person employed on the basis of a contract of employment, an appointment, an election, a nomination or a cooperative contract of employment – it means working within the framework of an employment relationship under an employer's supervision.

112 Act on Amending the Act on Trade Unions and Other Acts, J.L., item 1608, 5 July 2018.

113 Consolidated text, J.L., item 2207, 13 November 2020.

114 According to Act on Minimum Wage, article 8d (3), "a commission fee" is defined as a remuneration that depends on results of work achieved by a person accepting a mandate or providing services or results of an activity of entrepreneur or other entity for which work/services are performed – these results may be measured in particular by the number or the value of contracts concluded, sale, services performed.

Labour Code) makes it clear that at present the statutory protection against inhumane working time is limited to those who work within the framework of the employment relationship. Additionally, limits on working time, including guarantees of rest periods, are applied, generally, within an employment relationship. Thus, in the case of an employee working simultaneously for two different employers, statutory working time limits are applied separately for each employment relationship, even if from the perspective of the employee his/her total working time exceeds limits set by labour law regulations.

Finally, regarding the guarantee of a safe and healthy workplace and according to article 66 (1) of the Constitution, everyone should have the right to safe and hygienic working condition; the method of implementing this right and the obligations of employers are to be specified by statute. The literal wording of the article is a little confusing. On the one hand, it has used the word "everyone", on the other, the article refers to the obligations of employers. When we look at statutory law, it is clear that an employer's obligation to ensure safe and hygienic working conditions[115] includes individuals (natural persons) who carry out work outside an employment relationship (also the self-employed), provided that they perform such work within the employing establishment or a place specified by the employer (article 304 (1) Labour Code, hereafter LC). article 304 (3) LC clarifies that the above obligation applies, *mutatis mutandis*, to entrepreneurs who are not employers but organise the work of individuals (natural persons) that is performed outside the employment relationship or the work of individuals who carry on an economic activity on their own account.

To sum up, all elements of the ULG concept have been recognised at the highest legislative level that is, at the constitutional level. However, some of these labour guarantees are not universal because they are not applicable to all persons who work (particularly, persons working under civil law contracts, including the self-employed).

5.2 The pros and cons of extending the employment relationship to all who work

According to article 22 (1) LC, by the establishment of an employment relationship, an employee obliges himself/herself to perform specific work for the employer, under his/her supervision, at the place and time specified by the employer, and an employer – to employ the employee for remuneration. The conditions mentioned in article 22 (1) LC are used to determine the existence of an employment relationship even if a contract has not been named by parties as an employment contract. Thus, naming a contract as a civil law contract (for example, a contract to perform a specific task or a contract for the provision of services), while work is performed upon conditions specified in article 22 (1) LC, does not result in establishing a civil law relationship between the one who provides a work and the other who obliges himself/herself to perform work.

Article 22 (1) LC specifies the theoretical model of the employment relationship, and as a consequence it enables a comparison of the model with a given existing legal relationship in terms of the degree of similarity of factors characteristic of the employment relationship. Thus, in order to distinguish the employment relationship from other legal relationships, labour courts apply a typological method.[116] What this means is that, as a rule, the extent to which factors characteristic of the employment relationship are present in a given case is decisive for classifying a legal relationship as an employment relationship.[117] It is worth mentioning that some authors state that the typological method is increasingly supplemented by the statutory assignment of specific categories of working persons to the category of employees (Grzebyk and Pisarczyk 2011, 171). Examples of the application of this

115 Safety and hygienic working conditions have been specified in the LC, article 207 (2). There are a general duty to protect health and life of working persons by ensuring safe and hygienic working conditions by an appropriate use and application of the achievements of science and technology and particular duties of: (i) organizing work in a manner ensuring safe and hygienic working conditions, (ii) ensuring observance of the regulations and rules of safety and hygienic work in the employing establishment, giving instructions to remove any breaches of such rules and regulations and supervising the implementation of such instructions, (iii) responding to needs in the field of safety and hygienic work and adjusting the measures undertaken in order to improve the level of health and life protection, having regard to the changing conditions of work performance, (iv) ensuring the development of a coherent policy preventing accidents at work and occupational diseases which includes technology, organization of work, working conditions, social relationships and the influence of factors related to working conditions; (v) taking into account the protection of health of the young, nursing individuals and disabled persons; (vi) ensuring compliance with orders, addresses, decisions and regulations issued by the authorities supervising working conditions, (vii) ensuring the observance of the recommendations of a public labour inspector.

116 For instance, see Supreme Court, Case No. I PKN 432/99, 9 December 1999, Case No. II PK 354/09, 27 May 2010, Case No. II PK 27/18, 16 May 2019, Case No. I PK 198/18, 3 December 2019.

117 For instance, see the Supreme Court, Case No. I PK 146/05, 7 March 2006, Case No. I PK 8/10, 5 May 2010.

assignment method by the legislature are a person managing the workplace on an employer's behalf, a person employed by a temporary work agency for performing temporary work or a tele-employee. The legislature has settled that each of these persons may be party to an employment relationship even if their working conditions do not correspond fully to factors characteristic of the employment relationship as defined in article 22 (1) LC. On the other hand, instead of applying the assignment method, the jurisprudence indicates an evolution in the understanding of an employer's supervision and establishes the concept of "autonomous subordination" of an employee to an employer. This concept has been applied by labour courts[118] to establish the employment status in the case of a person performing creative work such as an executive, journalist, a manager or other person with autonomous decision-making powers and is also applicable in the case of a person working in a task-specific working-time system,[119] a mobile employee or a tele-employee.[120]

The definition of the employment relationship is fundamental to determine the scope of the Labour Code's application. According to article 1, the Labour Code defines the rights and duties of employees and employers. At this point it should be clarified that the LC, apart from defining the employment relationship, defines both the notion of "an employee" and "an employer". An "employee" is understood as a person employed on the basis of a contract of employment, an appointment, an election, a nomination or a cooperative contract of employment[121] (article 2 LC). An "employer" is understood as any entity, even if they have no legal personality, and any individual person, if they employ employees (article 3 LC). Reading articles 2 and 3 LC together with 22 (1) LC, it is justified to assume that: (1) an employee is an individual who obliges himself/herself to perform specific work for the employer, under his/her supervision, at the place and time specified by the employer on the basis of a contract of employment, an appointment, an election, a nomination or a cooperative contract of employment; (2) an employer is an entity or an individual person who obliges himself/herself to provide and organise work for the employee (to employ an employee) and pay him/her remuneration for the work performed on the basis of a contract of employment, an appointment, an election, a nomination or a cooperative contract of employment. Thus, the factors characteristic of a person's employment status are: performing work in person for an employer (personal work and the relativity of work); performing work on a continuous basis; performing work under an employer's supervision, at the place and time specified by an employer; performing a specified type of work (the type of work is specified at the moment of establishing the employment relationship); performing work for remuneration.

From a theoretical point of view, an employer's management rights are the means to fulfil his/her contractual obligation to provide an employee with a work. By entering an employment contract an employer obliges himself to organise work in the manner best suited to make effective use of working time and achieve high efficiency and appropriate quality of work by an employee through the exercise of their abilities and qualifications (article 94, paragraph 2 LC). So, if an employee is ready to perform work and is prevented from doing so on account of reasons attributed to an employer (for example, lack of efficient work organization, a stoppage which has not been caused by an employee's fault, an employer's refusal of access to the workplace), an employer has to pay him/her a remuneration according to his/her individual monthly or hourly rate of pay (article 81 (1), (2) LC). On the other hand, an employee cannot refuse to perform work within time specified as his/her working time. Even if there is no work to perform, an employee is obliged to remain at the disposal of an employer within that working time – this means that he/she is to be ready to take up work whether asked to do so (articles 100 (2) and 128 (1) LC). We may sum up that an employer's duty to employ an employee by providing him/her with work, an employee's duty to be at the disposal of an employer within an agreed time limit and an employer's management rights constitute

118 In particular Supreme Court, Case No. II PK 81/05, 13 April 2016 and the Supreme Court judgments mentioned there.

119 According to the LC, article 140, a time-specific working time system may be applied to an employee in cases justified by the type of work, the organization or place where work is performed. In order to apply this system, an employer has to specify the time required for performance of entrusted tasks subject to the limitation of working time defined in the LC article 129.

120 As defined in the LC, article 67-5, a tele-employee is an employee who performs work regularly outside the employing establishment with the use of electronic communication means and transfers work results to an employer, in particular by use of electronic communication means. It should be clarified that Act on Special Measures in Relation to Prevention and Elimination of COVID-19, Other Contagious Diseases and in Times of Emergency Resulted Therefrom, 2 March 2020 (consolidated text, J.L., item 2095, with further changes, 29 October 2021) has introduced the legal definition of "telework" (*praca zdalna*) which is different from the legal definition of a tele-employee in LC. By telework is understood work agreed in the employment contract which an employer ordered to perform for a defined period outside the regular workplace (Act of on Special Measures in Relation to Prevention and Elimination of COVID-19, Other Contagious Diseases and in Times of Emergency Resulted Therefrom, 2 March 2020, article 3(1)). It has to be emphasised that an employer right to order telework is limited by the duration of the state of epidemic threat or the state of epidemic announced because of COVID-19.

121 The most popular legal basis of the employment relationship is a contract of employment. Others – an appointment, an election, a nomination are used mostly in the public administration in situations specified by the legislator. As regards to a cooperative contract of employment, this contract is reserved for an employer that is a work cooperative and an employee who is a member of that cooperative.

the essence of an employment relationship that are closely linked and interdependent. An employer's management rights are justified by the existence of his/her duty to employ the employee and the fact that an employer, not an employee, is responsible for organizing work, so it is the employer who bears the risk of the occurrence of obstacles to the performance of work. Furthermore, since the employer has the right to determine unilaterally an employee's obligation to perform work (that is, to specify a task, place, time and manner in which a task is to be performed by an employee), there is a need for limitation of the employer's managerial powers for the sake of the employee's protection. For instance, the need for protection of the employee's health and safety justifies the employer's duty to observe the statutory limitation of working time and the statutory guarantee of minimum uninterrupted, regular rest periods, since it is the employer who decides on the time of work. As the employer has the right to determine the place and manner in which work is to be performed, it is justified to hold him/her accountable for providing a healthy and safe workplace.

In view of the above characteristics of an employment relationship, the idea of extending the employment relationship concept to all those who work raises doubts. The main question is whether it is justified to hold an employer responsible for a worker's protection when the need for that protection does not result from the managerial powers of that employer. This would be the case, for example, of a self-employed person who is hired under a civil law contract (for example, a contract for the provision of services) and organises his/her work. When the contracting party has no control over the place, time and manner in which services are performed by the self-employed person, there are no just reasons for making him/her responsible for safe and healthy working conditions or for the observance of working time limits and rest periods. Obviously, the protection of self-employed persons is needed, but the question is who should be responsible for ensuring this protection and to what extent.

The narrative of the need for a worker's protection is ubiquitous, but it seems to be advisable to complement it with the organizational function of labour law. This leads us to the very general question of why an employer (broadly speaking, an employing entity) exists in the economy. It would be naive to claim that the sole aim of an employer is to provide an employee with work and salary. To answer this question, it would be helpful to refer to explanations presented in economic theory by Ronald Coase (Coase 1937, 386–405). He states that the main reason it is profitable to establish a firm would seem to be that there is a cost to using the price mechanism (that is, the method of coordinating the economic system which is based on the assumption that human activity, need and supply is adjusted to demand, and production to consumption by a process that is automatic, elastic and responsive). The cost of using the price mechanism includes the costs of negotiating and concluding a separate contract for each exchange transaction which takes place on the market. Thus, according to Coase, the operation of a market costs something, and by forming an organization and allowing some authority (to an entrepreneur) to direct resources, certain market costs are saved. He points out another factor which may become important to an individual in deciding to establish a firm (an organization) – exchange transactions on a market. The same transactions organised within a firm are often treated differently by governments or other bodies with regulatory powers. Coase concludes that since there are alternative methods of organization – by the price mechanism or by being the entrepreneur – such regulations would bring into existence firms which otherwise would have no reason to exist.

Applying this to an exchange transition in which human work is the object, we may assume that this exchange transaction can be made on an open market and coordinated by a price mechanism, or alternatively it may be made within a firm, within the framework of an employment relationship. The choice between these two options, from the perspective of an individual, whoever he/she is – a potential employer or a potential employee – depends on comparing the costs of a transaction made on an open market with those of a transaction made within the purview of a firm, including the costs generated by regulations. It is worth mentioning here that an employer–entrepreneur may revert to an open market transaction when carrying out a transaction within a firm generates higher costs than those generated by using a price mechanism. However, the same may apply to a potential employee, when he/she is able to earn more by his/her work on an open market coordinated by a price mechanism than from an employer.

An employee's protection is the main aim of labour law; however, it results in additional costs of an exchange transaction between an employee and an employer which otherwise (that is, without applying labour law) would not arise. When such costs may be avoided or minimised by concluding an exchange transaction on an open market instead of within a firm, there will be the risk that labour law will not apply to all who are contracted to work in this manner through a price mechanism. Theoretically speaking, the perfect situation would be one where the costs of a transaction caused by the necessity of having an employee/worker protection were "out from the equation of cost calculation" in deciding between the alternative methods of organizing an exchange transaction – the exchange of personal work for remuneration. Thus, the extension of the employment relationship to all who work may level the protection floor of all who work, but at the same time it may minimise incentives

for being an employer, when worker protection costs could be considerably reduced or eliminated by using an open market and the price mechanism in lieu of an employment relationship inherently linked with the existence of a firm.

Keeping in mind this theoretical perspective, problems of the Polish labour market regarding the effective protection of all who work seem to go beyond the desire of employers to avoid costs generated by the application of labour law. In the case of Poland, a significant factor for both – those who hire and those who are hired to perform work – constitutes the costs generated by fiscal regulations (tax and social security regulations) (for the differences between the situation of a self-employed and an employee in terms of social insurances as well as tax law, see Lasocki 2021, 23–48).

At the beginning it should be clarified that, contrary to the notion of "an employee" and "an employment relationship", there is no legal definition of "a self-employed person" in Polish law. For the purpose of social insurance regulations the situation of a self-employed person is covered by the definition of "a person pursuing non-agricultural economic activity", and "an economic activity" is understood as an organised activity pursued for profit, for their own benefit and on a continuous basis (article 8 (6) paragraph1 of the Act of 13 October 1998 on the Social Insurance System,[122] read together with article 3 of the Act of 6 March 2008 – Entrepreneurs' Law[123]). The decision to provide services as a self-employed person – instead of performing the same type of activity as an employee – results in savings. The burden of social contributions is considerably lighter on a self-employed person, especially when he/she starts an economic activity, compared with that borne by an employee. For instance, in the case of a self-employed person, a base of social contributions (for old–age pension, disability and sickness insurances) is declared by the self-employed person in the amount no less than a statutory minimum, while in the case of an employee the social contributions base is always his/her income. Thus, in the case of a self-employed person an increase in savings regarding social contributions is directly proportional to an increase in income from the moment at which his/her income exceeds the statutory minimum base of social contributions. Moreover, sickness insurance is obligatory in the case of an employee (an employee bears the costs of social contributions for sickness insurance in full), but voluntary for a self-employed person. Additionally, a person starting up an economic activity may avail himself/herself of relief from paying social contributions. For instance, he/she may be exempt from social insurance for the first six months of pursing an economic activity. Moreover, a person pursuing a non-agricultural economic activity with an income not exceeding 120,000 PLN in the previous calendar year may take advantage of the reduction of the minimum statutory social contribution base for maximum three years in a period of five consecutive years. Similar relief does not exist in the case of activity performed within an employment relationship. It is also worth mentioning that when the same person is an employee and pursues a non-agricultural economic activity (for example, as a self-employed person), he or she does not have to pay social contributions concerning his/her economic activity. However, when the same person is employed by more than one employer, each employment relationship constitutes a separate title for social insurance, what means that social contributions are deducted from his/her remuneration (Lasocki 2021, 1–30). Thus, to sum up, comparing a business-to-business (B2B) relationship (a transaction made between two entrepreneurs in the framework of a civil law contract) with an employment relationship with regard to the social contributions burden, the first one results in savings for both contracting parties – the one who provides work as well as the other who performs work. The saving translates to a higher net salary for the work performed as a self-employed person compared with that performed as an employee. Obviously, the savings go hand in hand with lower social security benefits in the future. Nevertheless, for many individuals an increase in net salary here and now constitutes a higher value than lower social security benefits in the future. Thus, Polish fiscal regulations are proving to be one of the factors that are conducive to self-employment.

From the perspective of social insurance regulations there are many advantages for those who work on a self-employed basis, considerably more in comparison with the situation of a person performing the same type of work as an employee within the employment relationship. Fiscal incentives for a person to start their own economic activity (being an entrepreneur instead of an employee) may supersede benefits that comes with the employment relationship and the application of labour law. Until the fiscal differentiation is not minimised, it is difficult to ascertain to what extent the replacement of employee status with self-employed status is caused by the desire of employers to avoid the costs of an employee's protection generated by labour law or by the desire of workers to earn a higher net salary for his/her work. This implies that the extension of the employment relationship to all who work, in order to fulfil its protective aim of labour law, should be accompanied with adequate changes in fiscal regulations.

