Jogtudományi Monográfiák 8.

Tamás Gyulavári – Gábor Kártyás

THE HUNGARIAN FLEXICURITY PATHWAY?

New Labour Code after Twenty Years in the Market Economy

PÁZMÁNY PRESS

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JOG- ÉS ÁLLAMTUDOMÁNYI KARÁNAK
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FOREWORD

Despite major contextual differences between the various European countries, labour laws share a common feature: their legitimacy and economic efficiency are questioned all over Europe, whatever the level of protection granted to the workers is. Lively debates are going on around the need and opportunity to reform national labour laws or, to use a more actual vocabulary, to modernize labour markets. The European Employment policy, now integrated in the European Semester, also focuses on the area of employment protection legislation and labour law. In this context, the case of Hungary is a unique example of a complete reform of labour law with the express aim of enhancing economic efficiency.

This book examines the recent reform of Hungarian labour law, however, in the clear mirror of European legislative developments. What makes this topic extremely interesting for readers from other countries, is the debate on the role of flexibility in recent labour law literature, equally at a national and an international level. The analysis of the Hungarian Labour Code, passed in 2012, is centred around the issue of creating new jobs, one million new workplaces in ten years in a labour market of only four million workers. Therefore, the political will was to establish the most flexible labour market in the world. Consequently, the national developments described by this book may be conceived as a legal laboratory of flexibility concepts and beliefs, what may provide both sides of the debate with interesting results and arguments.

The authors of this book, Tamás Gyulavári and Gábor Kártyás from Pázmány Péter Catholic University in Budapest, do not intend to give a detailed, exhaustive, comprehensive presentation on the new Labour Code. As an alternative, they bring into focus a few internationally disputed and nationally controversial, respectively leading topics, such as the legal framework of atypical employment, with special focus on temporary agency work, prohibition of discrimination, respectively alternative dispute resolution, workers' representatives.

The first chapter evaluates the objectives and results of the labour law reform and specifies the fundamental amendments and legal innovations of the Labour Code, thus, the reader may get an insight of the preparation of the new law as well as the first experiences of its implementation. The second chapter, somehow

also of a general character, concerns the legal framework of legal relationships aimed at work, including the challenging and inventive subject of regulating economically dependent work. The ensuing two chapters discuss many different kinds of atypical employment, with special emphasis on temporary agency work, which is a provocative and compelling story in itself, with so many dogmatic issues and legislative twists. The prohibition of employment discrimination is a hit in international labour law, therefore, the national developments always keep some original solutions and surprises. Finally, collective labour law and dispute resolution are rather different, however, quite stimulating terrains of labour law research and practice.

The publication of this book in English gives an unique opportunity to approach and understand the whole Hungarian labour law. The book and the analysis suggested by the authors shall also be taken into account in the current and essential debates going on around the future of labour law and its function in our societies.

December 2015

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I.

THE NEW HUNGARIAN LABOUR CODE: DESIRES AND REALITY

The new Hungarian Labour Code came into effect on the 1st of July 2012, thus, the fundamental reform of the entire employment legislation was undertaken exactly twenty years after the former Labour Code came into effect.[1] The main reason for the reform was the wide criticism of the former Labour Code for its rigidity regarding employers' interests and its outdated concept of focusing exclusively on large companies. Therefore, the declared objectives of the labour law reform were the flexibilisation of regulation to increase the employment rate, the simplification of the Code and the adjustment of labour law provisions to changing economic circumstances. That said, the flexibilisation of labour law became the real focus of the new Code aiming to increase the employment rate by promoting the competitiveness of employers.

As a result, what remained of the EU concept of flexicurity was the flexibilisation of labour law, since the concept of the new Labour Code is primarily based on the assumption: the less the labour rights, the better, since this will automatically lead to a more viable economy generating more jobs and prospering companies. The simplification and improvement of the legal text was merely a secondary objective of the Code. This reorientation of labour law policy has been widely criticized by academics and trade unionists, since one of the decisive effects of the new Act is the reduction of employee protection. At the same time, the new employment law did not really result in a more successful labour market: there are neither more, nor better jobs.

Firstly, the chapter describes the main objectives and background of the labour law reform. Secondly, we elucidate the main points of the reform, with a special emphasis on the situation of trade unions. The main question is, what effects

[1] Act No. 22 of 1992 on the Labour Code came into effect on the 1st of July 1992.

may be expected from flexibilised employment protection and diminished trade union rights. In our opinion, the legal text of the new Labour Code is better in terms of professional quality and applicability, thus, it will solve several problems of interpretation raised in the course of former judicial practice. However, it will not be able to live up to the employment policy expectations widely publicized by the government. Instead of creating many new jobs, the new employment law will deepen social inequality, especially in the case of low-skilled, vulnerable employees.

1. Background and objectives of the reform

1.1. Background of the 2012 reform

After the Second World War, Hungarian labour law, as all other socialist labour laws in the region, was characterized by the existence of a Labour Code. During the socialist period (1948-1990) two Labour Codes were passed (1951 and 1967)[2] and this legal structure was maintained by the adoption of the 1992 Labour Code.[3] The 1992 Labour Code merely stipulated minimum standards, while more favorable rules could be regulated through collective agreements and the employment contract, without prejudice to the cogent rules of the Labour Code. That said, collective agreements and employment contracts were not afforded a significant regulatory role in legal practice.

Moreover, some other laws also contained provisions on employment relationships in certain matters, such as the equal treatment act, the labour safety act or the act on strike. Therefore, although the Labour Code was the central piece of legislation in the legal framework concerning employment, it had to be interpreted and implemented together with several other laws.

As regards the formal aspect, the labour law reform did not question the expedience and efficiency of the traditional model based on a single labour law codex. Although the possibility of diffusing the contents of the Labour Code to several acts (individual and collective labour law etc.) was raised, the legislator finally decided to adhere to legal tradition and kept the 'Labour Code format'.

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2 Statutory Rule No. 7 of 1951 on the Labour Code and Act No. 2 of 1967 on the Labour Code.

3 Act No. 22 of 1992 on the Labour Code.

1.2. Criticism of the former Labour Code

The 1992 Labour Code was widely criticized by legal practitioners, academics and politicians during the last decade. The government's policy paper (2011)[4] and the ministerial reasoning of the Labour Code (2011) listed the following problems in relation to the old Labour Code of 1992:

a) The social and economic background of the Labour Code has dramatically changed since 1990. The 1992 Labour Code was designed for the large, state owned companies, however, these 'socialist firms' have since disappeared (privatized, shut down, disintegrated etc.). Thus, the dominant role of the former socialist industry gave way to the third sector with its micro and small businesses, employing 60% of all employees.[5] The provisions of the 1992 Labour Code, tailored for large companies, cannot be properly applied in the new economic situation, causing problems, extra expenses for small companies.

b) The original text of the 1992 Labour Code was amended too many (about 50) times, thus, the original meaning of several rules was lost, resulting in unpredictable court decisions. These problems of interpretation were elucidated in the published decisions of the Supreme Court. Consequently, simplification and clarification of the existing 'patchwork' regulation became a general demand, calling for the development of new rules on the basis of case law.

c) The crucial problem of the Hungarian labour market is the extremely low employment rate. According to the governmental strategy the main reason for the low employment rate is the very high cost of employment, deriving from high taxes, social security contributions and burdensome labour law provisions. In the opinion of employers' organizations and several labour law practitioners, this cost may primarily be reduced through the flexibilisation of employment law. An alternative way to

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4 The government published the first consultation document entitled the 'Hungarian Work Plan' (Magyar Munkaterv) in June 2011: http://www.kormany.hu/download/e/a7/40000/Magyar_Munka_Terv.pdf (in Hungarian). This was an important document because it set the context of the revision of the 1992 Labour Code.