122 Consolidated text, 1 March 2001, J.L., item 423, 2001.

123 Consolidated text, 8 December 2020, J.L. item 162, 2002.

5.3 Alternatives to the extension of the employment relationship to all who work

The discussion on the personal scope of labour law, in particular the need for its extension to persons other than employees, have been present in Polish labour law doctrine for a long time. The concept that seems to dominate the discussion is that of applying some, not all, of the institutions traditionally and inherently linked with the employment relationship to non-employment labour relationships (for example, to persons employed under civil law contracts, the self-employed). This approach can be seen in the recent drafts of Labour Codes – the first from 2007 prepared by the Codification Commission for Labour Law established by the Council of Ministers Regulations of 20 August 2002 on the Establishment of the Codification Commission for Labour Law (J.L. 2002, No 139, item 1167 with changes),[124] and the second from 2018 prepared by the Codification Commission for Labour Law established by the Council of Ministers Regulations of 9 August 2016 on the Codification Commission for Labour Law (J.L. 2016, item 1366).[125]

According to the concept introduced in the draft from 2007, the aim of the Labour Code is to regulate employment in the framework of the employment relationship. However, it has been emphasised in the first article of the drafted Labour Code that "*to the extent necessary to protect work, the Labour Code regulates "employment" (zatrudnienie) based on other legal relationships than the employment relationship*". The employment relationship has been defined as a relationship between an employee and an employer in which the employee obliges himself/herself to perform specific work personally under the supervision of the employer and on at their own risk, and the employer obliges themselves to employ the employee for remuneration (article 44 (1) of the draft). The draft indicates only two legal bases for the employment relationship – a nomination and a contract of employment (article 45). Article 462 (1) defines the notion of "'employment' other than on the basis of the employment relationship" that is, an employment-like work relationship (*zatrudnienie niepracownicze*) as a situation in which a person is employed on the basis of a contract other than an employment contract, performs work personally of a continuous or repeated nature, for one hiring entity, for remuneration which exceeds half of the statutory minimum wage (hereafter referred as "a hired person"). According to article 462 (2), the Labour Code provisions that apply to an employee also apply to a person who performs work for a hiring entity and obtains the majority of his/her salary from that entity on the condition that it exceeds half of the statutory minimum wage. According to the justification provided in the Labour Code draft, the reason for applying some labour law provisions to a hired person is the existence of the dependence between such a person and a hiring entity which manifests itself by the fact that the work constitutes the main source of income for the hired person. Importantly, according to the drafted Labour Code a hired person has significantly less statutory protection in comparison with an employee. The essential elements of that protection include: the prohibition of discrimination, the calculation of work period entitlements on the leghth on employment, minimum notice periods, protection against immediate termination of a contract, protection against termination of a contract during pregnancy and for eight weeks after childbirth, maternity leave, limited protection of remuneration, non-paid on-demand holiday leave, healthy and safe working conditions, and the application of collective labour agreements.

As regards the Labour Code draft of 2018, the main emphasis has been put on the assumption that the rights of a working person are human rights. One of the main postulates of the draft of 2018 is the introduction of solutions aimed at minimizing the phenomenon of hiring under a so-called civil contract of mandate in exchange for the introduction of flexible types of employment contracts concerning short-term work. Therefore, according to article 1 (1), the Labour Code regulates human rights relating to the performance of gainful employment and obligations arising therefrom. Gainful employment, as it has been clarified in article 1 (2) of the draft, may be performed within or outside the framework of the employment relationship or on a self-employed basis, unless the Act specifies otherwise. All forms of gainful employment mentioned above have been defined in the draft. Thus, by establishing the employment relationship, the employee obliges himself/herself to perform specific work under supervision of the employer, and the employer agrees to employ the employee for remuneration (article 45). It is worth noting that the Labour Code draft has introduced the legal presumption of the employment relationship. According to article 50, when significant doubts are raised as to whether or not work is performed within an employment relationship or on a self-employed basis, the court shall decide in favour of the employment relationship. What is more, an employer who denies the existence of an employment

124 Polish versions of the Labour Code and Collective Labour Code drafts with justifications.

125 Polish versions of the Labour Code and the Collective Labour Law Code drafts together with justifications.

relationship has to prove that work is not performed under his/her supervision. The introduction of the legal presumption of the employment relationship has been justified by the need for promoting the employment relationship in the context of widespread abuse of employment under civil law contracts. Employment-like work outside the employment relationship (*zatrudnienie niepracownicze*) is defined as a situation in which a person performs work within the organizational structures of a hiring entity, providing that the Act allows for work outside the employment relationship [article 7 (1)]. A self-employed person, in turn, has been defined as a person performing work within an economic activity which he/she is pursing or outside such an economic activity, and the Act is to determine whether a self-employed person performs work within or outside his/her economic activity (article 7 (4)). The notion of "a self-employed person" has been narrowed down by article 177 (1). This article defines "an economically dependent self-employed person" who provides services by himself/herself directly to a specific entrepreneur, an entity other than an entrepreneur or an agricultural enterprise on average for 21 hours per week within a period of 182 days. A self-employed person loses the status of economically dependent self-employed after each period of 91 days during which the number of hours of services is lower than an average of 21 hours per week. The draft of 2018 has extended some protection mechanisms traditionally applied in the case of an employee to an economically dependent self-employed person without reclassifying the latter as an employee. We are talking about the protection of remuneration for providing services (the minimum amount of remuneration, the date of payment), minimum notice periods, a right to days off, protection against the liability for not performing services in cases of sickness, pregnancy, in the period of eight weeks after childbirth and of using the maternity allowance, and the application of a collective labour agreement.

In conclusion, in both Labour Code drafts the concept of the employment relationship generally remains the same. The most important feature of the employment relationship is still an employee's subordination to an employer. The need for statutory and collective labour protection of a hired person other than an employee, including self-employed persons, also has been recognised. Thus, in the drafts some selected protective measures traditionally applied to an employee have been extended and applied *mutatis mutandis* to non-employees.

It should be emphasised that neither of the Labour Code drafts are binding law. Thus, currently, there is no legal definition of a hired person, a worker or a self-employed person in the Polish Labour Code. However, there are statutory laws specific to the Labour Code which contain some protective measures that apply to persons working outside the employment relationship, modelled on protective mechanisms traditionally applied to employees.

The piecemeal statutory protection of a hired person other than an employee includes, for instance, the protection of their claims against an employer's insolvency. The Act of 13 July 2006 on the Protection of Employee Claims in the Event of Insolvency of an Employer[126] was one of the first pieces of legislation that recognised the need for the protection not only of an employee's claims but also those of persons hired on the basis of civil law contracts. According to article 11 of this Act, in the event of an employer's insolvency, employees' claims are covered, within the limits set by the Act. For the purpose of applying article 11, an employee is understood more broadly than in the Labour Code. Pursuant to article 10 of the Act on the Protection of Employee Claims in the Event of Insolvency of an Employer "an employee" means an individual (a natural person) who is employed on the basis of the employment relationship, a cottage industry contract (*umowa o pracę nakładczą*), a civil law contract such as an agency contract, a contract of mandate, or a contract for the performance of services or performance of gainful employment on a basis other than an employment relationship for an agricultural co-operative – if, in this respect, he/she is subject to the pension and disability insurances obligation, with the exception of a domestic help employed by an individual (a natural person).

The next legislation, in chronological order, that has been adopted regarding the need for the protection of a person hired outside the employment relationship is the Act of 3 December 2010 on the Implementation of Some Regulations of European Union Regarding Equal Treatment.[127] As a rule, in accordance with its article 4 paragraph 2, the Act applies to conditions of taking up and pursuing an economic activity or professional activity, in particular on the basis of a civil contract. It prohibits the discrimination of individuals in respect of gender, race, ethnic origin, nationality, religion, creed, belief, disability, age or sexual orientation. The person against whom the principle of equal treatment has been violated has the right to compensation. Moreover, in the case of discrimination based on the above Act, the reversal of the burden of proof is applied. So, a person claiming to be discriminated against must prove the likelihood of discrimination, whereas the defendant should demonstrate that the alleged discrimination did not take place to absolve himself/herself of liability.

Another example of extending labour law protective measures to a hired person other than an employee

126 Consolidated text, 22 November 2019, J.L., item 7, with further changes, 2020.

127 Consolidated text ,18 November 2020, J.L., item 2156, with further changes, 2020.

constitutes the introduction of the statutory minimum hourly salary rate. The Act of 22 July 2016 on Amending the Act on Minimum Wage and Other Acts[128] introduced a minimum hourly salary rate defined as a minimum amount of salary for each hour of performing a mandate or providing services to which the person accepting a mandate or providing such services is entitled. It is therefore essential to note that the Act of 22 July 2016 introduced a legal definition of "a person accepting a mandate or providing services" (*osoba przyjmująca zlecenie lub świadcząca usługi*) that applies solely for the purpose of the Act of 10 October 2002 on Minimum Wage.[129] Thus, "a person accepting a mandate or providing services" is: (a) an individual (a natural person) pursuing an economic activity registered in Poland or in the country other than a member of the EU or EEA, who does not hire employees nor contractors, or (b) an individual who is not pursuing an economic activity – who accepts a mandate or provides services on the legal basis of a civil contract mentioned in article 734 (a contract of mandate) and article 750 (a contract for provisions of services) of the Civil Law Code, for an entrepreneur or other organization unit within the framework of activities pursued by them.

The measures aimed at protecting the salary of a person accepting a mandate or providing services' include: (1) a statutory minimum hourly salary rate set annually together with the statutory guarantee that the salary of a given person accepting a mandate or providing services will not be lower than the amount resulting from the application of a statutory minimum hourly salary rate, (2) a prohibition on waiving or transferring the right to a salary of the amount resulting from the application of the statutory minimum hourly salary rate, (3) the duty to pay the salary in cash on a regular monthly basis (the latter in the case of a contract lasting more than one month) of the amount resulting from the application of the statutory minimum hourly salary rate. It has to be clarified that there are many exceptions to the protective mechanisms mentioned above. For instance, they do not apply to contracts of mandate or for the provisions of services if a person accepting a mandate or performing services decides on the place and time of performing the mandate/services and is entitled to a commission fee in return for his/her work/services (article 8d (1) paragraph 1 of the Act on Minimum Wage).

The most recent changes aimed at the extension of labour law's protective mechanisms to a hired person other than an employee have been introduced by the Act on 5 July 2018 amending in particular the Act on Trade Unions, the Labour Code and the Act on Resolving Collective Labour Disputes.[130] The Amending Act (the majority of its provisions) entered into force in January 2019. Generally speaking, the main amendment concerns the personal scope of the freedom of association, the right to collective bargaining and the right to strike. The Act introduced into Polish collective labour law the notion of "a person performing paid work" (*osoba wykonująca pracę zarobkową*). "A person performing paid work" is understood as an employee (within the meaning of the Labour Code) or a person performing work for remuneration on a basis other than the employment relationship, on the condition that he or she does not employ for that kind of work other persons, and has such rights and interests connected with the performance of work that may be represented and protected by a trade union. Thus, the definition is broad enough to include those who perform work under civil contracts such as a contract of mandate, an agency contract, a contract for providing services or a contract for a specific task. It should be once again noted that these civil law contracts are quite popular in Poland, mainly for fiscal reasons. For instance, the work performed under a contract for a specific task generally is not subject to the social insurance system, so it is not connected with the duty to pay social contributions by any of the contractual parties. It is worth adding that civil law contracts are also the legal basis for the provision of work/services by the self-employed. Thus, the definition above also covers a self-employed person, including a dependent self-employed person. It should be emphasised that the dependence (in particular, economic dependence) between a hired person and an entity that hires him/her does not constitute a criterion for defining the scope of the notion of "a person performing paid work". As a result of amending the Act on Trade Unions, a person performing paid work may enjoy freedom of association (both the freedom to participate in setting up a trade union and to join a chosen trade union). Consequently, her/his legal status may be subjected to collective bargaining and regulated by collective labour agreements. To be precise, according to article 21 (3) of the Act of 23 May 1991 on Trade Unions,[131] the regulation of the Labour Code concerning collective bargaining and collective labour agreements applied equally to persons performing paid work other than employees. Additionally, their rights and interests may be the subject of a collective labour dispute and consequently they may exercise the right to strike (amendments introduced by the Act of 5 July 2018 to the Act of 23 May 1991 on Resolving Collective Labour

128 J.L., item 1265, 2016.

129 Consolidated text, J.L., item 2207, 13 November 2020.

130 Act on Amending the Act on Trade Unions and Other Acts, J.L., item 1608, 5 July 2018.

131 Consolidated text, J.L., item 263, 12 February 2019.

Disputes[132]). It is too early to assess the effects of these new laws. However, many scholars have already pointed out the lack of precision of the amended provisions, mainly the vague wording of the definition of "a person performing paid work", together with theoretical and practical problems with the equal application of the Labour Code provisions concerning collective bargaining and collective agreements to persons other than employees. The main question is that of the legal effect of collective labour agreements on civil law contracts (Pisarczyk 2019, 399–406; Raczkowski 2019, 358; Pawel Czernecki et al. 2022). Another issue concerns the application of a collective labour agreement to the self-employed in the context of antitrust laws (the issue explained is further in the CJUE judgment of 4 December 2014 in *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, Case No. C-413/13; ECLI: EU: C: 2014:2411).

To sum up, as a result of the piecemeal legislation, at present, in Polish labour law there are many different definitions regarding a hired person, each of which applies for a different purpose. There are separate definitions for the purpose of protection against an employer's insolvency, salary protection and for the purpose of collective labour law. These definitions appear to be detailed such that one cannot say that they lack clarity. Taking all these factors together, the emerging sophisticated picture of legal statutory protection of workers other than employees does not increase their legal protection. It could be said that recent decisions of the Polish legislator paint a picture of labour law in transition from the labour law of an employee (understood as a party to the employment relationship) to the labour law of all who work.

132 Consolidated text, 27 January 2021, J.L., item 123, 2020.

6. From employment protection to work protection: A Romanian perspective, *Raluca Dimitriu*

6.1 The starting point: A landscape of precarious work in Romania

In Romania, as in other communist countries, before 1989, work almost always was carried out within the limits of the standard employment contract. In fact, performing work was not an option. "Working people in towns and villages" were required to view work as a "duty of honour", according to article 5 of the Romanian Constitution of 1965. Failure to get a job was considered to be a punishable misdemeanour.[133]

Only with the return to democracy could the freedom to work be fully exercised, both in its positive form (as the right to work) and in its negative form (as the right not to work). Employment contracts have diversified and, although the Romanian legislation still retains some rigidity in relation to new contractual arrangements, atypical employment contracts have taken their place in the field of employment relations.

Some of these contractual relations offer more safety than others. Some of these provide workers with certain stability and predictability, while others do not. Some provide protection from risks and allow a decent retirement, while others keep workers in a vulnerable situation. The Romanian legislation seems outdated in its approach to limiting the degree of vulnerability of workers. It is a daily struggle that must be undertaken to ensure a decent standard of living for workers, but it must be emphasized that the existence of precarious work is the price for the freedom to work: only in authoritarian societies, where freedom to work is lacking, can precarious work be completely removed.

- Precarious work is not really the opposite of the standard agreement. On the contrary, agreements concluded on a project basis, part-time labour agreements meant to combine professional options with private options, flexible working schedules and so on may be ways to flexibilize contractual arrangements that are desirable for both parties and for the labour market in general. The issue of precarious work appears when the worker cannot choose a certain agreement form freely. This is the moment when contractual freedom is over, and the worker is subject to increased vulnerability.
- Precarious work is generally described in terms of low wages, low labour safety, limited control of conditions at the workplace, low protection against risks affecting health and safety at the workplace and low chances for professional training and career progression (Rodgers and Rodgers 1989, 56). In this perspective, we can see that, in Romania, even workers who perform regular work, based on a standard employment contract, may be exposed to a certain risk of precariousness. Regardless of the contractual form chosen, work ceases to be decent work when it does not allow the worker to ensure a stable and sustainable existence. Taking all this into account, the collateral phenomena of precarious work can be identified: a certain deficit of work dignity, lack of information to employees about the employer's decisions that could directly affect them, deficiencies in ensuring health and safety at work, lack of professional training, discriminatory treatment and an absence of equal treatment.

The unfortunate trend of job insecurity has been exacerbated in the context of the Covid-19 crisis. Many employment contracts were suspended, and with the

133 Decree No. 153/1970 for establishing and sanctioning contraventions regarding the rules of social coexistence, public order and peace. No. 33, 30 April 1970 sanctions a series of deeds "committed by persons who evade the citizen's duty to ensure their livelihood through work, tending to the practice of a parasitic way of life."

introduction, by law, of the shortened work week,[134] many employees have found themselves receiving a fraction of their former salary. Although, in theory, such workers fell in the category of standard employees, based on full-time and open-ended contracts, they faced financial and contractual unpredictability that is the attribute of precariousness.

The landscape of precarious work in today's Romania is therefore extremely diverse; from undeclared and under-declared work to casual work, and from work mislabelled as "independent" to atypical work – various categories of staff are affected by the wave of precariousness that is spreading in many parts of the world. The following are some of the ways in which work is performed that can lead to precariousness.

6.1 Undeclared and under-declared work

The most obvious category of unprotected worker is the worker who performs undeclared work. Against the backdrop of the multiplication of contractual arrangements that escape from the constraints of traditional labour relations, undeclared work is a violation of legal and fiscal obligations to which all participants are often complicit: both the employer and the employee, and sometimes even the public as consumers of products that are cheaper as a result of untaxed work. The higher the fiscal burden, the stronger the temptation to avoid registration of activities according to the legal provisions (Dimitriu 2018, 203).

- As a solution to this, the Romanian legislature has extended the scope of undeclared work. In Romania, Government Emergency Ordinance No. 53/2017,[135] amended the Labour Code by introducing a definition of the concept of undeclared work that far exceeds the usual limits of the notion. Thus, according to article 15.1 of the Labour Code, undeclared work is today:

a) The employment of a person without the conclusion of an employment contract in written form on the day before the beginning of the activity.

In most legal systems, this is where the definition of undeclared work stops. But the Romanian legislation continues:

b) The employment of a person without recording the employment contract in the general register of the employees no later than the day before the beginning of the activity. In other words, work that is performed under a written but unregistered contract is considered undeclared and sanctioned accordingly.

c) Calling an employee to work during the period when his employment contract is suspended.

d) Calling an employee to work outside the working hours established under the part-time employment contracts.

This provision starts from the assumption that, since the contract was part-time, the work carried out outside this fraction of the contract takes place outside the contractual boundaries, so the worker is virtually without contract.

We are therefore dealing with a wide range of activities that are considered to be performed outside the contract of employment, and most checks carried out by the labour inspectorate aim to impose fines for these situations. Moreover, in 2021[136] the notion of "under-declared work" was introduced in the Labour Code, defined as the actual payment of a net salary higher than the one recorded in the payroll statements and in legal declarations. In case of under-declared work, there is a written and registered employment contract, yet this only partially corresponds to the reality of the relations between the parties. Under-declared work is also consistently sanctioned with fines.

6.1.2 Disguised subordinate work

In an attempt to ensure the protection of workers against precarious arrangements of work, the Romanian legislature has opted for strict regulations and punitive measures in the case of non-compliance with legal rules by employers. However, the effect was not as expected: a large number of workers migrated from the sphere of labour relations (that is, from the protective umbrella of labour law) to that of civil law relations. Thus, the so-called "collaboration contracts" were more frequently concluded, which are in fact employment contracts disguised in the form of civil contracts. Therefore, the fight has moved from the front of ensuring superior protection for employees, to the front of revealing the true legal nature of the contract of those who work.

134 Implemented by Emergency Ordinance No. 132/2020 on support measures for employees and employers in the context of the epidemiological situation caused by the spread of SARS-CoV-2 coronavirus, as well as for stimulating employment, published in the *Official Gazette,* No. 720 of 10 August 2020.

135 *Official Gazette*, No. 644, 7 August 2017.

136 Emergency Ordinance No. 117/2021 amending and supplementing Law No. 53/2003 – the Labour Code, *Official Gazette,* No. 951, 5 October 2021.

Bogus self-employed workers are people who formally enter into a civil contract that, in fact, disguises in a substantive way, an employment contract.

Sometimes the classification of the nature of the relationship between the parties is objectively ambiguous, other times it is deliberately obscured (Rosioru 2013, 19).

Article 4 (b) of the Employment Relationship Recommendation, 2006 (No. 198) provides that national policy should at least include measures to "combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status", noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due.

Such policies are difficult to articulate, much less to implement. The Romanian legislation includes criteria for identifying a dependent employment relation; however, they are not established within the rules of labour law but of fiscal law.[137] At the same time, the purpose of these rules is not to ensure the protection of the worker who performs activity on the basis of a false civil contract but only to direct to the state budget the taxes and contributions corresponding to the salary income. The fiscal control bodies carry out the reclassification of the income as coming from an employment contract.

However, sometimes it is the labour law courts that reclassify the civil contract, based on the very definition of the employment contract, when they find the presence of elements that undoubtedly lead to the conclusion of a subordinate relation between the parties. For example, in the case of a driver employed as an independent contractor at a sports club, he was declared to be an employee, given the purpose of the contract, the explicit reference to the job description, the imposition of a workplace, a program of activity and the form established for remuneration.[138]

In another case, the employment contract concluded with a security guard expired and, thereafter, the parties signed a collaboration contract (that is, civil contract). 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. 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.[139]

Even though such incipient case law exists, it would be useful for the Romanian courts to have some legal criteria contained in labour legislation and adapted from the perspective of labour law, so that they do not have to rely solely on ILO Recommendation No. 198 (2006) on the rules of tax law and on common sense. As shown, by relying on the facts, instead of the contract's wording, as the legal basis to determine the classification of the working relationship, the classification mechanism could become more factual in nature rather than purely formalistic (De Stefano et al. 2021).

Precariousness can therefore arise not only from the content of the contractual arrangement but also from its fictitious character, with the employee falsely wearing the clothes of a self-employed person. Indeed, a significant number of employees has been transformed into self-employed and bogus self-employed workers. They return to the labour market in a new position, which not only exposes them to vulnerability and precariousness but also is perceived by other workers as a danger – a form of unfair competition.

A particular category of so-called independent workers is that of platform workers. Many of them are hired on civil contracts, thus lacking the protection that labour law can provide. This is the trend everywhere in Europe, where nine out of ten platforms active in the EU currently are estimated to classify people working through them as self-employed (European Commission 2021). They are in a subordinate relation to the beneficiary of the work, while the platform does not acknowledge its status as employer. It takes a step back and designates the client as the beneficiary of the work. The worker is not in direct contact with their employer (which is an abstraction, a "digital platform"), but with customers: the worker responds

137 According to Romanian Fiscal Code, article 7 (3) (Law No. 227/2015, *Official Gazette,* No. 688, 10 September 2015) independent activity (self-employment) 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; 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.

138 Constanța Court of Appeal, Civil Section I, Decision No. 18, 2016.

139 Alba Iulia Court of Appeal, Decision No. 1093, 2018.

to the customers' requests, is under their control and is evaluated by customers through the rating system of the business.

In Romania, the problem of platform workers is far from being addressed. In essence, they conclude civil contracts, and the new alternative transport legislation (Uber-type)[140] does not include more favourable provisions, nor does it establish presumptions regarding the existence of an employment contract.

Nonetheless, it is to be hoped that the situation will change with the entry into force of the forthcoming European Directive on improving working conditions in platform work.[141] According to the draft of this new European directive, the contractual relation between a digital platform and a person carrying out activities through that platform is presumed to be an employment relationship. This is, of course, a rebuttable presumption, which can be overturned by either party. But by establishing this presumption, the numerous civil contracts, in which the service provider is not, in fact, a self-employed person, will be brought back into the sphere of labour law.

6.1.3 Telework

In the case of teleworkers, the Romanian legislature has taken a step towards flexibility. The law on telework[142] regulates this form of work performance in a rather permissive way (compared to standard work) and currently[143] no longer requires the contract to include a provision on the actual place of work. Such work can therefore be performed from anywhere, and the employer does not have to be informed regarding the space in which the worker decides to carry out the activity. However, there is also a flip side: unaware where the work is carried out, it is difficult for the employer to fulfil his/her obligations to ensure the health and safety of the worker. Unions have expressed dissatisfaction with the precarious position of the worker as a result of this development.[144]

In case of the teleworking activity, the employment contract includes, in addition to its general elements, the period and/or days when the teleworker carries out his/her activity at the workplace organized by the employer, as well as the means of recording the hours worked by the teleworker.

In Romania, the concept of on-call work does not exist, nor is there a legal possibility to oblige employees to remain available after working hours. In case law, there are actions by which the employee claims payment for hours of work performed via teleworking after working hours, as well as "compensation for his [or her] deprivation of the benefit of the 24 consecutive hours of rest granted by national and international law to restore working capacity for each period of seven days of work performed".[145] Therefore, in theory, the rules on working time are fully applicable to teleworkers. However, notably, Romanian law does not include the worker's right to disconnect. As a result, teleworkers may be pressured to respond to messages and requests, even outside of business hours, with a profoundly negative impact on their free time and its predictability. Thus, some collective bargaining agreements have begun to include protection rules, limiting the employer's ability to affect the employee's free time.[146] But it is a slow beginning; in the absence of a generally applicable rule ensuring the right of the employees to log off, they remain exposed to employer abuse (see Dima and Högback 2020; Marica 2019, 70–78).[147]

As a rule, telework can be performed only with the agreement of both parties. However, during the pandemic, a piece of legislation was passed that allowed employers to decide unilaterally that employees should work from home. Such a decision could create difficulties, especially among employees who did not have the necessary facilities to work from home, and who were forced to sacrifice part of their own home in order to carry out work.

140 Emergency Ordinance No. 49/2019 on alternative transport activities with motor vehicle and driver, *Official Gazette,* No. 537, 1 July 2019.

141 COM/2021/762 final.

142 Law No. 81/2018 on the regulation of telework activity, *Official Gazette,* No. 296, 2 April 2018.

143 As a result of the amendment by Government Emergency Ordinance No. 36/2021 regarding the use of the electronic signature in the field of labour relations and for the modification and completion of some normative acts, *Official Gazette,* No. 474, 6 May 2021.

144 We consider that the elimination of the explicit provisions regarding the workplace(s) where teleworkers can carry out their activity weakens the control capacity of the Labour Inspectorate regarding the violation or abuses of employers in respecting the telework activity. We draw attention mainly to the risk of developing the phenomenon of partially declared work and especially to working overtime in undeclared and unpaid telework, possibly even beyond the limits imposed by labour law.

145 Cluj Court of Appeal – Section IV for Labour Disputes and Social Insurance Decision, No. 893/2017, 29 June 2017.

146 For example, Single Collective Labour Agreement, article 36, paragraph 2, at the level of groups of units, the system of mutual aid agencies of employees, Official Gazette, Part V No. 1, 29 January 2020, provides: "Any visit or task submitted by the employer after the working hours, with performance on the same day, is considered overtime and will be treated as such according to law." Similar provisions may be found in the collective agreement concluded at the level of group of units in the financial sector (2019-2021).

147 In the literature, the right to log off is only mentioned for informational purposes, by reference to comparative law, without formulating the proposal for its introduction in the Romanian legislation.

Finally, it should be pointed out that one of the key features of the telework contract is the reduction of the element of subordination. Tele-employees ("tele-workers" or "click-workers") benefit from a functional autonomy superior to that of standard employees, their relationship with the employer being predominantly virtual. As a result, the traditional criteria for differentiating between dependent and self-employed work are no longer fully applicable. Thus, the teleworker may find himself or herself in the situation of a debtor of a performance obligation (like a service provider with a civil law contract), but in a position of apparent dependence. The differences between the employee and the economically dependent worker grows dimmer; legal dependence gives way to economic dependence.

6.1.4 Domestic work

The International Labour Organization adopted the Domestic Workers Convention (No. 189) and the Domestic Work Recommendation (No. 201) in 2011, aiming, *inter alia*, to facilitate the organization of domestic workers and their employers. Furthermore, the European Commission has presented a proposal for a Council Decision authorizing Member States to ratify this Convention of the International Labour Organization.

The Convention defines domestic work as work performed in or for a household or households, and the domestic worker as any person engaged in domestic work within an employment relationship. On the contrary, a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker.

Romania has not ratified the Convention, despite proposals to that effect. In our opinion, the reluctance of the political decision-makers to ratify Convention 189 is not caused by the current state of labour law. On the contrary, Romanian law makes no distinction between work performed for the benefit of a legal person and that performed for the benefit of a natural person; it does not include discriminatory distinctions between the activity of domestic staff and other types of activities, and it does not limit the responsibility of employers of such a category of personnel compared to that deriving from other employment contracts. However, the problem stems from the difficulty to monitor, collect statistical data and especially to control undeclared work. Indeed, the difficulties are not caused by the situation of legally concluded and registered contracts, but by the activity performed by domestic staff in the absence of such contracts.

6.1.5 The vulnerable position of the worker in case of multiparty work

In practice, the employment relationship no longer assumes only two actors, that is, the employer and the employee, but may also involve a third participant, who either controls the employer, uses the employee's work directly or intervenes in some way in the contractual relationship between the two. The problem is that such a third party often does so without assuming any responsibility in relation to the employee, because they do not have the formal status of employer.

Such triangular work relations have varied forms. From temporary work to the outsourcing of workers, and from transnational postings to franchise relationships, employees become subject to the demands of a third party, who retains a right of control over the workers and scales their rights. In Romania, few of these multiparty work relationships are properly regulated, and often go under the "radar" of the authorities. Even when such regulations exist, they fail in their attempt to effectively protect the worker.

- Jurisprudence in Romania has not developed specific tools for identifying subcontracting relationships, and the protection of employees is also done according to the pattern of the typical employment contract, in which the only person responsible for worker's rights is the direct employer.
- The typical example of multiparty work is **temporary agency work**. In Romania, the temporary employment contract is regulated in the Labour Code, by rules transposing the Temporary Agency Work Directive 2008/104/EC. However, the position of the temporary worker remains fragile. The user (who does not have the status of employer) can give up their services at any time, under the terms of the sourcing contract concluded with the temporary work agency[148] and to which the employee is not a party, sometimes not even knowing its content. When the user renounces the services of the temporary employee, it will prompt the termination of the commercial contract concluded by the user with the temporary work agency. However, the employment contract between the temporary worker and the temporary work agency may continue. The temporary employee may be sent on several successive assignments in the performance of the same contract concluded with the temporary work agent. But what is the legal status of the employee between assignments?

148 Labour Code, article 95 (4): The temporary employment contract terminates at the end of the mission for which it was concluded or if the user renounces its services before the end of the mission, under the terms of the sourcing contract.

National legislation does not expressly oblige the temporary work agency to pay the worker between assignments; the law only provides that the worker has to remain at the disposal of the temporary work agency. In practice, temporary workers often go on unpaid leave between assignments. Thus, this lack of predictability exposes temporary workers to job insecurity and precariousness.

In Romania, Law No. 67/2006 transposed the Transfer of Undertakings Directive No. 2001/23/EC into national legislation. However, in cases where the conditions of a transfer of undertakings[149] are not found, we may deal with an **outsourcing of activities**, when the protection rules laid down in Law No. 67/2006 are not applicable, because no transfer of assets or takeover of staff took place.

After outsourcing an activity, the transferee company will be able to send its own employee to carry out the same activity that the employee of the transferring company initially carried out. This does not necessarily imply the conclusion of a temporary work agency contract. On the contrary, the employee can be sent to carry out permanent activities, by establishing the job within the transferring company (for example, carrying out cleaning activities, after outsourcing these activities).

Since she/he is not a temporary agency worker, the employee of the transferee company will not benefit from the provisions of article 5 of the TAW Directive concerning the principle of equal treatment between temporary agency workers and those directly recruited by the undertaking to occupy the same job, which has been transposed into the Romanian Labour Code. As a result, she/he may have worse working conditions than the original employee or another employee directly recruited by the transferring company. Furthermore, neither will the provisions of the collective labour agreement at the level of the company that outsourced the activity be applicable.

Under the right circumstances, outsourcing thus can circumvent the provisions on the transfer of undertakings and those on TAW legislation.

The possibility of outsourcing also makes the company's initial employees vulnerable. They may lose their jobs and their activity be performed either by freelancers or by employees of a company with which the initial employer has concluded a service contract. Unlike in the case of the transfer of the company, in the case of outsourcing there are no restrictions on the dismissal of the initial employees. In general, the courts limit themselves to finding that the position no longer exists in the organization chart, without analysing the outsourcing decision, which is considered by the exclusive prerogative of the employer.[150]

According to Romanian law, **franchising** is a system of marketing products and/or services and/or technologies, based on an ongoing collaboration between legally or financially independent individuals or legal entities, through which a person, called a franchisor, grants another person, called a franchisee, the right and imposes the obligation to operate a business, in accordance with the concept of the franchisor.

The franchisee uses their own employees, and Romanian law does not place any responsibility on the franchisor in relation to them. However, in practice the franchisor participates in the recruitment and training of the franchisee's employees and exercises some control over the personnel policies of the franchisee.

The franchisee's freedom to employ, dismiss and bargain collectively with their own employees is sometimes limited by the franchisor's right to control some of their human resource decisions. If the franchisee decides to dismiss employees, for reasons unattributable to them, the judicial analysis will focus on the real and serious cause of the dismissal strictly in relation to the franchisee, even if the decision to dismiss is imposed by the franchisor upon the franchisee.[151]

Also, in practice, the salary rights for each position are established by the franchise agreement, which limits the possibility of individual or collective bargaining at the level of the employer (see Lokiec 2017, 79).[152]

149 Understood as "transfer from the ownership of the transferor to the ownership of the transferee of an undertaking, business or part thereof, with the aim of continuing the main or secondary activity, whether or not it seeks to obtain a profit".