5 Károly Fazekas – Péter Benczúr – Álmos Telegdy (eds.): *The Hungarian Labour Market 2013.* Budapest, Hungarian Academy of Sciences, 2013. 342. This figure refers to the proportion of small and medium sized enterprises amongst employers with more than 5 employees, therefore the real proportion of small, micro and medium employers is even higher than 60%. http://www.econ.core.hu/file/download/HLM2013/TheHungarianLabourMarket_2013_onefile.pdf (in English)

diminish the cost of production would be tax reduction, however, it is much easier for the government to shift the risk of this process from the state budget to the employees. Thus, the main route for reducing employers' costs is to water down employee protection (labour law 'reform') instead of reducing taxes (tax reform). Accordingly, the government argued that diminishing the rights of employees and trade unions would considerably increase the level of employment. Naturally, this assessment was rejected by trade unions and several academics.

d) The legal practice of the last two decades has shown that the regulatory role of collective agreements remained extremely limited despite the original intentions of the government and the Parliament. According to the policy papers of the present government, the limited possibility of (in melius) deviation is the sole explanation for the moderate regulatory role of collective agreements. Should we accept this analysis, the straightforward conclusion would be that the number and coverage of collective agreements may be increased by permitting in peius deviation as well (see later).

1.3. Declared governmental objectives of the 2012 reform

As a consequence of the criticism detailed above, the governmental documents defined the following objectives for the new Labour Code:

a) Flexibilization of labour law

Since the government fully agreed with the statement on the flexibilisation of labour law (point c. above), it became the central pillar and therewith also the main 'battlefield' of the 2012 labour law reform. This objective is based on the consideration that the current costly labour law provisions constitute the main obstacle for creating new jobs. According to this governmental policy the cutback of employee protection and trade union rights will automatically lead to a higher employment rate.

As flexibilisation of labour law is undoubtedly the central aim of the reform, the following chapters will primarily discuss the feasibility of this strategy. The government's policy paper identified the following measures to ensure more flexibility for employers: detailed regulation of atypical employment relationships, more flexible provisions on the unlawful termination of the

employment relationship, as well as the relaxed liability of the employer for damages incurred by the employees.

b) Minimum harmonisation of EU law

In accordance with the aforementioned aim of the flexibilisation of labour law, the goverment declared the strategy of keeping the harmonisation of labour law Directives at a possible minimum to provide flexible conditions in the labour market.

c) Approximation of labour law to civil (private) law

The ministerial reasoning of the Labour Code clearly stated that "this Act perceives labour law an integral part of private law".[6] The government, however, failed to explain how this relationship should be understood and what its practival implications were. Even the theoretical basis of this statement is unclear. Nevertheless, it served as a successful ideological foundation for flexibilisation endeavours. Consequently, flexibilisation of employment law was based on the legal policy argument of approximating labour law to civil (private) law.

d) Increasing the regulatory role of the contractual sources of labour law

The new labour policy intends to significantly enhance the role of contractual sources, collective agreements as well as employment contracts in the regulation of employment relationships. In order to achieve this policy aim, a new hierarchy of labour law sources was introduced: the collective agreement may deviate both in peius and in melius from the dispositive (not cogent) provisions of the Labour Code.

According to the government, this legal technique considerably increases both the freedom and the responsibility of employers and employee representatives, reducing with it the regulatory function of the state. This measure is therefore based on the assumption, that the increased freedom of the parties of collective labour law will automatically double the number and coverage of collective agreements. Meanwhile, a small circle of guarantees remain ius cogent or allow only for in melius derogation.

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[6] Private law is regulated by the new Civil Code (Act No. 5 of 2013). There have been attempts in 2013 to incorporate the body of labour law in the new Civil Code, however, several academics and labour judges support the formal independence of labour law.

Interestingly, the increased regulatory role of employment contracts is also mentioned with collective agreements, however, the government remained silent as to the reason, theoretical basis or the way to achieve the increased role of employment contracts. This seems odd in light of the fundamentally different legal nature of collective agreements and employment contracts, since individual autonomy and collective autonomy are historically opposed, conflicting notions, and not cohesive concepts.[7]

e) Adjustment of the regulation to the needs of small- and medium sized employers

There has been a general consensus within labour law and employment policy scholarship, that labour law reform must serve the adjustment of the new Labour Code to the fundamentally changed social and economic circumstances (point a. above). The 1992 Labour Code was passed in an economic situation where the labour market was still dominated by large, state owned or newly privatized companies. At the time, the dominant employment model was characterized by a large employer with hundreds of employees. The proliferation of small and micro employers had yet to begin.

By contrast, the present labour market is characterized by employees employed in typical or atypical employment relationships concluded with small-, micro- and medium sized employers. It is therefore a legitimate aim to take into account the changed situation as well as expectations of these smaller employers, companies in the framework of labour law reform. Nevertheless, designing a codex for such different actors is always a difficult task, which may be solved by two distinct techniques. Firstly, the general level of protection may be lowered in order to benefit small employers. This policy, however, has painful side effects. Secondly, exceptions and special rules may be introduced in orther to deal with the problem of small enterprises. As will be demonstrated below, the new Labour Code mainly focuses on the first method, since there are only a few minor regulatory changes addressing the problem of small enterprises.

f) Simplification of the Labour Code:

The simplification of legislation (point b. above) had been demanded by a wide range of academics, judges, labour law and human relations practitioners, for the former Labour Code became extremely complicated and difficult to apply. This

[7] Lehoczkyné Kollonay, Csilla: Génmanipulált újszülött – Új munkatörvény az autoriter és neoliberális munkajogi rendszerek határán. In: Kun, Attila (ed.): *Az új munka törvénykönyve dilemmái.* Budapest, KGRE ÁJK, 2013. 32.

was the result of the changed economic and social environment, the staggering number of amendments (over fifty), the abrupt harmonisation packages, etc. Problems related to interpreting the former Code were well reflected in the published decisions of The Supreme Court. Accordingly, the reform aimed at producing a less complicated, better legal text to serve legal practice, with special emphasis on the chapters on working time and wages, also taking into account the developments in case law.

Several legislative objectives have been identified above, however, it may be useful to categorize them. In our opinion, the ultimate purpose of the reform is to radically raise the employment rate by creating one million new jobs in ten years. This economic goal is meant to be achieved through the labour law policy of flexibilisation. If we take a close look at the concept of 'flexibility', it is apparent that more flexibility evidently means less protection for employees, less rights for trade unions and more freedom for employers. Thus, more flexibility means the approximation of labour law to private (civil, commercial) law, but also the minimum harmonisation of the labour law Directives, the promotion of the regulatory role of the contractual sources of labour law, and last but not least, the flexibilisation of regulation for small- and medium sized employers. As such, all 'other' objectives (points b.-e. listed above) may be perceived as the methods for creating more flexibility in the labour market in order to promote the creation of more jobs. The simplification of the legal text of the Labour Code is the odd one out, since this is the sole purely legal, technical, non-ideological objective of the reform.