150 See Cluj Court of Appeal – *Section IV for labour and social insurance disputes* decision No. 1381/2020 of – Labour disputes – appeal on dismissal 7 December 2020. In Ploiești Court of Appeal decision No. 1067, 25 May 2010, the court of first instance had ruled that the reduction of activity could not be merely a pretext for the dismissal of an employee, and his dismissal could not be followed by the conclusion of a service contract with another company providing in the object of activity exactly the same duties that the fired employee previously performed, because then there would be no real and serious ground for dismissal. However, the Court of Appeal Ploiești ruled that "in order to retain the real and serious cause of the reorganization, it is sufficient for the employer to pursue the efficiency of its activity in order to use human and financial resources with maximum efficiency, being the exclusive attribute of the employer to decide the organization of its activity. (...) The employer is free to manage the personnel policy in the directions he deems appropriate for the efficiency of the activity."

151 For example, Cluj Court decision No. 2343, 6 November 2020, where the dismissals were determined by the franchisor's decision to close a number of 19 stores in Romania. However, it should be noted that, in that case, the dismissals were upheld by the court also on the basis of the evidence of a decrease in the franchisor's sales figures.

152 For example, Hunedoara Court Decision No. 1631, 2 October 2018, the salary levels were included in the franchise agreement. The legal literature considers that limiting the franchisee's employees' ability to bargain collectively should entail the franchisor's liability in the employment relationship between the beneficiary and the employees.

6.1.6 Workers on probation

The protection of employees during the probation period is a persistent concern for labour law theory and practice because the rules for protection during this period when the worker is most vulnerable can be quite easily circumvented.

During or at the end of the trial period, either party may terminate the contract following a simple notification without notice. Termination is not subject to any prior procedure. If the initiative to terminate the contract is made by the employer, there is no need to provide reasons for the termination and/or to follow the normal procedure for dismissal.

The probationary period is therefore a time of utmost vulnerability for the employee when his/her contract (although concluded) may be terminated at any time by a simple written notice. Employees on probation are, in principle, the subject of precarious work because of the unpredictability of their employment relationship. The employer's ability to terminate the contract at any time undermines the premise of work stability which generally characterizes the employment contract. That is probably the reason that Law No. 283/2022,[153] which amended the Labour Code in December 2022, introduced article 62 (4), which also concerns dismissal during or at the end of probationary periods. Such provision states that employees who consider they have been dismissed for exercising their rights may request the employer to provide, in writing, the reasons on which the decision to terminate their employment was based. The legislature seems to have intended to ensure that employees whose contracts are terminated during or at the end of the probationary period may request a justification for the termination. This justification is not the same as that owed by the employer in the case of dismissal but rather a summarized justification intended to dispel the suspicion that the termination did not occur for reasons related to the employee's abilities.

6.1.7 Workers who are not employees

Some contracts under which subordinate work is performed do not constitute employment contracts and are therefore not subject to the Labour Code. They are contracts akin to the employment contract, which the legislature has chosen to regulate by special laws. This is the case, for example, for day-labourers or interns who are not employees but benefit from a number of protective labour rights. Likewise, under the provisions of the Romanian legislation,[154] cooperatives conclude an agreement analogous to an employment contract, without the workers actually being employees.

The legislation applicable to day-labourers[155] has been amended no less than 9 times in the last 12 years, while the legislature is trying to find effective ways to protect them from abuse. Theoretically, day-labourers are exposed to precarious work and vulnerabilities of various kinds. Therefore, the law protects them, and it does so more precisely by imposing so many tasks and responsibilities on the employers of day-labourers' work that the hiring of day-labourers is disincentivized.

Regarding interns, things are not radically different. They conclude an internship contract,[156] which, although not an employment contract, offers them certain labour rights, especially with regard to working time and remuneration, while also imposing significant obligations on the employer. In practice, however, informal, unpaid internships are more widely used than those governed by law.

This seems to be one of the most difficult issues in policies against precarious work: how is it possible for the worker to be protected against precariousness and abuse, without the employer being so overwhelmed by tax and bureaucratic burdens that they abandon such contracts altogether? Likewise, how can the contractual freedom of the parties and their right to choose their own contractual formula be preserved, without the employer using this freedom for the purpose of coercing and exploiting the worker?

That is why it is difficult to find effective solutions: the labour market reacts like a living organism, often in unexpected ways.

153 *Official Gazette,* No. 1013 of 19 October 2022.

154 Law No. 1, 2005 regarding the organization and functioning of cooperatives, *Official Gazette*, No. 368, 20 May 2014, and Law No. 566/2004 of the agricultural cooperative, *Official Gazette,* No. 1236, 22 December 2004, as subsequently amended.

155 Law No. 52/2011 regarding the performance of occasional activities carried out by day-labourers, *Official Gazette*, No. 947, 22 December 2015.

156 Regulated by Law No. 176, 2018 regarding the internship, *Official Gazette*, No. 626, 19 July 2018.

6.2 Work relationships and collective bargaining

Workers' vulnerability, caused by poor regulations or circumvention of legal rules at the individual level, can be offset by a strong collective response. Collective bargaining is a source of balancing regulatory shortcomings.

The problem is that, in Romania, collective labour relations have become increasingly unstructured, so that workers, and especially those who have concluded atypical employment contracts, hardly can find protection in the solidarity that originally founded the collective labour law. Indeed, the shift to atypical and unconventional work relations has diminished the unity of the workers and the possibility for them to organize collectively.

The shortcomings of collective bargaining and social dialogue as a whole have consistently been the subject of the Country Specific Recommendations received by Romania in the context of the European Semester. The recommendation to strengthen social dialogue is repeated year after year, almost identically,[157] and the COVID-19 crisis has only highlighted, once again, the deficiencies of this dialogue.

There are many debates on the role of the legislature in relation to social dialogue. Essentially, when it intervenes in the space of social dialogue, legislation may in some cases *allow* the social partners to build their own legal constructions and in other cases may *stimulate* the creativity of social partners, encouraging self-regulation. Basically, in Romania the legislation does neither. Indeed, in Romania, even more than in other states, there is a deep crisis of collective labour relations, to which both the legislation and the clumsiness of the social partners have contributed, and which has been further amplified by the pandemic. Invigorating collective bargaining and increasing the number of employees covered by collective bargaining agreements (an objective that has never been expressly enshrined in public policies in Romania) will require a significant effort of social solidarity (Dimitriu 2021, 585–596). Some steps have been taken, however, through the adoption of the new Law on Social Dialogue No. 367/2022.[158] Currently, to form a union, a number of at least 10 workers from the same undertaking or at least 20 workers from different undertakings of the same sector are required. Under the previous law, the formation of a union required a number of at least 15 employees from the same undertaking. In addition, the thresholds for obtaining representativeness have been reduced; notably at the unit level, where a trade union is considered representative if it has as members 35 per cent of the total number of employees (compared to 50 per cent + 1, as provided in the previous law).

Despite these advances, globalization, digitalization, competitive relations between workers, pressure from consumers, an increasingly significant image deficit experienced by unions (traditional exponents of employees in collective bargaining), the dissolution of solidarity between workers at the national but also the European level led to a contraction (collapse) of collective bargaining to disturbing levels.

6.3 Looking ahead

Against this background of vulnerability, which affects not only atypical employees but also standard ones, both at the level of individual and collective relations, the concept of a Universal Labour Guarantee can prove to be useful.

6.3.1 Work relation versus employment relation

The first course of action already is promoted by the terminology used in some European directives, avoiding the use of such expressions as employment contract and employee, and favouring broader terms like "employment relationship" and "worker". Indeed, by using the notion of "employment relations", European

157 "The functioning of social dialogue remains limited, in particular at sector level," COM/2020/523 final (Recital 25); "Social dialogue is characterised by low collective agreement coverage, in particular at sectoral level," COM/2019/523 final (Recital 16); "Social dialogue is characterised by a low level of collective bargaining, especially at sectoral level," COM/2018/422 final (Recital 13); "Social dialogue remains characterised by low collective bargaining at sector level and by institutional weaknesses that limit the effectiveness of reforms," COM/2017/522 final (Recital 17).

158 *Official Gazette*, No. 1238 of 22 December 2022.

and international regulations seek to prevent Member States defining the concept of an "employment contract" narrowly, thus removing certain categories of persons from the scope of protective regulations, even though they work on the basis of a legal relation of subordination.

The Court of Justice of the European Union has clarified the European concept of a "worker" and given it a broader meaning. From its case law it follows that Member States may not restrict, by internal rules, the meaning of that concept, given that the purpose of the acts of the Union using that concept is to provide extensive protection to this category. The *sui generis* legal nature of an employment relation from the point of view of national law cannot have any effect on the status of the worker within the meaning of European Union law (for developments, see Voinescu 2019).

The status of "worker" within the meaning of EU law "is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organizational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work, does not share in the employer's commercial risks, and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking" (see also Risak and Dullinger 2018, 22).[159]

Therefore, in applying the European rules, the national court is thus bound to accept the Union definition to the detriment of any other legal characterization in national law.[160] Regardless of the type of contract a worker concludes, and what it would be called in national law, they would be covered by the social directives when performing work in a dependent relation for a certain period of time in exchange for remuneration.[161]

By using the concept of the "employment relationship", the emphasis is shifted from the legal name of the contract to the substantive aspect of subordination and dependency, which is in fact the justification for the need for legal protection. This paradigm shift can also be noticed in the ILO Centenary Declaration for the Future of Work, adopted by the International Labour Organization on 21 June 2019, which reaffirmed "the continued relevance of the employment relationship as a means of providing certainty and legal protection to workers" (see ILO 2019).

As regards the content of the rights which, in practice, workers should enjoy, even if they do not have an employment relation but only a work relation (that is, whether or not they are classified as employees in national law), a good starting point is Article 31 of the Charter of Fundamental Rights of the European Union, which provides that every worker has the right to working conditions which respect his or her health, safety and dignity, a limitation of maximum working hours, daily and weekly rest periods and an annual period of paid leave.

An important step towards redefining workers in an inclusive way, covering all categories of people in a work relation (that is, not only employees but also domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices) was the adoption of Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union. According to its provisions, the right to information must be among the rights generally applicable to workers.

This integrative approach can also be used by the national legislator. For example, in Romania, the category of workers includes day-labourers, interns, apprentices, temporary workers, members of cooperatives, athletes with a sports contract – regardless of whether the contract under which they work is an employment contract, a civil contract or a *sui generis* contract. They carry out their activity on the basis of an employment relation and, according to article 1 (2) of the Labour Code, are governed by the provisions of the Labour Code insofar as the special laws do not contain specific derogating provisions.

In future, we could go one step further: the Labour Code could set out a series of criteria that would automatically determine the applicability of labour legislation, regardless of how the contract is specifically named by a special rule or by the contracting parties themselves.

6.3.2 Categories of workers

In summary, we can consider that the landscape of those who perform paid activity includes six categories:

1) employees who have concluded an employment contract. They work on the basis of an *employment*

159 Case C413/13 *FNV Kunsten* and Case C-256/01 *Allonby*.

160 Exceptions are the directives which make express reference to the definition of the concept of employee in national law.

161 Among the cases in which the Court of Justice of the European Union defined the concept of worker, the author mentions: Case 66/85 *Deborah Lawrie-Blum*, Case C229/14 *Ender Balkaya*, Case C428/09 *Union syndicale Solidaires Isère*, Case C413/13 *FNV Kunsten*, Case C232/09 *Dita Danosa*, Case C-216/15 *Betriebsrat*, Case C-256/01 *Allonby*.

relationship and completely fall within the personal scope of European social directives.

2) workers who perform undeclared work, based on a verbal contract and in respect of whom, the labour inspectorate and the court may recognize the quality of an employee, based on the evidence submitted. From the moment the existence of undeclared employment relationship is established, the employer will be sanctioned with a fine, and the workers will have all the rights enshrined in labour legislation.

3) those who are in bogus self-employment and who, once the true legal nature of the contractual relation is revealed by the court, are considered to be employees, having all the related rights, including the right to collective bargaining.

Workers falling under categories 2 and 3 are reclassified as employees, subject to the condition of obtaining a court decision qualifying them as such. Until such a decision is reached, they do not enjoy the rights enshrined in labour legislation. The burden of proving the true legal nature of the work relationship lies with the person challenging its civil law nature, that is, normally **the worker**. Therefore, it would be useful to establish a legal rebuttable presumption of the existence of an employment relationship, in which case the burden of proof essentially would fall on **the employer**.

This is what it is being attempted in the case of platform workers, through the proposal of a European directive on improving working conditions in platform work:

4) persons who carry out their activity on the basis of an employment-like work arrangement, have the quality of "worker" in the European meaning of the concept and perform activity on the basis of a *work relation*. The Labour Code applies to them unless the special legislation contains derogating rules. For instance, the Labour Code, as amended by Law No. 283/2022, provides for the right to information upon the conclusion of a work relationship (even if not based on an employment contract).

For example, in the case of interns, Law No. 176/2018 provides that they have the right to be remunerated with an amount that cannot be less than half of the national minimum wage. Also, daily labourers cannot be paid less than the national minimum wage, in proportion to the number of days worked. Both interns and day-labourers benefit from limited working hours, under the same conditions as the employees.

5) persons who have concluded genuine civil law contracts but who are economically dependent on a single or a small number of principals or clients/ employers for their source of income. This often results in inequality of bargaining power, putting the persons concerned in a similar situation to that of workers (Risak and Dullinger 2018, 7).

6) freelancers in a relation of genuine economic independence to the beneficiary of their work. They do not benefit from the rules of protection of the labour legislation, having a contract governed entirely by civil law. They are exempt from any rules of labour legislation except those generally applicable to contractual relations, such as protection against discrimination.

In our opinion, the category that creates the most legal problems is the fifth. Unlike the third category, these workers did not disguise the employment contract into a civil contract but concluded a real contract for service, so that an action in declaration of simulation would not be admissible in court. As a result, the presumption as to the existence of an employment contract is not useful in their case because, from a legal point of view, the relationship is not one of dependent work. The distinction between the third category of workers and the fifth seems to follow from the CJEU jurisprudence, especially cases C-413/13 FNV Kunsten, to which we will refer below. Therefore, in the following, we will analyse economically dependent workers, trying to assess the extent to which the rules of labour law could become applicable to them.

6.3.3 Economically dependent workers (EDW)

EDW are placed on the boundary between employees and freelancers. Formally, they have entered into a civil contract, which is why it is difficult for them to be covered by labour law. However, the contract they have concluded generates the same type of economic dependence as an employment contract. We consider here the situation where the worker negotiating the contract is not in fact on an equal legal footing in relation to the beneficiary of their work, because the worker lacks the economic independence that would ensure free negotiation. The need for social protection can be *a result* of identifying EDW ("they are in a relation of economic dependence, so they need social protection") or, on the contrary, a *premise* of it ("they need social protection, therefore they are in a relation of economic dependence").

In case of EDW, the concept of Universal Labour Guarantee can prove effective in the attempt to protect them. What could it contain and by what means could it be implemented?

- Solutions are sometimes being sought for ensuring protection in stages: from the heavy core of typical employees, to the categories of people who, although they do not have the quality of employees, should still benefit from a minimum set of rights – the so-called "floor of rights": equal treatment, health protection and occupational safety, protection against

discrimination, fundamental security rights, the right to information, and in some cases minimum wage and maximum working time (regarding the floor of rights in CEE, see Gyulavári 2014, 267–278). This would expand the scope of employment protection beyond the employment relationship to all workers providing work organised by another party (De Stefano et al. 2021).

The most difficult issue in terms of ensuring a floor of rights for EDW is the right to collective bargaining. It has been raised in case C-413/13 (FNV Kunsten Informatie en Media),[162] providing that article 101 TFEU prohibits all agreements among undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Indeed, self-employed persons are subject to competition law. They can only bargain collectively if they are employees who are falsely labelled as self-employed, as the Court of Justice of the European Union has ruled. In this universally competitive field, it is unsurprising that it is competition law which imposes limits on collective labour law.

It has been pointed out that "the assumption that any form of coalition and collective bargaining process of independent contractors would hamper the functioning of the free market, leaving space for unlawful cartels, seems exaggerated" (Aloisi and Gramano 2021; see also Aloisi 2019, 1–41). However, current European legislation does not seem to call into question the possibility for self-employed workers to negotiate collective bargaining agreements. In Romania, the new Law on Social Dialogue No. 367/2022 appears to expand the regulation of social dialogue, unionization and collective bargaining to include dependent workers who do not have an employment contract and even independent workers. However, it is not yet clear how these regulations will be applied in practice.

In order to ensure the protection of EDW, some legal systems have opted for the special regulation of this intermediate category of workers who would perform para-subordinate or semi-dependent work (for instance, the case of Great Britain, Italy or Spain; for an analysis of the categories of economically dependent personnel, see Ticlea 2010, 66). A possible option is the introduction in the legislation of a third category of workers, riding the border between employees and the self-employed. Already the traditional binary classification of work as employment, or independent, has started to be considered "insufficient and rigid" (Ticlea 2010, 71). For example, in Germany the concept of quasi-employees (*Arbeitnehmer*ähnliche Personen) is used; in France (without expressly stating the existence of a "third category of workers") there is a relative equalization of the legal regime of employees and economically dependent workers; both in Italy[163] and in Spain this special category is considered by separate regulations (*trabajadores autónomos económicamente dependenties)* and so on (for a comparative law study, see Dimitriu 2016, 75–78).

Nevertheless, very often the labour market does not follow the logical rules we would expect. Thus, in many legal systems, this legislative innovation has not led to the protection of quasi-independent workers but, on the contrary, to the lowering of the protection of standard employees. Often, in practice, employers have taken advantage of the new laws in order not to grant superior rights to the self-employed and to diminish the rights granted to hitherto standard employees (see Roda 2013, 152). This disturbing trend was the exact opposite of the one envisaged: introducing this intermediate category encouraged employers to conclude seemingly civil contracts, using para-subordinate work which supposedly entails less onerous obligations for the beneficiary of the work and more limited rights for the person performing the work (and who is not actually an employee).

Therefore, it cannot be overlooked that the special regulation of this third category of persons (neither employees nor self-employed) **also poses risks**. There is a concern that some of those who until now were proper employees will migrate to the grey, intermediate zone of quasi-employees. The Italian experience illustrates, to some extent, this risk. Indeed, at one point the Italian government introduced project collaboration agreements to turn bogus independent workers into employees. Immediately, there was a significant increase in the number of "para-subordinate" workers (who until then had been considered employees). These concerns undoubtedly explain why, in some Member States of the European Union, governments or social partners oppose the creation of intermediate categories between the employee and the self-employed.[164]

162 "On a proper construction of EU law, it is only when self-employed service providers who are members of one of the contracting employees' organizations and perform for an employer, under a works or service contract, the same activity as that employer's employed workers, are 'false self-employed', in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU."

163 Here para-subordinate work (*collaborazione coordinata e continuativa*) is recognized in view to ensure adequate remuneration; workers will be entitled to pay in proportion to the quantity and quality of the work and in relation to the wages usually paid on the labour market for that type of service.

164 In this regard, see the Report of the European Economic and Social Committee, *New trends in self-employment: the particular case of economically dependent self-employment*, "Official Journal of the EU", No. C 18, 19 January 2011.

As regards the application of the Universal Labour Guarantee in Romanian law, a possible solution is to open the right to action in court of EDW for their recognition as workers. At present, it is possible to bring an action for the purpose of reclassifying the contract of service into an employment contract. This possibility is relevant for those who are engaged in bogus self-employment. But in the case of EDW, such an action is not admissible, because their contract belongs in fact to civil law, so it could not be reclassified as employment. In these circumstances, it might be considered that there be a right of action for **the reclassification of the status of the person, not of the contract**: by applying the test of economic dependence, the employer would be required to recognize the worker, in the meaning of the concept as defined in European law, with the consequence that national legislation transposing European social directives would be applicable. We refer in particular to the Working Time Directive (2003/88/EC), the Directive on transparent and predictable working conditions (2019/1152), the OSH Framework Directive (89/391/EEC), the Parental Leave Directive (2010/18/EU) and Equality Directives. By shifting the emphasis from the legal nature of the contract to the quality of the person performing the work, the scope of protection provided by labour law can be broadened, without affecting the contractual freedom of the parties.

Such an approach involves the implementation of certain legal criteria for identifying EDW. In legal literature, the following criteria were considered as indicators of economic dependency:

- The services are provided in person; the right to use substitutes is limited or does not make sense economically,
- The work is provided for only one or a very small number of contracting parties. The person concerned therefore does not perform work fully on the market but depends on a limited number of contractual partners;
- Lack of own operating resources and/or employees;
- Restriction on working for other parties;
- Dependence on the earnings for the living of the person concerned (Risak and Dullinger 2018, 8).

Other criteria have also been used over time: lack of a clear organizational separation (work on the employer's premises and/or use the employer's equipment); no clear distinction of tasks (perform the same tasks as some of the existing employees or tasks which were formerly carried out by employees and later contracted out to "collaborators" and the "service" they sell individually to employers falls outside the traditional scope of "professional services" (tasks are simple, do not require specific skills and no professional knowledge or competence is needed) (Pedersinim 2002). A useful example is also the California law ABC test, which presumes that workers are employees unless *the employer* can establish that the worker is:

(a) free from control by the putative employer, both under the contract, and in fact; *and*

(b) doing work that is outside the usual course of business of the putative employer; *and*

(c) engaged in an independently established business.

Such criteria can also be scaled according to the field of activity, in order to offer protection to workers especially in areas where EDW have few standard employment alternatives. By applying the legal criteria, the court would be entitled to remove the service provider from the sphere of civil law and place them in the sphere of labour law.

6.4 Conclusion

Romania is facing a wave of precarious contractual arrangements, amplified by the Covid crisis and by the absence of an articulated social policy. However, simply banning them or increasing punitive measures does not seem to be an effective course of action for limiting the vulnerability of new categories of non-standard workers. Moreover, precarious situations can be encountered even in the case of certain workers with employment contracts, such as probationary employees, teleworkers and, most notably, employees in multiparty work relations. At the same time, fragile social dialogue and unstructured collective bargaining can hardly make up for these disadvantages.

Until now, the Romanian legislature has been particularly concerned about the limitation of undeclared work and tax law issues, ignoring the issue of the effective protection of workers who have not concluded an employment contract but a service contract. While the aspects related to the simulation, namely the employment contract disguised as a civil contract, have been the subject of analysis for the Romanian courts – despite the very limited legal basis available – the issue of EDW concluding a genuine service contract, but which places them in a position of vulnerability similar to that of employees, has not been addressed. Romania still follows the binary

approach: employees and independent contractors. Furthermore, the incipient references to workers without an employment contract included in the amended Labour Code and the Law on Social Dialogue are not completely clear (for example, there is no definition, criteria or list of categories of workers to which these regulations specifically refer).

In this context, it seems useful to extend the concept of the worker and implement the Universal Labour Guarantee so that it also covers EDW, but this will involve legislative changes at the national level and a paradigm shift in national social policies. The establishment of legal criteria for identifying the employment relation and workers, beyond the simple legal definition of the employment contract, would be an effective support to the jurisprudence in its process of reclassification of civil relations as employment, with the consequence of including EDW under the scope of labour law protection.

Once the EDW identification criteria have been implemented, the scope of the protection rules applicable to them would be particularly relevant to the rights enshrined in European directives which include workers in their personal scope.

7. The idea of the universal labour guarantee in the context of Serbian labour law and practice, *Senad Jašarević*

7.1 Introduction

During the 1990s the foundations of labour law unexpectedly began to destabilize. This was influenced by various powerful circumstances, in particular, globalization, the fall of socialism and economic crises. These changes have given rise to new forms of work – so-called "flexible forms of work" (see Cazes and Nesporova 2003, 26–39).[165] Following the trend towards flexibilization of labour relationships, the number of permanent employment contracts has been decreasing, while a tendency to a "deregulation" in the field of labour law is noticeable.

In recent years, major changes have taken place in the work environment, which some authors refer to as the "fourth industrial revolution" (see Božičić 2021, 94). This revolution has been spurred by "digitalization". Digital technology has penetrated into all spheres of life and work (from listening to music to sparking revolutions). These technological advancements have impacted the organization of work as well as labour relations (see Jašarević 2016, 282–290). In that sense, Vanadeale states that "restructuring of capitalism" is underway (see Vanadaele 2021, 207). Due to the intensity of changes, some authors refer to the modern economy as "digital economy" (ILO 2021),[166] while the new emerging society is called the "information technology society" or "digital capitalism" (see Pfeiffer 2014, 599-619; Ales 2015).

One of the questions posed by these changes is how labour law should respond to new challenges, that is, how it might adapt to protect people in new forms of work.

7.2 Legal protection of workers in new forms of work

For labour law, flexible forms of work are not a problem, but their abuse is an outstanding issue. Around the year 2000, "disguised forms of flexible work" began to be used increasingly instead of regular employment to avoid legal and fiscal obligations. Some examples of such employment are: "disguised employment", "bogus self-employment", fraudulent forms of employment presented as a civil or commercial contract, abuse of atypical forms of work (temporary work, temporary and occasional work), or "hidden employment". According to the 2006 EU Green Paper on Modernising Labour Relations, *"disguised employment* occurs when a person who is an employee is classified as something other than an employee so as to hide his or her true legal status to avoid costs that may include taxes and social security contributions. This illegal practice can occur through the inappropriate use of civil or commercial arrangements" (European Commission 2006).

165 Flexible forms of work include: (1) part-time work, (2) temporary work, (3) temporary and occasional work, (4) work from home and teleworking, (5) agency work, (6) self-employment (when working for a certain employer), (7) work for jobs based on civil law contracts.

166 "'Digital economy'" incorporates all economic activity reliant on, or significantly enhanced by the use of digital inputs, including digital technologies, digital infrastructure, digital services and data. It refers to all producers and consumers, including government, that are utilising these digital inputs in their economic activities" (OECD 2020b, 5).

This process has deepened in recent years under the influence of digitalization. Digitalization has enabled the appearance of new forms of work that are currently taking place mainly outside the employment relationship (see also European Foundation for the Improvement of Living and Working Conditions 2015; Jašarević, 2015, 281–298.[167] Completely new concepts in the field of labour relations are emerging, such as: digital work,[168] digital worker,[169] online platforms, [170] the platform economy, platform work and digital nomads (see Kilhoffer et al. 2019, 7).[171] One of the major consequences of digitalization in the field of work is the increasing mass labour through platforms – so-called platform work (Kilhoffer et al. 2019, 25).[172] "Platform work is all labour provided through, on, or mediated by online platforms in a wide range of sectors, where work can be of varied forms, and is provided in exchange for payment" (Kilhoffer et al. 2019). Platforms can be: (1) international – when the work is done around the world, on call (programming, translation, work with clients, administrative work), and (2) local – when the work is done in a local area. Transportation and delivery are most often associated with the latter, while crafts and other services as well as childcare services are provided in the former.

At the moment, local platforms are more dominant in Serbia, and they are largely engaged in food delivery, with transport and other services also strengthening (021.rs 2017). It is estimated that there are more than 100,000 platform workers. Furthermore, Serbia has one of the highest percentages of workers working through international platforms (programming, translation, language classes and dispatch among others) (see Radonjić 2020).[173]

People who work through platforms usually do not enjoy any employment protection, as they do not have the status of employees. Platform work is "triangular" in its shape and does not take assume the form of an employment relationship. Workers are hired through platforms to work for a third party or client. Although platforms actually hire that person to work in their favour (taking a commission) and determine the conditions of work and engagement, and therefore function as an employer, platforms try to conceal the true essence of that legal relationship. To avoid declaring themselves as employers, although in most cases they are,[174] they present themselves as intermediaries, claiming to provide only IT services, that is, that clients and service providers are only connected through the platform. Persons who work are registered as freelancers, self-employed or conclude modified (non-standard) civil law contracts, and with rare exception are treated as employees. Vanadeale points out that this way of working is reminiscent of the forms of work in early capitalism – *work per piece (piecework)* – individual manual production that was done at home (Vanadaele 2021). At that time, workers were so-called independent contractors, without any protection. Now that process is being reintroduced through non-standard forms of work.

Although platforms avoid being presented as employers, they frequently do control and subordinate working people, which is the basic prerogative of the employer. Platforms only do it in a different way from how it has been done in the form of permanent employment to date. A "covert subordination", which is sometimes more intense than the subordination performed by regular employers, flourishes in this arrangement.[175]

Apparently, in platform work, work organization and management are different. Work management is performed automatically – with the help of algorithms (or *"algorithmic management"*). Helped by very few management personnel, platforms exercise strict control over the performance of tasks, both in terms of time and space, and in terms of conditions, intensity and quality of work (Adams-Prassl 2020).[176] At the same time, it is misleadingly presented that platform workers enjoy extreme flexibility and that they have great freedom – to work as much as they want and when they want.

167 For example, telework, agile work/ICT-based mobile work, crowd employment, platform work, casual work, dependent self-employment, informal work, piecework or work from home.

168 Work with the help of digital technology.

169 A person who works with the help of digital technology.

170 Internet service in which a "virtual platform" is formed in the internet space that facilitates communication between one or more parties, especially for the exchange of payment services for the performance of work.

171 Workers who do work with the help of the internet, while changing their place of residence.

172 Form of work through or on network/Internet platforms.

173 In the analysis of the World Bank (Kuuk, et al. 2015), Ukraine, Romania and Serbia were for the first time identified as key suppliers of labour on global digital platforms, per capita.

174 There are also a few platforms that do not hire employees but only provide connection services (such as Facebook, Instagram, WhatsApp, Viber).

175 For example, the OECD document *– Regulating Platform Work in the Digital Age* – states that it is a question of "false self-employment" and that these persons are in fact the same: like employees, they often have limited control over their work (for instance, in some cases they cannot set prices, they are required to wear uniforms, they cannot choose the order of their tasks and so on) and/or are dependent on their clients/employers in other ways (for example, financially). Control may be exerted via technology enabled monitoring, with the algorithm taking the place of a traditional manager."

176 As one of the many disadvantages of this kind of management, Preissl mentions "algorithmic discrimination" of people who work.

On the other hand, if they are not ready to work often enough, workers will be warned first, and subsequently excluded from the platform (which is essentially a dismissal, without giving reason or explanation, much less severance pay). Generally, and so far unprotected from exploitation, digital workers are exposed to strict work discipline: they have no protection against dismissal; being (false) self-employed (in so-called bogus self-employment), they bear the risk of business, labour and maintenance expenses (for example, vehicles – for transport or delivery); they are not paid when they are not working (public holidays or annual leave); and expenses for treatment if they are injured or ill are not covered. Therefore, their present is as uncertain as their future. They can be dismissed at any time, their earnings are not guaranteed (the rates change often)[177] and they do not have social insurance.

This situation is unsustainable and that it destroys the foundations of the whole society. This recent recognition has brought about a sweeping action to regulate the employment status of platform workers and all persons working in non-standard forms of work. This action is led by the International Labour Organization (ILO), and it is widespread in European countries as well. It is also underway in Canada, the USA (see Batey 2020; Aammon 2021)[178] and around the globe. In addition, there are numerous lawsuits filed around the world that are pending against large transportation platforms (such as Uber) or food delivery service providers (see Kilhoffer et al. 2019, 69; for more details on 150 court cases, see Hiessl 2021; Wray 2021). Initial protests already have taken place, in addition to strikes and attempts to set up trade unions.

There are several questions to be answered here. The first: – what status should employees have in new forms of work? This is considered to be the single-most challenging issue in the field of work at the moment (Biagi et al. 2018). According to Kilhoffer: "Employment status remains a core issue when addressing working conditions and social protection challenges for platform workers at national and EU levels. Policymakers may therefore consider actions that make it easier to identify and reclassify bogus self-employed platform workers and clarify which platform practices are incompatible with self-employment. There should be a clear distinction made between dependent contractors and those who are legitimately self-employed" (Kilhoffer et al. 2019, 24)

With further consideration, the question arises whether these persons should be made equal to employees, receive a specific status (an intermediate category between employment and self-employment), be given the status of "worker" (a term that would comprise all persons working in a form of dependent work outside the employment relationship), be registered as "dependent self-employed" or simply remain unclassified, while raising their legal status and treatment to that of employees. For instance, the Netherlands, proposed the introduction of a gradual system in 2015, whereby protection increases incrementally with the level of dependency the worker has vis-à-vis his or her contractor/client/employer (European Risk Observatory 2017, 59).

On the other hand, in 2019, in the Global Commission on the Future of Work's report, "Work for a Brighter Future", the ILO presented the idea to establish a *Universal Labour Guarantee for all persons working, regardless of the status and legal basis of work.* According to the Commission, a Universal Labour Guarantee should cover: "(a) fundamental workers' rights: freedom of association and the effective recognition of the right to collective bargaining and freedom from forced labour, child labour and discrimination; and (b) a set of basic working conditions: (i) "adequate living wage"; (ii) limits on hours of work; and (iii) safe and healthy workplaces" (ILO 2019a; ILO 2019b).

In the ILO document, *World Employment and Social Outlook 2021: The Role of Digital Labour Platforms in Transforming the World of Work* (ILO 2021), it is noticeable that countries have taken various approaches to extending labour protections to platform workers. According to this ILO document from 2021, these include: occupational safety and health;[179] social security;[180] employment relationship; [181]

177 Platforms do this regularly. First, workers are paid well, until business develops, then salaries are reduced.

178 The big debate was initiated by Bill 22, which was adopted in California at the end of 2020. This act deprived the workers on the platforms of many rights that were granted to them by the previous law from 2019.

179 Laws in Australia and New Zealand have extended occupational safety and health coverage to all workers. In Brazil, a judicial decision has extended safety and health legal standards to platform workers.

180 Several countries have extended social security to platform workers. "These include requiring that platforms cover the accident insurance costs of self-employed workers (France); extending social security for self-employed workers (many Latin American countries); and providing work injury and death benefits to workers on particular platforms (Indonesia and Malaysia). In response to the COVID-19 pandemic, some countries have extended sickness benefits to all workers (Ireland) and unemployment benefits to uninsured self-employed workers (Finland and the United States)."