1.4. Main elements of the reform: varied sources of flexibility

The most important conceptual changes seeking to provide for more flexibility in the labour market, apart from diminishing certain employee and trade union rights, are as follows:

a) The new provisions on hierarchy of labour law sources reshuffled the legal sources of labour law by increasing the regulatory role of contractual sources (collective agreements, employment contracts) in order to foster flexibilisation of employment conditions through the following measures:
   – enhanced role of collective agreements by allowing for in peius and in melius derogations;

- decentralization of collective bargaining by allowing lower level collective agreements to deviate in peius from higher level collective agreements;
- works councils may also conclude quasi collective agreements (normative works council agreements) in case the employer is not covered by a collective agreement, or there is no trade union entitled to conclude a collective agreement;
- employment contracts may deviate in peius from more provisions of the Labour Code than before;
- restrictions on company by-laws (statutes).

b) Amended individual labour law provisions provide more flexibility on several issues, such as:
- flexible regulation of working time and wage supplements;
- downgraded protection against unfair dismissal by the employer;
- limited liability of employers for damages through the insertion of a new exemption clause, resulting in an approximation of labour law liability to liability provisions in the Civil Code;
- flexible regulation and new forms of atypical employment.

c) Diminishing trade union rights and shifting some of their former rights to works councils:
- works councils and not trade unions monitor compliance with labour law;
- consultations with works councils instead of trade unions in cases of restructuring the employer's organization (transfer, collective redundancy);
- legal protection against termination of employment is not provided for every officer of the trade union anymore, but only for 2-6 officers depending on the number of employees at the workplace;
- the employees designated by the trade union are only entitled to a shorter working time reduction;
- working time reduction cannot be redeemed by the employer, if the trade unions fail to use up this extra working time;
- the right to veto certain measures of the employer is deleted from the Labour Code.

In the following three chapters me shall analyse the flexible labour law provisions listed above. On the basis of this analysis, me will try to answer the rather complex question, whether the Labour Code will be able to achieve the declared economic and legal objectives of the government.

2. Contractual sources of labour law: revival?

The most important pillar of the reform is the complete reorganization of the hierarchy of labour law sources. The rigidity of Hungarian labour law has been explained by reference to the weak regulatory function of collective agreements in the last two decades. The main aim of this conceptual change is therefore to enhance the role of contractual sources of labour law, in particular that of collective agreements (collective autonomy), but also that of the agreement of the parties (individual autonomy). Interestingly, these two, rather distinct contractual sources were considered by government policy to be legal institutions of the same legal nature, which is an absolute misunderstanding in our view. At the same time, only laws and collective agreements can constitute the sources of labour law, called 'employment regulations'.[8] The employment contract is a source of rules binding upon the parties involved, yet it is not a source of labour law.

2.1. The role of collective agreements under the 1992 Labour Code

As described above, one of the main objectives of the new Labour Code was to enhance the role of collective agreements in the regulation of employment relationships. This conceptual change was necessary, since the objectives of the 1992 Labour Code were only partially realized in the legal practice of the last 20 years.[9] The 1992 Labour Code aimed for an essentially private law based regulation of employment relationships, laying down minimum standards, while further rules more favourable for employees could have been regulated

[8] Article 13 of the 2012 Labour Code: „For the purposes of this Act, 'employment regulations' shall mean legislation, collective agreements and works agreements, and the binding decisions of the conciliation committee adopted according to Section 293."

[9] Kiss, György: Munkajog a közjog és a magánjog határán – egy új munkajogi politika kialakításának szükségessége. *Jogtudományi Közlöny*, 2008/2. 70–81.

by collective agreements. However, since the legislator expected that it will take time for collective agreements to develop both on the workplace level and the sector level, it also introduced dispositive rules in the Labour Code, from which the parties could depart in favour and exceptionally to the detriment of the interest of the employees.

The lack of the genuine (efficient) regulatory function of collective agreements was revised by the legislator in two ways. The amendments of the Labour Code increased the number of possible derogations from the Act to the detriment of employees.[10] However, these were scarce and individual interventions and did not change the general rule of relative dispositivity (in melius derogation). In addition, several statutory provisions were adopted to compensate for the lack of collective agreements. According to some authors, this resulted in a relatively rigid regulation of employment relationships, not sufficiently embedded in private law.

2.2. Collective agreements in practice: low coverage and weak contents

In spite of it all, collective agreements remain insignificant instruments in the regulation of employment relationships.[11] According to the data from 2009, only 33.9 % (901 500 persons) of all employees (2 656 000 people) were covered by collective agreements. In other words, approximately two-thirds of the Hungarian employees are not covered by any kind of collective agreement. This rate is very low compared to the EU bargaining coverage rate of 66 %, i.e. in contrast to the Hungarian situation two-thirds of all EU employees are covered by a collective agreement.[12] Although the scope of collective agreements may be extended to an entire sector of the economy as well, only 8.6 % of Hungarian employees are covered by such sector level agreements.

Research carried out on this subject has pointed to several weaknesses in the content of such collective agreements. Collective agreements often merely repeat the rules of the Labour Code (so-called parrot clauses)[13], and frequently

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[10] See especially Act No. 16 of 2001 on the amendment of the 1992 Labour Code concerning transposition of nine Directives.

[11] Radnay, József: Munkajogunk helyzetéről. *Gazdaság és Jog,* 2010/9–10. 33.

[12] *Industrial Relations in Europe 2010*. European Commission, 2011. 36.

[13] Újvári, József: A papagájklauzula esete a munkaszerződéssel. In: *Tanulmányok Dr. Veres József egyetemi tanár 70. születésnapjára*. Szeged, 1999. 427–430.

include illegal or meaningless terms and conditions. This remains the case, notwithstanding the fact that the Minister has the right to revise the legality of collective agreements in the extension procedure.[14]

2.3. Sector level collective bargaining: much ado about nothing?

The main field of collective bargaining has always been the workplace, therefore, sector level collective agreements traditionally played a very limited role in labour law regulation. This situation did not change after the detailed regulation of sector level collective bargaining in the separate Act on Sectoral Social Dialogue Committees in 2009.[15] The Act introduced the possibility for sector level collective agreements to be concluded in a Sectoral Social Dialogue Committee. However, this intention failed, since Sectoral Social Dialogue Committees have only managed to conclude a few such agreements.[16]

This deficiency may be partly explained by the fact that employers' organizations represented in the above mentioned committees employ only a small proportion of employees, therefore, it would be pointless to conclude a sector level collective agreement in order to establish uniform working conditions in the entire sector. Besides, in wake of the economic crisis, many employers' emphasized the difficulties inherent in long-term planning, an inevitable condition for concluding such an agreement. Therefore, while the Sectoral Social Dialogue Committees provided an adequate institutional framework for sector level social dialogue, this did not change the motivation of the parties and the low interest in concluding higher level collective agreements.[17]

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[14] Kártyás, Gábor – Takács, Gábor: Pellengér vagy piedesztál? A kiterjesztett hatályú kollektív szerződések normatani értékelése. *Pécsi Munkajogi Közlemények,* 2011/2. 91–111.; Fodor, T. Gábor – Nacsa, Beáta – Neumann, László: *Egy és több munkáltatóra kiterjedő hatályú kollektív szerződések összehasonlító elemzése. Országos összegző tanulmány.* Budapest, Kende Ügyvédi Iroda, 2008, pp. 17–19.; Ungi, Noémi: A kollektív szerződések elemzésének tapasztalatai, I–II. rész. *Munkaügyi Szemle*, 2007. január-február.