181 "Employee status remains important, as most labour and social protections are associated with it. Countries have adopted various approaches to the classification of platform workers, often arising from litigation, which fall along a spectrum between very broad and very narrow approaches to employment status. These include: (i) classifying them as employees, often based on the amount of control exercised by the platform; adopting an intermediate category in order to extend labour protection; (iii) creating a de facto intermediate category to ensure that they obtain certain benefits; and (iv) classifying them as independent contractors, often based on the degree of their flexibility and autonomy."

working time and remuneration;[182] dispute resolution;[183] access to data and privacy.[184] The same document states that platform workers should be provided with: clear and transparent terms of engagement and contractual arrangements, correct classification of their employment status, transparency in their ratings or rankings, accountability of algorithms for workers and businesses, protection of workers' personal and work data, the right to bargain collectively, anti-discrimination protection, occupational safety and health protection, fair termination processes, access to the courts, wage protection, fair payments and working-time standards (ILO 2021).

In the context of the ILO idea of the *Universal Labour Guarantee,* the European Risk Observatory addressed the possibilities of adequate protection of platform workers in the field of health and safety at work in its 2017 document. Accordingly all workers should have the following rights (2017, 59): the right to the full probation period; the right to predictable working hours; the right to a contract with a minimum number of hours; the right to request a new form of employment (and the employer's obligation to reply); the right to training; the right to a reasonable notice period in case of dismissal; the right to adequate redress in case of unfair dismissal or unlawful termination of contract and the right to access effective and impartial dispute resolution in case of dismissal and unfair treatment (European Risk Observatory 2017, 5).

The problem of digital, platform and other non-standard workers has been discussed in the European Union for a long time. Despite the Union having a clear position that these workers should be protected, little has been done. A document entitled *Proposal for a Directive on improving working conditions in platform work* has been proposed recently.[185]

Until this document is adopted, we will refer to existing Community regulations. For the time-being, there are only hints of the protection of persons working in new forms of work (especially digital and platform workers) in the Union legislation. Indications of future regulations appear in two recent EU documents – the Directive on transparent and predictable working conditions, 2019,[186] and Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.[187]

In the Directive, which will be applied from 1 August 2022 for the first time in an EU document, "atypical workers" are explicitly mentioned. Point 8 of the preamble to the Directive states: "Provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers, voucher-based workers, platform workers, trainees and apprentices could fall within the scope of this Directive. Genuinely self-employed persons should not fall within the scope of this Directive since they do not fulfil those criteria. The abuse of the status of self-employed persons, as defined in national law, either at national level or in cross-border situations, is a form of falsely declared work that is frequently associated with undeclared work."

A step forward in this area is that the Directive also defines the notion of *bogus self-employment* in the same point, defining them as eligible to enjoy the rights from the directive if they meet the criteria of the notion of workers. "Bogus self-employment occurs when a person is declared to be self-employed while fulfilling the conditions characteristic of an employment relationship, in order to avoid certain legal or fiscal obligations. Such persons should fall within the scope of this Directive. The determination of the existence of an employment relationship should be guided by the facts relating to the actual performance of the work and not by the parties "description of the relationship." However, this concept has not been fully implemented, as the status of the employee has been left to be regulated by national legislation (article 2), owing to which many categories of workers can be excluded from the status of "employees".[188]

In paragraphs 1 and 1 of the Preamble to *Regulation (EU) 2019/1150,* which was adopted at the same time as the Directive, and in order to ensure transparency and fairness in the operation of internet platforms, as well as to provide effective mechanisms to protect the rights of their users. A unique quality of the Regulation are provisions on the protection of the rights of platform users, which also can be applied to platform workers, as they are users of platform services.

Regarding the *Proposal of the Directive on improving working conditions in platform work*, it is stated that this document is based on the fact that revenues in the digital labour platform economy in the EU are estimated to have grown fivefold in the last five years. According to the Proposal: "Nine out of ten platforms

182 For example, French law provides that a platform's voluntary social charter should include methods of enabling self-employed platform workers to obtain a "decent price" for their work.

183 The Supreme Court of Canada, for example, invalidated a platform's arbitration clause on the ground that it "makes the substantive rights given by the contract unenforceable".

184 Regulations regarding data and privacy protection are adopted for instance in Brazil, India, Nigeria and the European Union.

185 COM/2021/762 final.

186 OJ L 186/105, 11 July 2019.

187 OJ L 189, 11 July 2019.

188 This Directive lays down minimum rights that apply to every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice.

active in the EU currently are estimated to classify people working through them as self-employed. However, there are also many people who experience subordination and varying degrees of control. Albeit in different ways, digital platforms use automatic systems to assign tasks, to monitor, evaluate and take decisions for the people working through them. Such practices are often referred to as "algorithmic management".

To protect platform workers in the Proposal for a Directive specific objectives are addressed: "(1) to ensure that people working through platforms have – or can obtain – the *correct employment status* in light of their actual relationship with the digital labour platform and gain access to the applicable labour and social protection rights; (2) to *ensure fairness, transparency and accountability in algorithmic management* in the platform work context; and (3) *to enhance transparency, traceability and awareness* of developments in platform work and *improve enforcement of the applicable rules for all people working through platforms,* including those operating across borders."[189] It is also proposed to establish of *rebuttable presumption of employment relationship* (including a reversal of the burden of proof) for persons working through digital labour platforms that control certain elements of the performance of work.

As one of the bases in the *Proposal for a Directive* (Preamble, 3) it is stated that Principle No. 5 of the European Pillar of Social Rights, of 2017,[190] provides that, regardless of the type and duration of the employment relationship, workers have the *right to fair and equal treatment regarding working conditions, access to social protection and training.* It is also stated: "While digital labour platforms frequently classify persons working through them as self-employed or "independent contractors", many courts have found that the platforms exercise *de facto* direction and control over those persons, often integrating them in their main business activities and unilaterally determining the level of remuneration."[191] It is also mentioned that: "Council Recommendation 2019/C 387/018 on access to social protection for workers and the self-employed recommends Member States to take measures ensuring formal and effective coverage, adequacy and transparency of social protection schemes for all workers and self-employed."[192]

In point 19 of the *Proposal for a Directive*, it is also stated: "To combat false self-employment in platform work and to facilitate the correct determination of the employment status, Member States should have appropriate procedures in place to prevent and address misclassification of the employment status of persons performing platform work." According to article 3 of the *Proposal of the Directive*:

> Member States shall have appropriate procedures in place to verify and ensure the correct determination of the employment status of persons performing platform work. The determination of the existence of an employment relationship shall be guided primarily by the facts relating to the actual performance of work, considering the use of algorithms in the organization of platform work, irrespective of how the relationship is classified in any contractual arrangement that may have been agreed between the parties involved. Where the existence of an employment relationship is established based on facts, the party assuming the obligations of the employer shall be clearly identified in accordance with national legal systems.

According to article 4 of the Directive Draft:

> The contractual relationship between a digital labour platform that controls, the performance of work and a person performing platform work through that platform shall be legally presumed to be an employment relationship. Controlling the performance of work within the meaning of paragraph 1 shall be understood as fulfilling at least two of the following: (a) effectively determining, or setting upper limits for the level of remuneration; (b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work; (c) supervising the performance of work or verifying the quality of the results of the work including by electronic means; (d) effectively restricting the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes; (e) effectively restricting the possibility to build a client base or to perform work for any third party.

Although not explicitly stated, this document expects that the legal status of platform workers will be equal to employees (see article 3). Some rights are explicitly mentioned, such as "Protection from dismissal".[193]

Platforms themselves have recognized the detrimental

189 Proposal of the Directive on improving working conditions in platform work.

190 *Interinstitutional Proclamation on the European Pillar of Social Rights* (OJ C 428, 13 December 2017, 10.

191 Proposal of the Directive on improving working conditions in platform work, Preamble, 7.

192 *Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed* (2019/C 387/01) (OJ C 387, 15 November 2019.

193 See Proposal of Directive, Article 18, "Member States shall take the necessary measures to prohibit the dismissal or its equivalent and all preparations for dismissal or its equivalent of persons performing platform work, on the grounds that they have exercised the rights provided for in this Directive."

effect of maintaining the *status quo* in this area. In January 2020, the *Charter of Principles for Good Platform Work* was published (hereinafter, the Charter).[194] This document was jointly adopted by some of the largest Internet platforms,[195] with the aim of establishing principles for improving the position of "platform workers".

The Charter has eight units, each of which refers to one corpus of platform workers' rights. The principle of *"diversity and inclusion"* is set first. Then it considers the protection of platform workers, with the basic idea that platforms, together with the competent state authorities and employers, take care of safety and health at work and provide dignified working conditions (the principle of *safety and well-being*). The next part of the Charter, entitled 'Flexibility and fair conditions' states that the conditions should be transparent, clearly formulated, comprehensible and presented in an accessible form to workers. It is also stated in item 3.2 that: "Grounds and procedures for account deactivation should be clear, and platforms should work to establish processes to challenge decisions where relevant, with multi stakeholder support if applicable. Processes should respect confidentiality where appropriate." In addition, the principles of *"reasonable pay and fees"*, *"social protection"* of workers, *"learning and personal development"*, *"voice and participation"* on the functioning of the platform, *"data management"* – protection of employees' personal data, are established. It is also stated in part 7 that: "Platforms should ensure that workers have access to transparent and accountable mechanisms, where applicable, for resolving disputes with users/clients and with other workers within a reasonable timeframe."

As for national regulations, a number of countries in the world are still undecided which way to go. "Countries generally attempt to apply existing legislation, regulations and policies to the new challenges. This holds for the status of workers, working conditions, and industrial relations and social dialogue" (Lenaerts et al. 2017). So far, only France and Portugal have taken more serious legislative steps in the direction of regulating the position, and Italy is on the right track (see Kilhoffer et al. 2019, 102; Vanadaele 2021).

Portugal (albeit, only for one specific business sector – transport) extended the personal scope of application of national labour and social protection law traditionally applicable to employees, by regulating the working conditions and social protection for persons in non-standard employment, or by strengthening the rights and protection of the self-employed. With Law 45/2018, it is assumed that the driver is employed by the operator who organizes the transport (Kilhoffer et al. 2019, 105).

An assessment of constitutionality is underway in Italy on recently adopted legislation which aims to establish the employment status of food delivery riders who work through digital platforms. The law affords riders better protection by ensuring a guaranteed minimum wage and the right to paid holidays and sick leave (see Kilhoffer et al. 2019, 105).[196]

France has made the most significant progress. The French parliament adopted the *Loi El Khomri* (El Khomri Law) in 2016 to improve the status of certain self-employed platform workers.[197] By introducing this Law, the French legislature has tackled the hybrid employment status of platform workers (see Aloisi 2020). Platform workers are defined as independent workers in an economically and technically dependent relationship with an online platform. The law provides platform workers with access to insurance for work accidents and illness, training and continued education. They also have the right to start or join trade unions and the right to take collective action (Kilhoffer et al. 2019, 105).

7.3 Universal Labour Guarantee and Serbian labour law

Within the context of the aforementioned new circumstances in the world of work, Serbian labour law requires serious "refreshment" (updating and modernization). Sadly, Serbian labour law theory so far has only skimmed the surface of this topic, and this process is at a very early stage.

The legal basis for the potential regulation of the work of digital, platform and other workers in non-standard forms of work is found in the Constitution of

194 See *Charter of Principles for Good Platform Work*.

195 Platforms referred to are Cabify, Deliveroo, Grab, MBO Partners, Postmates and Uber.

196 See Law No. 128 of 2 November 2019 on urgent provisions for labour protection and corporate crisis resolution.

197 Loi No. 2016-1088 *relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels* (Law on work, modernising social dialogue and securing career paths), 8 August 2016.

the Republic of Serbia.[198] Article 19 of the Constitution guarantees human dignity.[199] In addition to this, article 23 prescribes: "Human dignity is inviolable and everyone shall be obliged to respect and protect it." Moreover, article 60 (4) states that "Everyone shall have the right to respect of his dignity at work, safe and healthy working conditions, necessary protection at work, limited working hours, daily and weekly interval for rest, paid annual holiday, fair remuneration for work done and legal protection in case of termination of working relations. No person may forgo these rights" (for more on the idea of providing platform workers with decent work in the world and in the country, see Anđelković et al. 2020, 3). Contrary to the Constitution, in the author's view, today, the human dignity of a significant part of the population in Serbia has been violated due to unregulated and irregular working conditions in new forms of work. At the moment, these workers have almost no guarantees of decent work and that is reflected in the indignity of life in general.

Problems related to platform work and other new forms of work in Serbia are similar worldwide and are exacerbated by high unemployment rates and poverty of the population working in such jobs. Workers in new forms of work (hereinafter: non-standard workers) have almost no rights or protection: their work is unregistered, they have neither social insurance nor guarantees of payment levels (they are paid "in cash", without any written agreement) and there are no guarantees of permanent employment (neither transparency in dismissal nor justified termination of work) (see Miletić 2019; Anđelković et al. 2020, 3; Dimić 2020; Savanović 2020).[200]

Existing laws that could provide non-standard workers with a better position are not enforced because the public and the courts remain unaware of the need to protect new categories of workers. The provisions of some current laws do permit a wider focus on workers other than employees and could be applied to those workers in non-standard forms of work. However, this does not happen in practice. Regulations that provide protection to workers other than employees include: the Law on Safety and Health at Work – 2005,[201] the Law on Prevention Harassment at Work – 2010,[202] the Law on Simplified Employment on Seasonal Jobs in Certain Activities – 2018,[203] the Law on Prohibition of Discrimination – 2009[204] and the Law on Gender Equality – 2021.[205] Referring to the categories they protect, in addition to employees, these laws also mention "employed persons" or "persons who work for the employer on any (legal) basis". However, for those who apply these regulations in practice, platformers, digital workers, freelancers and other non-standard workers are invisible. They are also invisible in the courts.

Regarding the problem of adequate protection of all workers, for example, the idea of applying the Universal Labour Guarantee in Serbia, *three basic issues* need to be clarified. First, should the position of new categories be regulated by the Labour Code or a special act? Second, should we aim to equate these people with employees or introduce a new category or more categories (for example, the dependent self-employed worker). Could new forms of work fit into an existing concept (such as "work engagement")? Third, what rights should be guaranteed to these persons, that is, should everyone be provided with equal rights?

To answer the first question, let us look at the existing legal background. It is unusual that the legislature did not regulate the notion of the employment relationship, although in many instances in various regulations the legislature uses the term *"employment relationship" (radni odnos)*.[206] The basic act that regulates labour relations in Serbia is the Labour Code (hereinafter, LC), adopted in 2005 (revised in 2014).[207] The law does not define the term "employment relationship". Nonetheless, this term is used to determine the term *"employee"*. According to article 5, paragraph 1, "an employee, pursuant to this law, shall be a natural person in employment relationship with the employer." So, the first priority is to define the term "employment relationship" and the term "employee" in Serbian law. The second question is whether it should be extended.

The Serbian legislation distinguishes between "entering into an employment relationship" and *"work engagement"*.[208] Although the term "work engagement"

198 *Official Herald,* No. 98, 2006. Note: in Serbian legislation, the date of actual enforcement of the law is not considered to be of great importance and no particular evidence is being made in this respect so that the date itself was not included.

199 See Constitution, article 19: "Guarantees for inalienable human and minority rights in the Constitution have the purpose of preserving human dignity and exercising full freedom and equality of each individual in a just, open, and democratic society based on the principle of the rule of law."

200 See also the publications on the website of the Center for Public Policy Research.

201 See Law on Prevention Harassment at Work, article 4, paragraph 1, published in *Official Herald*, No. 101, 2005; No, 91, 2015; No. 113, 2017.

202 *Official Herald,* No. 36, article 2, 2010.

203 *Official Herald,* No. 50, articles 3. and 6, 2018.

204 *Official Herald,* No. 22, 2009; No. 52, 2021, article 2.

205 *Official Herald,* No. 52, article 29, 2021.

206 Also, the concept of an employment has been neither clearly nor systematically defined in court practice.

207 The Code was published in *Official Herald*, No. 24, 2005, and the remaining amendments in No. 61, 2005; No. 54, 2009; No. 32, 2013; No. 74, 2014.

208 For instance, see LC articles 5 and 35.

is mentioned in the LC (article 5, paragraph 2 and article 35),[209] it does not clarify which forms of work to which it refers and whether these persons enjoy the same protection as employees (for more detail, see Jovanović 2015), 179).[210] Also, the term "employment" is mentioned in a number of other laws, but it is not defined anywhere.

When interpreting other laws which mention this term, it seems that the term "work engagement" is broader than "employment" and could include all existing and possibly some new forms of work.[211] For example, according to the Act on Protection of Whistleblowers of 2014,[212] "work engagement" is an employment relationship, work performed outside an employment relationship, volunteering, performing of a function, as well as any other work performed for the employer. In the Law on Prohibition of Discrimination, from 2009, according to article 16, paragraph 2, protection against discrimination at work shall include all persons in employment relationships, as well as all persons that work on occasional or temporary work contracts, that perform additional work, or carry out a public function, members of the army, persons seeking employment, students and trainees, persons engaged in vocational or professional training carried without entering into an employment relationship, volunteers, and "any other person performing any work based on any other ground". It is obvious that this law was not content with the notion of an employee from the Labour Law regarding the comprehensiveness of protection against discrimination, but it included all persons who work on any basis. It is commendable that the Law on Prohibition of Discrimination refers to "any work based on any other ground" and does not refer only to "persons hired by the employer", since platforms and "digital employers" just avoid declaring themselves as such. This could provide a clue for new solutions when innovating labour legislation.

What could be the potential changes in this area? First, we primarily believe that the solution should be sought within labour legislation and within the framework of the Labour Code. Any transfer of work to another area can only "blur" the whole issue and make it less transparent. This could eventually be detrimental to non-standard workers.

In addition, we believe that the notion of employee should be extended to include all categories of "false self-employed" and "bogus self-employed" (false freelancers). If a person performs any work for the employer on a permanent basis, a rebuttable presumption of employment should be made.

In that sense, we will cite some good examples from comparative law.

For example, according to the Croatian Labour Code, article 10, paragraph 2:[213] "If the employer concludes a contract with the employee for the performance of work which, given the nature and type of work and the employer's authority, has the characteristics of the job for which the employment relationship is established, it shall be considered that an employment contract has been concluded, unless the employer proves otherwise." Furthermore, the Croatian Labour Code in article 10, paragraphs 4 and 7, specifies that in case of assignment of an employee to conduct work by a linked company, the former shall be considered the employer in terms of its duty to apply the provisions of the Labour Code and other statutes and regulations governing safety and health at work (so-called linked employer).

In neighbouring Slovenia, the Labour Code (article 13, paragraph 2)[214] prescribes: "(2) If there are elements of an employment relationship in accordance with article 4, in connection with articles 22 and 54 of this Act, work may not be performed on the basis of civil law contracts, except in cases specified by law." According to the amended Slovenian Act on Labour Inspection,[215] if the labour inspector established that a contract of general law of obligations has been concluded, which is contrary to the rule of the Labour Code (article 13, paragraph 2), the work cannot be performed on the basis of such contracts. In that case the inspector orders the employer to provide the contractor a written employment contract within three working days of delivery of the decision according to article 19, section 2. The written contract must correspond to the actual situation arising from the decision (regarding the type and scope of the work performed), the salary must be comparable to the salary prescribed for the same work by the collective agreement and general acts binding on the employer (whereby the contributions

209 The following definition of the term "employer" *(poslodavac)* is provided: "An employer, pursuant to this law, is a domestic or foreign legal or natural person who employs or hires/engages for work one or more persons." See LC, article 5, paragraph 2.

210 Based on some other laws, it is concluded that these persons have the right to protection of health and safety at work, and they are entitled to health, unemployment, pension and disability insurance. Collective labour law rights (such as rights of association, strike) to them are basically denied.

211 It can be indirectly concluded that in the Labour Code the term "work engagement" refers to flexible forms of work that are regulated in the LC. 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 These contracts are regulated by LC, Arts. 197–202.

212 Act on Protection of Whistleblowers, *Official Gazette,* No. 57, article 2, paragraph 1, section 5, 2014.

213 Zakon o radu (Labour Code), published in *Narodne novine Republike Hrvatske,* No. 93/2014, 127/2017, 98/2019.

214 Published in: *Uradni list RS,* No. 21/13, 78/13 47/15 – ZZSDT, 33/16 – PZ-F, 52/16, 15/17.

215 *Uradni list RS,* No. 19, 2014 i 55/2017.

to obligatory social insurance and tax obligations are also taken into consideration). If the employer fails to offer the contractor an employment contract, he has a right to resort to the courts within 30 days.

In the assessment of whether a person is a "false self-employed person", the definition of "employee" by the European Court of Justice can serve as a starting point, entailing that "the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration". The basis for assessing whether a person is actually employed is based on three basic criteria: looking cumulatively at the existence of a subordination link, the nature of work and the presence of remuneration (see Risak and Dullinger 2018).[216]

Another possibility is that persons who do not fit into the typical definition of an employee will receive the status of *"worker"* in Serbia. Something similar exists in the British Employment Act of 1996, according to which workers enjoy almost the same protection as employees.[217]

In case of doubt whether they are dependent workers or freelancers, courts in the various countries established a range of tests and factors to decide on an individual's employment status. These tests include: *the control test* (establishing the degree of control exercised by the employer – the extent of supervision); *the integration test* (establishing to what extent the work provided is integrated into the core activities of the business); *the economic reality test* (considering whether the individual is in business on his or her own account, bearing in mind factors such as payment methods, supply of equipment, working time arrangements, holidays, financial risk); and *the mutuality of obligation test* (European Risk Observatory 2017, 25).

We believe that, in the case of Serbia, the control (dependency) test should be introduced into the national legislation in combination with the economic reality test. Here, we would like to point out British and German practice as a good example. The British Hight Court has ruled in the Aslam Case (2018)[218]: "In *James v Redcats (Brands) Ltd* [2007] UKEAT 0475, [2007] ICR 1006, Elias J said: '59... the dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings?'" According to recent court practice in Germany (International Lawyers Assisting Workers Network 2020), *personal dependency* is a key factor in the German concept of worker. The German Federal Court states that: "Such an approach does not extend the concept of employee inadmissibly. It is not a question of moving types of contracts which have hitherto been considered to be part of the liberal employment contract into the field of labour law. Rather, the aim is to take a correct view of new types of jobs created by technical development and to correctly classify the corresponding legal relationships in our legal system."[219]

In order to completely regulate this issue, it is not enough just to regulate the status of the person who works. It is also necessary to innovate and *expand the concept of employer*. The "employer" category should include platforms, as well as all atypical employers – all entities that earn income from hiring workers, while controlling the dynamics, manner, circumstances and working conditions.

What labour rights should a worker be entitled to regardless of their employment status? All persons working for employers and all other entities should be guaranteed fundamental labour rights under the Labour Code, with a few exceptions in relation to some categories of workers with regard to a few specific rights (as exemplified in the next paragraph). This is the only way for hidden employers to stop looking for loopholes in legislation. Equalizing the rights of all persons working for employers (and for all others who employ workers) would eliminate the recourse to disguised employment relationships. In addition, non-payment of taxes and social security contributions would be discouraged.

What specific rights should non-standard workers have? These are the rights established by international labour standards such as: a minimum wage, limited working time, prohibition of discrimination and harassment at work, health and safety, professional training, breaks (daily, weekend, paid annual leave), sick leave, protection against unfair termination of work (individual and collective), the right to organize, collective negotiation and strikes, social security (unemployment, health and pension insurance) and effective dispute resolution mechanisms. Optionally,

216 For example, see Court of Justice of, *Deborah Lawrie-Blum v Land Baden-Württemberg*, C-66/85, ECLI:EU:C:1986:284, 3 July 1986. *UX v Governo della Repubblica italiana*, C-658/18, ECLI:EU:C:2020:572, 16 July 2020. Court of Justice, *B v Yodel Delivery Network Ltd*, C-692/19, ECLI:EU:C:2020:288, 22 April 2020.

217 See *Employment Rights Act 1996*, Section 230, Employees, workers and so on "...(3)In this Act 'worker' (except in the phrases 'shop worker' and 'betting worker') means an individual who has entered into or works under (or, where the employment has ceased, worked under) (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly."

218 *Aslam And Ors v Uber BV And Ors,* 19 December 2018, 23.

219 German Federal Labour Court, 5 AZR 819/76 Rn. 31, 15 March 1978.

some categories, such as persons for whom work is only a supplementary source of income or who perform short-term work for the employer, may be exempted from certain rights (see European Risk Observatory 2017, 35).[220] For example, they would not have a guarantee of protection of termination of employment, the right to professional development or the right to collective negotiation.[221]

An outstanding question is: what type of legal and fiscal changes or policy measures could be applied to ensure that all workers benefit from some or all labour rights and social security entitlements which are usually guaranteed to employees? We believe that the only effective solution is for all persons who hire workers or mediate in any form of work to pay taxes and social security contributions on behalf of and to the account of workers. However, the problem is how to cover hidden employers (platforms and others) who are abroad. In this sense, only a similar solution is possible, as recently acted upon by the G7 countries, which reached an agreement to introduce a minimum tax in the world (15 per cent) (Stein and Farzan 2021). Until such an agreement is reached globally on the taxation of platforms and other hidden employers, the situation in this area will not improve to any significant extent.

Serbia has already introduced some changes in the field of taxation, but these changes should also include hidden employers. Amending article 85, paragraph 1 of the Law on Personal Income Tax from 2019,[222] a new point 17 introduces the so-called *"independence test"* of the flat-rate entrepreneur. According to that test, if an entrepreneur meets five of the nine criteria, they are considered to be in a hidden employment relationship, and not a business cooperation relationship between client and entrepreneur. Such an entrepreneur will not qualify for flat-rate taxation (a lighter tax regime than the standard). In short, the criteria in the Law refer to whether the ordering party determines a hired person's working hours, vacations and absences; whether the person works at the employer's premises; whether the client organizes training for work and professional development; how the client found a person working for him (through an advertisement or an employment agency); who provides tools, equipment and means for work; whether at least 70 per cent of the total income per year obtained by that person comes from working for the ordering party; who bears the business risk; whether the hired worker works exclusively for the ordering party; whether the worker performs activities for the same ordering party or for a person related to the ordering party continuously or with interruptions for 130 or more working days over a period of 12 months.

Also, in 2019, article 12 of the Law on Pension and Disability Insurance[223] (new point 3a, paragraph 1) states that persons "who work in the territory of the Republic of Serbia for a foreign employer who does not have a registered office in the Republic of Serbia and who are not insured on any other basis are included in the system of compulsory pension and disability insurance as self-employed persons". So, in this law, the category of non-standard employees has been noticed, but they are classified as self-employed (they pay social security contributions themselves).

Regarding new circumstances, it is inevitable to raise a question whether some groups of workers are facing emergent forms of inequality due to the legacy of Covid-19. In that sense, the position of non-standard workers in Serbia has further deteriorated. They remain unprotected, with no income if prevented from working (due to illness or curfew). If they can and must work, their protection against health issues is usually basic, and they are more exposed to the risk of infection. The legislature still turns a blind eye to these categories, and they themselves are too unorganized to draw attention to their rights.

The pandemic also revealed weaknesses in industrial relations, that is, the system of the rule of law regarding labour relations. It is evident that we have witnessed a sort of uncontrolled suspension of many human rights of employees, which has partly affected non-standard workers. The unions were unprepared for such circumstances, so they did not react. A future labour law might incorporate certain protective norms in favour of employees in the event of a pandemic and similar emergencies. It should be defined which rights can in no way be suspended (for example, minimum wage, working hours, rest, health and safety, advising employees on measures concerning safety and health at work). Furthermore, a temporary suspension of the right to collective dismissals by the employer should be imposed. Similar provisions should be included in collective agreements.

220 For example, Dutch employment law features a presumption of employment, which applies when self-employed people can show that they have worked on a weekly basis for an employer for a period of 3 months, or for a minimum of 20 hours per month.

221 For example, it would be difficult for employees in the field of delivery or transportation to exercise the right to professional development. Also, protection against collective dismissals.

222 *Official Herald,* No. 86, 2019. The law was first published in 2001 (No. 21) and amended 37 times, so the author did not list all the official gazettes in which they were published.

223 *Official Herald,* No. 34, 2003; No. 64, 2004; No. 84, 2004; No. 85, 2005; No. 101, 2005; No. 63, 2006; No. 5, 2009; No. 107, 2009; No. 101, 2010; No. 93, 2012; No. 62, 2013; No. 108, 2013; No. 75, 2014; No. 142, 2014; No. 73, 2018; No. 46, 2019; No. 86, 2019; No. 62, 2021.

7.4 Conclusions

New circumstances worldwide have led to the rise of new forms of work and new categories of workers. Radical innovations in the organization of work have shaken the standard conception of labour law. That is why a new approach to labour regulation is needed globally, and in Serbia as well. This implies innovating the concept of employment, employee, employer and possibly introducing new protected categories. The International Labour Organization has pointed out a possible path with the proposal for the establishment of the Universal Labour Guarantee. However, it remains to be determined whether these guarantees will be implemented as before, within the labour law or by the introduction of special laws, and it is yet to be determined how to classify persons working in new forms of work. A solution should be sought within the framework of labour law since the position of persons in new forms of work is basically the most similar to the position of full-time employees. Also, a "rebuttable resumption" of employment should be introduced for all who live from working for another person. These persons should be guaranteed all the basic rights from the corpus of rights of employees if this could be achieved within a given job.

8. The prospect of introducing the Universal Labour Guarantee in Ukraine, *Sergii Venediktov*

8.1 Introduction

The adoption of the Centenary Declaration on the Future of Work at the 108th International Labour Conference in 2019 was preceded by a four-year process that marked the Future of Work Initiative (FWI). The ILO Global Commission's Report and Recommendations presented in 2019 as a part of the FWI calls for a human-centred agenda for the future of work that strengthens the social contract by placing people and the work they do at the centre of economic and social policy and business practice. This human-centred agenda consists of several pillars of action, one of which is to increase investment in the institutions of work. Increasing investment in the institutions of work aims to strengthen and revitalize the institutions of work, from regulations and employment contracts to collective agreements and labour inspection systems. Among the recommendations, within the framework of the implementation of this pillar, is the establishing of the Universal Labour Guarantee (ULG) (ILO 2019, 38–39). Establishment of the ULG stipulates that all workers, regardless of their contractual arrangement or employment status, should enjoy fundamental workers' rights, an "adequate living wage" (ILO Constitution), maximum limits on working hours, and health and safety at work.

The national labour legislation of Ukraine is characterized by the classical model of regulation of the employment relationship. This is due to the fact that the foundational labour legislative act of the country – the Labour Code (LC) – was adopted over 50 years ago. The Code still retains the legal structure of the period when it was adopted and does not consider many recent trends in the world of work. We also can observe tendencies related to the reform of labour legislation in Ukraine expressed in draft laws. The drafts are currently pending in parliament and are not yet formal law. A substantial proportion of these draft laws is characterized by contradictory content, dictated by economic rather than social considerations.

The purpose of this chapter is to analyse the relevant national legislative base, specific draft laws, and risks and expectations related to the possible application of the ULG in Ukraine.

8.2 Fundamental labour rights and legislation of Ukraine

Ukraine has ratified nine of the ten fundamental ILO Conventions. This indicates that the fundamental labour rights, provided for by these Covenants, are implemented at the level of national legislation. Moreover, these rights are reflected not only directly in the labour laws but also in the rules of laws that are broader in scope of coverage. For instance, the recognition of the right to the freedom of association, prohibition of forced labour, guarantee of equal opportunities in choosing a profession and type of work activity, right to a proper, healthy and safe work conditions are provided for in the articles 36 and 43 of Constitution. The minimum age requirements for admission to any type of employment (15–16 years) and business activities (16 years) are determined in the Law on Child Protection. Also, under this Law, in order to protect their labour rights, working children may form or join trade unions. It should be noted that the Law on Child Protection directly prohibits the worst forms of child labour in Ukraine and provides a distinct

legal category. According to the Law, the worst forms of child labour include: all forms of slavery or practices similar to slavery; using, recruiting or offering a child for prostitution and the production of pornographic products or pornographic performances; using, recruiting or offering a child for illegal activities; work that, by its nature or the conditions in which it is performed, is likely to harm the physical or mental health of a child.

The issue of elimination of discrimination is governed by two special laws – the Law on Ensuring Equal Rights and Opportunities for Women and Men (LERO) and the Law on Preventing and Combating Discrimination (LPCD). Both laws contain a "labour component" in their rules. For example, the LPCD defines the organizational and legal framework for preventing and combating discrimination. The Law highlights direct discrimination, indirect discrimination, incitement to discrimination and complicity in discrimination and harassment. Under article 4 of the LPCD, this Law applies to all spheres of public relations. The purpose of the LERO is to achieve the parity of women and men in all spheres of society. Separate articles of this Law are devoted to ensuring equal rights and opportunities for women and men in work and receiving remuneration as well as ensuring equal opportunities when concluding collective agreements (for example, the Law provides that if a collective agreement is concluded, it must contain provisions on assigning the duties of a gender commissioner to one of the employees which he/she must perform on a voluntary basis). Additionally, LERO contains definitions of sexual harassment and gender-based violence as well as mechanisms to combat them.

The Constitution of Ukraine also contains provisions concerning adequate living wage, maximum limits on working hours, and health and safety at work. For example, article 43 of Constitution states that everyone has the right to proper, healthy and safe working conditions and wages not lower than those determined by the law. Under article 45 of Constitution, everyone who works has the right to rest; this right shall be ensured by providing weekly rest days, paid annual leave and by establishing a shorter working day for certain professions and industries, as well as reducing working hours at night; the maximum duration of working hours and the minimum duration of rest and paid annual leave are determined by law.

8.3 Regulation of labour in Ukraine

In addition to labour law, work relations in Ukraine are also regulated by civil and administrative law. Labour law governs the employment relationship, that is, relationship based on an employment contract. Administrative law applies to work attributed to the public sector. This includes activity of civil servants, police officers, military, emergency responders, prosecutors, judges and so on. The basis for service relationship in this case is an act of appointment or a special non-employment contract.[224] The legal status of independent contractors is regulated by civil law.