[15] Act No. 74 of 2009 on sectoral social dialogue committees and certain issues on medium level social dialogue.

[16] Nacsa, Beáta: *Az Ágazati Párbeszéd Bizottságok működésének jogi-munkajogi elemzése*. Kutatási Zárótanulmány. Budapest, 2010. 36.

[17] Arató, Krisztina: *A középszintű érdekegyeztetés változásai Magyarországon a PHARE projekttől napjainkig, illetve az Ágazati Párbeszéd Bizottságok kapcsolatai a makroszintű érdekegyeztetés intézményeivel. Kutatási zárótanulmány.* Budapest, Civil Európa Egyesület, 2010. 57–58., 64.

2.4. The reasons for the low collective agreement coverage

The low collective agreement coverage is a decisive characteristic of all former socialist Member States: the Czech Republic, Poland, Slovakia, Bulgaria, Latvia, Lithuania, etc. have a similar, or even lower figure. „Although before 1990 sector level bargaining never played an important role in most of the CEE countries and collective bargaining has always taken place mainly at company level, the central state had an important influence on wage setting and coverage rates were high. After 1990, in most CEE countries central elements disappeared from the wage-setting process (with the important exception of the minimum wage) and coverage rates declined rapidly."[18] "Collective bargaining structures and practices remain fragile in Central and Eastern Europe and coverage is low — the average of 43 % around the end of the decade is 4 percentage points below that in 2000."[19]

There are several other reasons explaining the weak regulatory function of collective agreements in Hungary. Firstly, mass privatization hampered the spread of collective agreements. With the cessation of the 'socialist firm', which was the basis of trade union activities, trade unions were not strong enough to enforce collective agreements in the years following the regime change.[20] Micro, small and medium sized workplaces became the dominant employers, employing over 60% of all employees, and the enforcement of the Labour Code in these workplaces generally problematic.[21] Furthermore, it has not been feasible to conclude a collective agreement in these small firms due to the lack of trade unions and the strict rules of the Labour Code on trade union representativity, since a great majority of votes at works council elections were required for a trade union to have the right to conclude a collective agreement.[22]

In addition, employers were not interested in the conclusion of collective agreements, since there were only a few rules in the 1992 Labour Code from which they could deviate via collective agreements to the detriment of the employees (in peius derogation). The main principle governing the relationship of the Labour Code and collective agreements was 'relative dispositivity', i.e

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18 *Industrial Relations in Europe 2010.* European Commission, 2011. 131.

19 *Industrial Relations in Europe 2010.* European Commission, 2011. 36.

20 Laky, Teréz – Neumann, László – Boda, Dorottya: *A privatizáció foglalkoztatási hatásai*. Budapest, 2001.

21 Laky, Teréz: Az atipikus foglakozásokról. http://people.mokk.bme.hu/~kornai/laky/Cikk/atipikus.pdf, 14.

22 Article 33 of the 1992 Labour Code.

that collective agreements could deviate from the rules of the 1992 Labour Code only in favour of employees (in melius derogation).

2.5. The enhanced role of collective agreements: derogation from the Labour Code allowed in almost every aspect

The new Labour Code introduced radical changes to the relationship between the statute and collective agreements. First of all, collective agreements may derogate from most of the rules on individual labour law (rules on employment relationship) also to the detriment of employees.[23] There are over fifty provisions which allow both in melius and in peius derogation. At the same time, there are over thirty cogent rules which do not allow any deviation, for example on the establishment and the termination of an employment relationship. Furthermore, there are statutory provisions, which allow for in melius derogation or in peius derogation only to a limited extent (see the table below).

Derogations by collective agreement from the provisions of the Labour Code

General rule: absolute (bilateral) dispositivity	**Three exceptions from the general rule**		
	1. Cogent rules	**2. Relative (unilateral) dispositivity**	**3. Restricted absolute (bilateral) dispositivity**
The collective agreement may derogate in peius and in melius from most of the provisions of the Labour Code. Being the general rule, these 'absolutely dispositive' statutory norms are not marked as such by the Labour Code.	It is null and void to derogate from the cogent rules of the Labour Code. Only the second and the third part of the Labour Code are dispositive, all other parts (1,4,5) are cogent. Furthermore, the cogent provisions within the second and the third part of the Labour Code are listed under the heading 'Derogations by agreements' at the end of each chapter.	Only in melius derogation is allowed, for example on the entire chapter in relation to the liability of the employer for damages incurred by the employee.	The collective agreement may derogate in peius and in melius from most of the provisions of the Labour Code, however, only to a limited extent. For example the number of extra hours may be 250 hours per year, which may be raised to 300 hours in the collective agreement.

The legislator expects that the wide possibility of in peius derogation will have a positive effect on the number of collective agreements, since employers

[23] Article 277 of the 2012 Labour Code.

will definitely be interested to conclude such agreements. However, this interest of employers to conclude a workplace level collective agreement in order to achieve even more flexible provisions, entails the danger of establishing yellow trade unions to serve their interest. This may be especially the case at those workplaces, where the organisation of employees is low and unfortunately this is the case in most of the companies.

Secondly, this conceptual change will strengthen the position of trade unions in collective bargaining, for in exchange for accepting detrimental changes they can demand more favourable conditions in other areas. Thirdly, the new soft representativity criteria of trade unions may also foster collective bargaining: a trade union shall be entitled to conclude a collective agreement if its membership reaches 10% of all workers employed by the employer.[24]

These changes may promote collective bargaining at workplace level and workplace level collective agreements may thereby play a (somewhat) greater role in employment regulation. It is however rather questionable, whether the players on the two sides of industry (employers as well as trade unions) are well prepared for this active collective bargaining process. At the same time, collective bargaining will remain at workplace level, since the conclusion of sector level collective agreements is not facilitated by the new legal and economic framework either, and the detailed rules are still missing from the Labour Code. Although no data is available on these developments, the social partners have not reported remarkable developments regarding the number and contents of collective agreements.[25]

2.6. Decentralization of collective bargaining: a harmful step

As an exception to the lack of special provisions on sector level collective agreements, the Labour Code regulates the relationship between higher (sector, subsector etc.) level and lower (eg. workplace) level collective agreements. Workplace level collective agreements are the typical form, just like in other

[24] Article 276 of the 2012 Labour Code.

[25] Conclusions of the Round-table discussion of Hungarian social partners at the Conference („The new Labour Code in the light of international obligations", http://www.pazmanymunkajog.com) organized by the Labour Law Department of Pázmány Péter Catholic University and the Freidrich Ebert Stiftung (Budapest, 19 November 2013).

countries of the region, while higher level collective agreements hardly exist.[26] Therefore, in practice the relationship between the collective agreements concluded at the different levels are not of great importance. Nevertheless, this issue has always been regulated by the Labour Code. According to the 1992 Labour Code, a collective agreement concluded at the workplace level may depart from a collective agreement of broader scope (sector, subsector) insofar as it specifies more favorable regulations for employees.[27]

Although the new Labour Code retained this principle, it added an important exception, opening the door to the decentralization of collective bargaining. A collective agreement of limited effect (concluded at the employer or the subsector) may namely derogate from the one with a broader scope (concluded at sector or subsector level) insofar as it contains more favorable regulations for the employees, unless otherwise provided for in the higher level collective agreement.[28] Therefore, the higher (sector, subsector) level collective agreement may contain a provision allowing the lower (typically employer) level collective agreement to derogate from its provisions to the detriment of employees. This new possibility will weaken the capability of higher level collective agreements to standardize working conditions in an entire sector,[29] thus, it may be considered a harmful legislative step, even if this opportunity will most probably not be widely exploited.

2.7. Collective agreement concluded by a works council: an absolute dogmatic failure

The really bad news is that the new Labour Code allows works council agreements, concluded by the works council and the employer, to take over the role of the collective agreement under certain conditions. Before the 2012 reform, works council agreements had a very different legal nature, since the

[26] See for example Poland (Piotr Grzebyk: Legal position of trade unions in Polish Collective Labour Law: enterprise-based trade union. *Hungarian Labour Law E-Journal*, http://www.hllj.hu, 2014/1., 73–86.

[27] Article 41 of the 1992 Labour Code.

[28] Article 277 of the 2012 Labour Code.

[29] Kártyás, Gábor: Kollektív szerződés. In: Gyulavári, Tamás (szerk.): *Munkajog.* Budapest, ELTE Eötvös Kiadó, 2013. 491.

law stipulated that only "issues pertaining to the privileges of a works council and its relations with the employer" shall be set forth in such an agreement.[30]

It must be mentioned that the possibility of works council agreements replacing collective agreements was already in place, but only for a very short period, as the socialist majority deleted this provision from the Labour Code immediately after winning the elections in 2002. There was a general consensus within labour law scholarship at the time, that the normative works council agreement is a normative failure for reason of the diverse legal nature of works council agreements and collective bargaining.

According to the new Labour Code, the primary role of works council agreements is still the arrangement of the relationship between the works council and the employer: "the employer and the works council may conclude a works council agreement for the implementation of the provisions of this Chapter and for promoting their cooperation".[31] However, works council agreements may also contain provisions governing rights and obligations arising in connection with employment relationships (normative part of the collective agreement). Such works council (pseudo collective) agreements may be concluded on the condition that the employer is not covered by a collective agreement,[32] and there is no trade union at the employer that would be authorized to conclude a collective agreement.[33]

There is only one restriction concerning the content of the normative works council agreements: namely that works council agreements must not derogate from the provisions of the entire Chapter of the Labour Code on wages.[34] This exception is also a dogmatic as well as a practical mistake, since higher wages are usually the compensation for several flexible provisions concerning in particular working time and resting periods in the collective agreement. Since such a pecuniary compensation is not allowed, the conclusion of a real and balanced deal may be hindered or even frustrated.

The number of collective agreements is still very low, therefore, the clear aim of this measure is to promote the conclusion of "near" collective agreements in medium sized companies. A works council shall be elected if the average number

30 Article 64/A of the 1992 Labour Code, introduced by an amendment of the original text in 1995.

31 Article 267 (1) of the 2012 Labour Code.

32 As a result, the employer may conclude a normative works council agreement, in case it falls under the scope of a subsector or sector level collective agreement.

33 Article 268 of the 2012 Labour Code.

34 Chapter XII., Article 136–165.

of employees at the employer or at the employer's independent establishment or division is higher than fifty.[35] There is usually no trade union at employer level, as employee organizations are concentrated in large companies, particularly in state-owned (eg. Hungarian Railways and other public service companies) and multinational firms (eg. Tesco, Audi).

As a result, the large and medium sized firms without trade unions have not really had a tradition, a practice or even an interest in collective bargaining. This situation may change to a certain degree, as these medium sized employers will be motivated to conclude a works council agreement in order to draw the advantages stemming from the flexibility of working time as well as wages provisions by way of derogation. Nevertheless, the first experiences show that no new collective agreements are emerging in this section of the labour market. It remains an open question, how these companies may be incentivized to engage in the collective bargaining process. Perhaps statutory provisions are flexible enough for these employers and the lowering of the level of protection has no tempting effect.

Although the above described legislative objective, the promotion of collective bargaining in a wider range of medium sized companies, may be acknowledged, the legal solution of the normative works council agreement raises serious dogmatic problems and doubts. The starting point must be an assessment in light of the legal nature of the works council, as a labour law institution: works councils are designed to foster "cooperation between employers and workers, and taking part in the employers' decisions".[36] This idea of participation seriously contradicts the attributes of collective bargaining, where the employees' representatives confront the employer to attain the best working conditions for the employees at the expenses of the employer.

Whatsmore, works councils must remain unbiased in to the event of a strike organized against the employer, they may not organize, support or obstruct strikes.[37] The lack of effective collective actions weakens the bargaining position of works councils.[38] The labour law protection of the members of works councils is also missing, since it is only the chair of the works council who enjoys protection against termination of employment.[39] Therefore, the

35 Article 236 of the 2012 Labour Code.

36 Article 235 and 262 of the 2012 Labour Code.

37 The mandate of works council members participating in a strike shall be suspended for the duration of the strike (Article 266 of the new Labour Code).

38 Gyulaváři, Tamás (szerk.): *Munkajog.* Budapest, ELTE Eötvös Kiadó, 2012. 53.

39 Article 260 (3)-(5) of the new Labour Code.

works council is like a tennis player in Wimbledon at the central court, in dire need of a racket. Moreover, there is a danger, that certain employers may urge the election of friendly, yellow works councils in order to create a partner for concluding a works council agreement derogating from the Labour Code in the employer's interest.

As a result of the above, the new Labour Code is expected to strengthen the role of collective agreements by allowing 'works council agreements' concluded by works councils and employers to derogate from the rules of the Labour Code. At the same time, works council agreements will play a subsidiary role, since they may regulate terms and conditions of employment only in case there is no collective agreement or any trade union that could conclude a collective agreement. The works council agreement, substituting the collective agreement, is a dogmatic failure and entails serious risks. As of yet, it is difficult to assess the prospective harm caused of this legal solution. Unfortunately, there is no available data on the number of such agreements, yet their real number seems to be negligible (if any). In our opinion, this normative function of the works council agreement should be deleted from the Labour Code, since it does not play the role it was elaborated for, on the contrary, it raises serious doubts.

2.8. Employment contract: dangerous increase of in peius derogations

Beyond collective agreements, the regulatory function of the agreement of the parties (employment contract and other agreements related to employment) was also strengthened by the new Labour Code, even if to moderate degree. As it was mentioned above, the approximation of labour law to private (civil) law served as the ideological background for reinforcing the role of the contractual sources of labour law. As a result, the regulatory role of the employment contract was considered to be equivalent to that of the collective agreement as if they were uniform legal institutions.

This is an absolute misunderstanding of the regulatory role of the employment contract, since the evolution of modern labour led from the unencumbered freedom of contract of the parties to the statutory as well as collective limitations of such contractual freedom. These detailed limitations of contractual freedom in modern labour law are based on the recognition concering the unbalanced powers of the two sides of the contract of employment. The free derogation to both directions from the Labour Code and the collective agreement (in peius

and in melius) means that the employer is entitled to enforce even more flexible rules against the employee.