8.4 The employment relationship versus the employment contract

A distinctive feature of Ukrainian labour law is that it is formed around an employment relationship and not an employment contract. This factor has historical justification. Indeed, starting from the moment of the formation of labour law and throughout the entire twentieth century, labour law in Ukraine is characterized by overregulation of the employment relationship by the provisions of legal acts. This circumstance limits the will of the parties in determining the terms of the employment contract. At the same time, labour law has always stated that the terms of employment contracts, which worsen the situation of employees compared to the labour legislation, are invalid (currently reflected in the article 9 of LC). The overregulation of the employment relationship is still a feature of Ukrainian labour law that has intensified along with an increase in the number of labour laws.

Paradoxically, the LC does not contain a definition of an "employment relationship" and does not disclose its features. The Code only defines the employment contract, according to which the employment

224 The exception is the civil service. In some cases, employment contracts may be concluded with civil servants.

relationship is interpreted. On the one hand, in 2020, Parliament amended the LC, limiting the content of an employment contract to working conditions as specified in labour legislation, applicable collective agreements and the agreement of the parties, which significantly complicates the procedure for establishing the existence of an employment relationship. On the other hand, the legislature has acknowledged the need for a legislative definition of an employment relationship, which is confirmed by the development of two draft laws (Nos. 5054[225] and 5054-1[226]). As of the beginning of 2022, these draft laws were not considered by Parliament.

In 2020, under the guise of modifying labour relations to the conditions of the COVID-19 pandemic, the LC was amended. These amendments primarily affected the regulation of remote work, work from home and flexible hours , which until that time were absent in the LC. The amendments also affected the definition of an employment contract contained in article 21 (1) of the LC. In accordance with the amended article, an employment contract is an agreement between an employee and an employer under which the employee undertakes to perform the work specified in this agreement, and the employer undertakes to pay the employee wages and provide working conditions required for the performance of work as provided by labour legislation, collective agreement and the agreement of the parties. The previous version in effect from 1991 to 2020 had contained a broader scope of an employment contract, which also encompassed work that was performed in accordance with the internal regulations of the employer. Case law at that time established that a contractor under a civil law contract, unlike an employee who performs work in accordance with the employment contract, is not subject to internal labour regulations, although he/she may be familiar with it, and organizes the work and performs it at his/her own risk.[227] Thus, whether the work was performed according to the employer's internal regulation was used as a test for the establishment of the existence of an employment relationship by a judge.

Returning to draft laws Nos. 5054 and 5054-1, they contain similar provisions defining the employment relationship and its features. Under the drafts, the employment relationship is a relationship between an employee and an employer, where the employee personally performs work for and under the direction and supervision of the employer for a remuneration paid by the employer. Among the features of an employment relationship, the draft laws establish: personal performance of work by an employee with a specific qualification, profession, position for, and under the control of the employer in whose interest the work is performed; work which is permanent in nature; performance of work at a workplace determined or agreed with the employer; provision of means of production (equipment, materials, raw materials, tools, workplace) that is provided by the employer; regular payment of remuneration to the worker; working hours and rest established by the employer; reimbursement of travel and other financial costs associated with the performance of work by the employer.

Unlike the current labour legislation, the draft legislation allows an employee to have several employment contracts with different employers. Another legislative proposal provides for the exemption of individual entrepreneurs from labour inspections.

8.5 Work relations and administrative law

Throughout the twentieth century practically all branches of professional activity in Ukraine were regulated by labour law.[228] This also applied to the work in the public sector, covered by two categories: (a) civil service and (b) civil service of a special nature (mostly military). For example, in accordance with the Letter of the Ministry of Labour and Social Policy of Ukraine No. 06/2–4/66, of 6 May 2000,[229] the work of fire brigade workers, police officers, national guard, national security and military personnel was regulated by a special employment contract provided for in article 21 (3) of the LC. In the twenty-first century, the situation began to change. Within the framework of the new rule-making policy in Ukraine, a significant part of the laws providing for the application of a special employment contract (article 21 (3) of LC) in the public sector were cancelled, and the new versions that came to replace them stipulate a completely different

225 Draft Law on Amendments to the Labour Code to Define the Concept and Signs of Employment Relationships.

226 Draft Law on Amendments to the Labour Code to Regulate Certain Issues of Employment Relationships.

227 For example, see Supreme Court Resolutions No. 820/1432/17, 4 July 2018; No. 802/2066/16-a, 6 March 2019; and No. 640/1099/19, 14 May 2020.

228 There were also some exceptions to this rule, for example, the work of members of collective farms and other cooperative organizations, conscript military service or individual entrepreneurial activity.

229 Letter of the Ministry of Labour and Social Policy of Ukraine No. 06/2-4/66, 6 May 2000.

direction of regulation of relations of work unlike the labour law approach.

In this case, the civil service can be called an exception. Thus, the Law on Civil Service provides two grounds for a civil service relationship – the act of appointment and the employment contract. However, the use of the employment contract in civil service cannot be called widespread. The special legislation states that the work in the civil service, which involves the conclusion of an employment contract, cannot be typical and repetitive. Such an employment contract can be concluded with a person whose main job responsibilities include the performance of a specific task that is predetermined, achievable, with set start and end dates (not performed continuously).[230] At the same time, regardless of the grounds for a civil service relationship, article 5 (3) of the Law on Civil Service states that the rules of labour legislation apply to civil servants in terms of relations not regulated by this Law. Also, article 7 (1) of the Law clearly indicates the right of civil servants to be a member of a trade union in order to protect their professional rights and interests.

The legislation on the civil service of a special nature (that is, police officers, national guard, military servants) in recent decades departs from labour law. The special legal acts (for example, Law on National Police, Law on Social and Legal Protection of Military Servants and Members of their Families, Law on National Guard) do not contain the provisions on the application of labour law to relationships they regulate. Moreover, in some cases, these acts include the rules that are polar opposite to the labour guarantees provided in the LC.

For example, paragraphs 8 and 11 of the Final and Transitional Provisions of the Law on National Police establish that, from the date of publication, all police officers are warned in due course of a possible future dismissal due to staff redundancies. The temporary disability of police officers or the use of leave is not an obstacle to their dismissal from the service. This Law entered into force in 2015 and served as the ground for dismissal of police officers who were on social leave at that time.[231] Going forward, judicial practice took the side of the dismissed police officers. Moreover, the justification of court decisions was carried out with reference to the rules of the LC. For example, the Resolution of the Supreme Court No. 826/27226/15 of 25.04.2018A, is based on the provisions of article 40 (3) of the LC, under which the dismissal of an employee at the initiative of the owner or its authorized body during his/her temporary incapacity for work, as well as during the leave, is prohibited.[232]

Paragraph 8 of the Final and Transitional Provisions of the Law on National Police also was ruled unconstitutional by a Decision of Constitutional Court of Ukraine in 2021.[233] This decision points to the extension of the provisions of the Termination of Employment Convention, 1982 (No. 158), ratified by Ukraine, to police service. In its decision, the Constitutional Court referred to the Article 4 of the Convention, under which the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

8.6 Civil law and labour law

Civil law, characterized by economic rather than social considerations, has gained significant traction due to the pro-economic course of Ukraine in recent years. For example, the mandate on formation and implementation of state policy in the field of labour, which has always belonged to the competence of the Ministry of Social Policy, passed to the Ministry of Economy of Ukraine from 2019. In addition, some draft laws directly contain a civil law component in their provisions. For example, the draft Law on Amendments to Certain Legislative Acts Concerning Simplification of Labour Relations in the Sphere of Small and Medium Business and Reduction of Administrative Burdens on Entrepreneurial Activity[234] can be cited. This draft law proposes amendments to the LC, according to which the general rules of the Civil Code on contractual relations shall apply to relations between the employee and the employer arising from the employment contract whenever left unregulated by the LC.

It should also be noted that civil law researchers have always been hostile about labour law in Ukraine. Ukraine's legal tradition historically considered labour law as a part of civil law (see Tal 1913, 150). For

230 Procedure for Concluding Contracts for Civil Service, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 494, 17 June 2020.

231 "Dismissals of female police officers: staff reduction or elimination of 'ballast'?".

232 Resolution of the Supreme Court No. 826/27226/15, 25 April 2018.

233 Decision of Constitutional Court of Ukraine No. 4-p(II)/2021, 21 July 2021.

234 Draft Law on Amendments to Certain Legislative Acts Concerning Simplification of Labour Relations in the Sphere of Small and Medium Business and Reduction of Administrative Burdens on Entrepreneurial Activity.

example, in this case, Maidanik notes that "*with the transition to a market economy, labour is increasingly becoming a commodity. At the same time, the border between civil and labour law is gradually disappearing, the number of civil law elements used in the regulation of employment relationship is increasing, which indicates a trend towards the return of the employment relationship to the pristine bosom of civil law*" (Maidanik 2007, 112). This position cannot be regarded as fundamental, but it is undoubtedly supported by many Ukrainian civil law scholars.

Accordingly, in theory, the following principle "people who work should enjoy rights at work" may cause the blurring of the boundaries between civil and labour law, which given the current trend in Ukraine will clearly not be in favour of labour law. An example of this blurring of borders is already being observed domestically in terms of the Law on Stimulating the Development of the Digital Economy in Ukraine (LSDE), adopted last year, which is discussed below.

8.7 Current trends

The LSDE is a vivid example of a legal measure in Ukraine that ensures that dependent self-employed workers benefit from some labour rights and social security entitlements usually guaranteed to employees. The goal of this Law is to benefit the IT sector in Ukraine. In addition, the Law provides for an alternative mechanism for regulating relations between IT companies and individuals who develop digital content. In Ukraine, these relationships traditionally belong to the sphere of civil law regulation. And, in this case, the legislature did not embark on a course of referring these relations to the sphere of labour law regulation. LSDE provides for a new type of contract – a civil law contract (which the LSDE classifies as a "gig contract") under which an IT specialist (whom the LSDE classifies as a "gig worker") undertakes to perform work personally on behalf of a company enrolled a resident user of Diia City. The said company undertakes to pay for work (services) performed and provide the IT specialist with appropriate conditions for the performance of work (services), as well as social guarantees prescribed by this Law. The status of a resident of Diia City is granted to Ukrainian- and foreign-owned companies registered under Ukrainian legislation. To be included in this Registry, a company must fulfil the following criteria: it carries out activities in the field of IT; the average monthly remuneration of its personnel is not less than the equivalent of €1,200; the average number of staff is not less than nine persons; 90 per cent of the company's income is derived from IT activities.

Under the LSDE, Diia City is a special legal framework for the IT industry, which provides, for example, a special taxation regime. This regime is provided for both the gig worker and the registered company. The following deductions are provided in the gig worker's income: 5 per cent personal income tax (PIT); 1.5 per cent military levy; a single compulsory state social insurance contribution at 22 per cent of the minimum wage, which is paid by the company.[235] At the same time, in the case of the conclusion of an employment contract, the deductions will be higher: 18 per cent personal income tax (PIT); 1.5 per cent military levy; a single compulsory state social insurance contribution at 22 per cent of an employee's accrued wages, which is paid by the Company. As we can see, from a financial view, the gig contract is more beneficial for an IT specialist. But is it socially beneficial? Let's find out by examining the legal nature of relationship between a gig worker and a company with the status of a resident of Diia City.

Despite the fact that the gig contract refers to civil law, it is characterized by the presence of some labour law components. For example, this contract is concluded for an indefinite period, unless otherwise established by the parties to the contract or by the law. The parties to the gig contract may agree on the number of hours for the IT specialist to perform the work, which may not exceed 40 hours per week and 8 hours per day. A gig worker is entitled to annual paid break during the course of the performance of work of no less 17 working days per year.[236] Under the LSDE, the gig contract or internal documents of the company may determine the following conditions: organizational behaviour of IT specialists in certain workplaces or in the place of a company's economic activity, periods of rest, rules on occupational safety and health (OSH) in places where the work is performed and responsibility for any violation, additional compensation payments and guarantees, and so forth.

In accordance with the LSDE, the company provides the IT specialist with equipment and other tools necessary to perform the work (services), unless otherwise provided by the gig contract. If a gig worker uses

235 Special legal framework for the IT industry.

236 The annual paid break of gig worker is not an annual leave in the meaning of the Law on Leaves. According to this Law, the minimum annual leave for employees working under an employment contract is 24 days.

personal equipment to perform work (services), the gig contract may provide for appropriate compensation payments. The unilateral termination of the gig contract by the company during an IT specialist's pregnancy and/or his/her temporary disability (limited to one continuous month) is prohibited. Any direct or indirect limitation of rights or the establishment of direct or indirect advantages when concluding, changing and terminating a gig contract is prohibited, no matter racial or ethnic origin, political, religious or ideological beliefs, membership in political parties and trade unions, gender or family life.

Notwithstanding the above-mentioned LSDE provisions, it should be concluded that the Law does not offer persons working under civil law gig contracts the full exercise of basic labour guarantees provided for employees who have entered into employment relationships. First, gig workers are deprived of the right to collective bargaining. LSDE in this case is silent about the possibility of concluding a collective agreement with IT specialists. Moreover, under the amended article 3 of the LC, the labour legislation does not apply to the relationships between gig workers and residents of Diia City. Furthermore, under article 3 (1) of the Law on Collective Agreements, a collective agreement is concluded between an employer, on the one hand, and one or more trade unions, and in the absence of trade unions, by the representatives of employees elected and authorized by a meeting of employees, on the other hand. Therefore, gig workers cannot collectively bargain. Special mention should also be made about OSH. In accordance with article 2 (2) of the Law on Labour Protection, the OSH of gig workers is regulated by the respective company internal documents and gig contracts in accordance with the LSDE. Because OSH issues are not specified in the LSDE, they may or may not be disclosed in the gig contract. This is an additional legal burden that the Company can legally avoid. Additionally, the LSDE does not provide gig workers with all guarantees related to labour remuneration. For example, this Law does not contain provisions regarding the minimum wage. The scope of the Law on Wages, which deals with issues of minimum wages, extends only to the employment relationships, and it does not apply to gig contracts. The same applies to the equal remuneration for work of equal value, financial protection of gig workers in the case of the Company's insolvency, maximum intervals for the payment of remuneration and so forth.

Summing up the analysis of the provisions of the LSDE, it should be noted that it is too early to draw conclusions about the practical value of this Law. After all, despite the fact that the LSDE come into force on 14 August 2021, the special legal framework Diia City, provided for by this Law, was launched fairly recently. For example, the special tax regime for residents of Diia City only came into force at the end of January 2022.

8.8 The impact of the COVID-19 pandemic

While analysing the possibility of introducing the ULG in Ukraine, the impact of COVID-19 pandemic, which strained all aspects of daily life, deserves special mention. The pandemic triggered the reform of the legal regulations on the employment relationship, which in Ukraine was traditionally "tied" to the employer's internal working rules. The COVID-19 pandemic required amendments to the LC in terms of regulation of work activity under lockdown conditions. And in 2020, the Code was supplemented with provisions regulating remote work, work from home and flexible working arrangements.

The legislative initiatives could be assessed as positive, since they established the rules of conduct for employee and employer when using specific work arrangements, but the legal changes were made in a hurry, which undoubtedly affected their quality. For example, amendments made in 2020 led to a misunderstanding of their practical application, as the legislative body combined remote work and work from home in one article of the LC, without establishing any distinction between these two categories. This confusion was only addressed in 2021, when further amendments to the LC clearly demarcated the legal regulation of home and remote work.

However, the legislative body subsequently did not continue the reform, in terms of their adaptation to regulations on labour amid the COVID-19 pandemic. The COVID-19-related amendments create the impression that the introduction of remote work, work from home and flexible work into the LC have a temporary nature relevant only during the pandemic. However, at the beginning of 2022, a significant part of the workforce still works under these arrangements. For example, those sectors that were traditionally associated with an employer's internal working regulation (for example, education or consulting) are still using telework and the prospects of a return to their original work organization remain vague.

Furthermore, while the application of the internal working regulation of the employers still is a legal requirement for collective bargaining, the relevant legislation has not been revised to provide modalities for collective bargaining during a pandemic.

8.9 Conclusion

Ratification by Ukraine of nine out of the 10 ILO Conventions indicates that the fundamental principles and labour rights, provided for by these conventions, are implemented in national legislation. The extension of their application not only to the standard employment relationship but also to a broader range of work relations is theoretically possible, and it can be developed by regulating new types of work.

In terms of a correlation between the employment relationship and the employment contract, the main function of an employment contract is to formalize the existence of an employment relationship. The rights and obligations of its parties are reflected primarily in labour legislation.

The special legal framework instituted by Diia City in the IT sector is an example of the application of specific elements of labour law in civil contract law, thus creating an intermediary category of workers. Despite the inclusion of some labour rights in IT contracts, IT workers do not enjoy the same employment protection as regular employees, who hold an employment contract. It is too early to draw conclusions about the consequences of implementation of the Diia City platform, but there is a risk that in the future this platform could serve as a model for regulating the employment relationship, and by analogy the IT work relationships.

The COVID-19 pandemic triggered some positive legal changes in terms of regulating remote work and telework. To some extent, it also negatively affected the proper implementation of fundamental labour rights. COVID-19-related legislative amendments only were seen as temporary solutions to short-term problems and were not correlated to underlying mid- and long-term challenges in the labour market.

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