The average employee usually has two choices: to sign the contract or to look for another job. The inequality in the position of these two parties means the lack of bargaining power on the side of the employee. Meanwhile, there are several employees who possess a strong bargaining power due to their education, experience, the labour market situation (eg. jobs in demand), yet this is the minority of the workforce. The majority of workers is defenceless in the course of the negotiations concerning the terms of the employment contract.

This is the reason why the 1992 Labour Code permitted only in melius derogation from the Labour Code and the collective agreement containing several cogent rules, while only a very few provisions allowed in peius derogation. It is a remarkable and regrettable change, that the 2012 Labour Code considerably increased the number of absolutely (bilaterally) dispositive rules, increasing the subordination of employees.

Although the parties' agreement, especially the employment contract, may derogate merely in melius from the Labour Code and from collective agreements, the new Labour Code allows such agreements to regulate a higher number of issues in peius than the former Act. For instance, by agreement of the parties, the employer may allocate part the vacation time by the end of the year following the year when due.[40] Taking into account the unequal position of the parties, these new provisions entail the risk of abuse by the employer. While the strengthened role of the parties' agreement is less important than the changing concept of collective autonomy, it highlights the increasing emphasis on contractual freedom.

[40] Article 123 (6) of the 2012 Labour Code.

Derogations by agreement of the parties from the Labour Code

General rule: relative (unilateral) dispositivity	Three exceptions from the general rule		
	1. Cogent rules	2. Absolute (bilateral) dispositivity	3. Restricted absolute (bilateral) dispositivity
Only in melius derogation is allowed.	It is null and void to derogate from the cogent rules of the Labour Code. Only the second part of the Labour Code is dispositive, thus all other parts (1,3,4,5) are cogent. Furthermore, the cogent provisions within the second part of the Labour Code are listed under the heading 'Derogations by agreements' at the end of each chapter.	The agreement of the parties may derogate in peius and in melius from most of the provisions of the Labour Code, if it is allowed by the given provision.	The agreement of the parties may derogate in peius and in melius from a few provisions of the Labour Code, however, only to a limited extent.

There are extremely flexible provisions on executive employees, since the employment contract of executive employees may derogate in peius or in melius from all the provisions of Part Two of the Labour Code on the employment relationship (so-called individual labour law). This means that the employment contract of executive employees may deviate in peius even from the cogent provisions of the Labour Code. Originally, there was only one exception to this general rule: collective agreements shall never apply to executive employees. However, the latest amendment[41] of the Labour Code slightly extended this list with four more cogent provisions.[42]

The ministerial reasoning of the Labour Code explained the possibility of the employer and the employee to freely design the employment contract with the (relatively) strong bargaining power of these employees compared to 'regular' employees. In our opinion this absolute freedom of the parties to the employment contract is exaggerated and it may even jeopardize the legal nature of the employment relationship by accepting terms, which are alien to a working relationship based on personal subordination. Therefore, further limitations, a longer list of cogent rules seems advisable.

41 Act No. 252 of 2013 on the amendment of several acts in relation to the coming into force of the Civil Code.

42 Article 209 of the 2012 Labour Code.

2.9. Regulation of company statutes: a real step forward?

In parallel to the growing proportion of large international companies in the Hungarian and regional economy, company statutes, unilateral codes and by-laws are playing an increasing role in labour law regulation.[43] Interestingly, socialist labour legislation already contained detailed rules on the regulatory function of company statutes and workplace practice, albeit in an evidently different context. Nonetheless, the 1992 Labour Code remained silent on the legal nature and applicable rules of company statutes, and the lack of detailed provisions led to serious problems in legal practice, for instance with respect to the termination of employment.[44]

Taking into account the relevance of soft law instruments in the structure of the legal sources of labour law, the new Labour Code[45] contains a laconic article on unilateral company statutes and workplace practice, declaring both to be a special form of 'employer's order' (unilateral legal statement).[46] Apparently, company statutes are not a legal source of labour law,[47] but rather the normative orders of the employer.

As for the possible deviation from the law or the collective agreement, the new provision remains vague. Principally, company statutes may regulate employment relationships as long as this is explicitly permitted by a law, collective agreement, or in case it contains a unilateral commitment made by the employer. Notwithstanding the above, it is still unclear, whether a company statute or workplace practice may derogate from the Labour Code (in peius, in meius or both). In addition, the collision between a company statute and workplace practice is also an open legal and practical puzzle (e.g. termination of employment based on the breach of obligations by the employee).

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43 M. Antonio Garcia – Munoz Alhambra – Beryl ter Haar – Attila Kun: Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law. *The International Journal of Comparative Labour Law and Industrial Relations*, Vol 27. December 2011/4. 334–367.

44 Gyulavári, Tamás – Kun, Attila: Munkáltatói jogalkotás? A munkáltatói szabályzatok szerpe a munkajogi szabályozásban. *Magyar Jog*, 2012. március, 160.; Kiss, György: *Munkajog.* Budapest, Osiris, 2005. 79.

45 Article 17 of the 2012 Labour Code.

46 Section 17 (1): Employers shall be able to implement the legal acts referred to in Sections 15–16 by means of internal rules established of their own accord or by way of a procedure formulated unilaterally (hereinafter referred to as "employer's internal policy"). (2) The employer's internal policy shall be considered delivered if published by means considered customary for, and commonly known in, the area.

47 Article 13 of the 2012 Labour Code.

Consequently, the new article of the Labour Code did not really help clarify the debated issues raised by earlier court practice. In our opinion, the specific normative character of company statutes should be formally recognised by the Labour Code and special provisions of the Labour Code should be dedicated to the establishment, amendment, termination and contents of this source of employment law.

3. Individual labour provisions

The second part of the Labour Code[48] contains all provisions governing the employment relationship (individual labour law). As a general observation we may state that this part of the Labour Code was considerably relaxed, however, the following topics listed refer to areas where the significant amendments considerably worsened the working conditions of employees:

- the relaxed working time and the related wages provisions;
- the restricted sanctions regarding unlawful termination of the employment relationship;
- the increased liability of employees for damages;
- the limited liability of employers for damages;
- the flexible regulation and new forms of atypical employment relationships.

The following chapter will present these changes, seeking to evaluate their critique and expected practical effects.

3.1. Extremely flexible regulation of working time and wage supplements

The new chapters on working time[49] and wages[50] brought about several minor amendments compared to the former Labour Code, however, these new rules remarkably relaxed the already quite flexible provisions. Therefore these new

[48] The Labour Code contains the following five parts: Part 1 General provisions (Articles 1–31); Part 2 Employment relationship (Articles 32–229); Part 3 Industrial relations (Articles 230–284); Part 4 Labour Disputes (Articles 285–293); Part 5 Closing provisions (Articles 294–299).

[49] Chapter XI (Articles 86–135).

[50] Chapter XII (Articles 136–165).

rules substantially affect working conditions, which is more important in the case of large companies, as adherence to working time rules as well provisions on pay supplements is more typical in these work organisations.

In relation to the organisation of working time and resting periods the Labour Code strives for providing the most flexible legal framework possible, certainly in compliance with the minimum requirements of the Working Time Directive.[51] The following changes may adequately demonstrate the orientation of legislation in this field:

- The annual maximum of overtime was increased from 200 to 250 hours per year, which may be raised by the collective agreement to 300 hours.[52]
- In case of an irregular work schedule, after six days of work one day of rest shall be allocated in a given week, with the exception of employees working in continuous shifts, shift work or in seasonal jobs, where employees shall be allocated at least one weekly resting day in a given month on a Sunday.[53]
- The maximum duration of working time banking was increased from two to four months, but may even be increased to twelve months in the collective agreement, if this is justified by technical reasons or reasons related to the organization of work.[54]
- The old rule remained, according to which the work schedule shall be determined for at least one week and shall be made known at least seven days in advance in writing. However, the employer may alter the work schedule for a given day upon the occurrence of unforeseen circumstances in its business or financial affairs, at least four days in advance.[55] In addition, the collective agreement may further shorten the minimum period of notification.

As for the new provisions on pay supplements, the most significant and telling amendments are as follows:

- The former compulsory wage supplement for afternoon shift work was deleted from the Labour Code, possibly reducing the generally already

[51] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

[52] Article 109 of the 2012 Labour Code.

[53] Article 105 of the 2012 Labour Code.

[54] Article 94 of the 2012 Labour Code.

[55] Article 97 of the 2012 Labour Code.

low salary in large companies using shift workers (the national gross average is about 750 euros).

– The agreement of the parties may determine that the basic wage may include most of the wage supplements (Sundays, bank holidays, shifts, night work) set forth in the Labour Code.[56] The collective agreement or the parties' agreement may of course contain further or higher wage supplements, however, the inclusion of an 'extra payment clause' is rather doubtful at many workplaces due to the weak bargaining power of workers, the lack of trade unions and the difficult labour market situation characterized by high unemployment.

Certainly, there are many similar changes in these chapters, erasing former "acquired employee rights", which have been intensely opposed by trade unions during the debate.

3.2. Unlawful termination of employment: radically limited sanctions

The detailed rules on the termination of the employment relationship have not really been changed, but rather simplified, therefore, termination by the employer has in no way become easier. The introduction of termination by notice in case of fixed-term employment contracts is the only significant, structural change in the field of dismissals, since according to the former rules, termination by notice was unlawful in relation to fixed term contracts.

Even though termination by notice is now possible, the list of lawful grounds are rather limited, therefore it will not be a popular, frequently exploited way of terminating a fixed-term contract. Moreover, the statutory reasons are vaguely framed, resulting in uncertainty and litigation. The reasons are fairly dissimilar concerning the two parties. Employers can terminate a fixed-term employment relationship by notice in case they are undergoing liquidation or bankruptcy proceedings; or for reasons related to the worker's ability; or if maintaining the employment relationship is no longer possible due to unavoidable external reasons.[57] By contrast, employees may terminate their fixed-term employment

[56] Article 145 of the 2012 Labour Code.

[57] Article 66 (8) of the 2012 Labour Code.

relationship, if the reason would render maintaining the employment impossible or would cause unreasonable hardship in light of the employee's circumstances.[58]

At the same time, the legal consequences of unlawful termination (unfair dismissal) by the employer has been significantly restricted, thus, in certain cases an unfair dismissal may be even cheaper for the employer than the continuation of an (unwanted) employment relationship.[59]

According to the new rules, the employer shall be liable to provide compensation for damages resulting from the wrongful termination of an employment relationship, yet compensation for loss of income from the employment relationship may not exceed twelve months' absentee pay (wage).[60] Formerly, the employee was entitled to full payment between the dates of the termination of employment and the decision of the court, beyond the extra payment of 2-12 months' salary or reinstatement to the job.

The former general possibility of reinstatement to the former job was confined to a few cases. At the employee's request, the court shall reinstate the employment relationship, if it was terminated in violation of the principle of equal treatment; if the employee served as an employees' representative at the time his employment relationship was terminated, etc.[61]

It is beyond question, that the old system of employee compensation was not always fair to employers, for in case the court proceedings lasted for 3, 4 or even 5 years, the employee was often entitled to a huge amount of compensation. Moreover, the employee was not even obliged to mitigate the damages incurred by the employer by searching for a new job in this period. Even if this system was justified by deterring employers from breaching the rules on the termination of employment, it also punished employers for the length of the court proceedings.

As a 'flexible' legislative answer for the above described problems, 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

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58 Article 67 (2) of the 2012 Labour Code.

59 For example, the employee has no lost income due to the maternity allowance and the employer immediately admits unlawful termination before the court.

60 Article 82 of the 2012 Labour Code.

61 Article 83 of the 2012 Labour Code "In addition to what is contained in Subsection (1) of Section 82, at the employee's request the court shall reinstate the employment relationship: *a)* if it was terminated in violation of the principle of equal treatment; *b)* if it was terminated in violation of Subsection (3) of Section 65; *c)* if it was terminated in violation of Subsection (1) of Section 273; *d)* if the employee served as an employees' representative at the time his employment relationship was terminated; *e)* if the employee successfully challenged the termination of the employment relationship by mutual consent or through his own legal act."

employee in case of wrongful dismissal. However, by limiting the compensation for loss of income to a maximum of twelve months' absentee pay with a very limited option to restore the employment relationship, it is questionable whether the employee receives appropriate reparation and whether the employer is efficiently restrained from introducing similar unlawful measures.

In our view, the new mechanism will not deter employers from the future violation of termination rules. At the same time it is worth noting that the new system has already led to a remarkable decrease in the number of labour law disputes.[62] While labour disputes may disappear, labour conflicts will surely remain with us also in the future. Interestingly, a very similar amendment was passed in the United Kingdom in 2013 by introducing a statutory cap (£ 74,200 or 52 weeks' salary) on damages awarded to successful claimants in unfair dismissal trials.[63]

3.3. Increased liability of employees for damages

The proposals of the Hungarian Work Plan were much more radical on the liability of employees for damages than the finally adopted text of the Labour Code, since the former originally proposed the introduction of the full liability of employees for damages caused to employers. Finally, the Labour Code introduced only minor changes concerning the liability of employees, including a higher maximum amount of compensation (4 months instead of the former half month) payable to the employer in case of slight negligence and liability for the full extent of losses in case of gross negligence (instead of the former half month). Thus, employees' liability remained pro viribus and cum viribus limited in case of negligence of the employee, except for the case of gross negligence.

The parties may further agree in writing, that employees must pay a guarantee of one month base wage to the employer in certain positions (e.g. cashiers), which may be used only for satisfying compensation claims.[64] Especially the latter amendment was fiercely opposed by trade unions, as it puts an extra burden on this low-waged group of employees. At the same time, this possibility is very beneficial for the employer, if the job involves the handling of cash or other

62 Unfortunately, there is no available data on court cases, this information stems from labour judges.

63 Jeremias Prassl: 'All in this together?' UK Labour Market Reforms under the Coalition Government. *Hungarian Labour Law E-Journal*, http://www.hllj.hu, 2014/1. 28.

64 Article 189 of the new Labour Code.

valuables received from third parties or the supervision of such transactions, since the eventual damage may be directly used for satisfying compensation claims in accordance with the provisions on the deductions from wages.

3.4. Limited liability of employers for damages

More radical changes were introduced regarding the employer's liability for damages. Although the former general rule of objective liability was upheld, according to which the employer shall be liable to provide compensation for damages caused in connection with an employment relationship, the new exemption clauses remarkably restricted this objective liability of the employer, resulting in a situation where the new labour law provisions are equivalent with the civil law rule on liability for the breach of contract.[65] This civil law and now also labour law liability provision was inspired by Article 79 of the United Nations Convention on Contracts for the International Sale of Goods: "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences."[66]

According to the new article on exemptions, the employer shall be relieved of liability if he/she is able to prove: a) that the damage occurred in consequence of unforeseen circumstances beyond his/her 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.[67] The first exemption is absolutely new and very much debated by scholars and labour judges as well, as it is a remarkable reorientation towards subjective, fault-based liability. On the other hand, the 1992 Labour Code already contained the second exemption which is so narrowly framed, that it has has hardly ever been exploited by employers.

The reason behind this conceptual change is the will to restrict the almost absolute objective liability of employers, which was clearly established by court

65 Article 6 (142) of Act No. 5 of 2013 on the Civil Code.

66 http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf

67 Article 166 of the 2012 Labour Code.

case-law based on the provisions of the 1992 Labour Code.[68] However, the ILO recommended maintaining the wording of the 1992 Labour Code, since ILO standards do not recognize elements of force majeure as an acceptable reason for refusing employment injury compensation. „With the exception of some limited enumerated cases, ILO instruments aim at ensuring that employment injuries be compensated with no fault imputed to either side and compensation shall be provided without any question raised as to whether the injury was attributable to fault on the part of the employer, the employee or any third party."[69]

The liability of employers for damages of employees is the most obvious field of approximating labour law to civil law, which measure serves the desired mitigation of the cost of employers, since the former provisions were rather strict and hardly provided any loopholes to escape the risks of employment. Nonetheless, it is a flawed legislative change, as we am convinced, that the employer should bear all the economic risks of employment.

3.5. Atypical employment relationships: flexible regulation and new forms

The 1992 Labor Code regulated five atypical employment relationships: part-time employment, open-ended employment relationship, telework, temporary agency work and the employment relationship of executive employees. In addition, some other laws determined further forms of atypical employment (e.g. home working, casual work). The new Labor Code expanded the list of atypical employment relationships.

The legislator obviously strives towards the full regulation of employment relationships, which may provide some stability to the otherwise ever to often changing provisions.[70] The other reason behind this abundance of atypical forms in the new Labour Code is the assumption, that these forms may be the main generator of the one million new jobs, at least according to governmental plans. According to the National Work Plan, the low Hungarian employment rate is closely connected to the low activity rates among certain disadvantaged groups of employees on the labour market such as women with small children,

68 Kun, Attila: A munkáltató kártérítési felelőssége. In: Gyulavári (ed., 2012) op. cit. 383.

69 Memorandum of Technical Comments on the Draft Labour Code of Hungary. International Labour Office, November 2011 (http://www.szakszervezetek.hu), 11.

70 For instance, there were two new Acts on Casual work in 2009 and 2010.

young workers, elder workers imminently before the pensionable age, workers whose employability has changed due to an accident etc. By referring to international experiences, the document points out that the employability of these disadvantaged groups could be enhanced by the extension of flexible forms of employment.[71]

However, some of the rules on atypical forms of employment, especially regarding on-call work, job sharing and joint employment are fairly brief and sketchy. Hungarian legal practice has so far been reluctant to use vaguely regulated new legal institutions, consequently, it is doubtful whether the adoption of these new forms of employment in itself will generate the expected employment effect. The same may be said for the whole issue and the potential labour market role of atypical employment relationships. Fixed-term employment and temporary agency work are and will remain the most popular atypical forms, while the proportion of all other, above mentioned atypical forms is insignificant. Therefore, the detailed regulation and the new atypical forms of employment will not have a significant impact on developments in the labour market.

4. Trade unions: the ultimate losers of the reform?

4.1. The changing relationship of trade unions and works councils

According to the 1992 Labour Code, the representativity of trade unions was based on the results their candidates achieved at the elections of works councils.[72] As the most important union rights were ensured only to representative trade unions (e.g. stipulation of a collective agreement), it was in the best interest of the union to nominate as many candidates to the elections as possible and to facilitate their success by all means. The union's candidates were generally members or officials of the trade union.

As a result, when such union candidates were elected as works council members, the personnel of the two different organizations became united, and the employer was to consult the same persons in the works council and at the bargaining table over a new collective agreement. Due to the different attributes

71 Hungarian Work Plan 11–12.

72 Article 33 of the 1992 Labour Code.

of the two organizations of employee's representation, such practice proved to be unbeneficial. In many cases the 'legally lightly armored' works councils lost their autonomy and became a consultative body of the trade unions.

According to the new Labor Code, exercising union rights is no longer based on the results achieved at the works council's elections. Now a trade union may conclude a collective agreement if its membership reaches ten percent of all workers,[73] so there is a lower chance that trade unions and works councils fuse together. However, as works councils have many important rights, it could still be useful for trade unions to get as many mandates in works councils as possible.

4.2. Trade unions versus works councils: reshuffled rights

Although the 2012 Labour Code considered neither one of the two types of employee's representations to take precedence over the other, one could experience a shift of emphasis in favor of works councils:

- In the structure of the Code the rules concerning works councils are presented before the rules of trade unions, which was the other way round in the previous Labour Code.
- According to the new Labour Code, monitoring compliance with labour law became the general task of works councils, whereas before, this used to be the competence of trade unions. However, necessary authority is not assured for works councils (e.g. the right to initiate proceedings before authorities).[74]
- EU law foresees consultation with the representatives of the employees' in cases of restructuring the employer's organization (transfer, collective redundancy). The new Labour Code grants this authority specifically to the works councils and not the trade unions.[75]
- Finally, the new Labour Code allows the employer to conclude a works council agreement which is equivalent to the collective agreement (except wages), provided that there is no collective agreement at the employer or there is no trade union entitled to conclude such an agreement.

[73] Article 276 of the 2012 Labour Code.

[74] Article 262 of the 2012 Labour Code.

[75] Article 72 and 265 of the 2012 Labour Code.

Considering the aspect of the protection of employees' interests, the significance of trade unions is obviously greater than that of works councils, as the latter can influence the decisions of the employer only by its rights of consultation and notification. Thus, it seems odd that the new Labour Code gives works councils a role in substituting unions. Whatever authority is granted for works councils by law, it cannot supplement the organizing power of trade unions.

4.3. Shrinking rights of trade unions

The new Labour Code diminishes the rights of trade unions in the following respects:

- Legal protection against the termination of employment is not provided for every official of the trade union compared to the 1992 Labour Code, but only for a minimum of 2 and a maximum of 6 officers (depending on the number of employees at the workplace).[76]
- The employees designated by the trade union are entitled to a shorter working time reduction, this is one hour after every second member of the trade union[77]. For example, if the trade union has 200 members at the employer, its members are entitled to 100 extra hours/month.
- Working time reduction cannot be redeemed by the employer, if the trade unions are not using this extra working time.[78] By contrast, the 1992 Labour Code allowed redeeming half of the extra working time, if the trade union members did not use it up.[79] According to the government, this rule was not in line with international labour standards and also threatened the independence of the two sides. However, this was a major source of income for trade unions, diminishing it remarkably reduced their financial stability.
- The right to veto certain measures of the employer was deleted from the Labour Code. According to the 1992 Labour Code, a local trade union branch was entitled to contest any unlawful action taken by the employer or his/her failure to act by way of a demurrer in case

[76] Article 273 of the 2012 Labour Code.

[77] In the 1992 Labour Code this was 2 hours after every third member of the trade union.

[78] Article 273 of the 2012 Labour Code.

[79] Article 25 of the 1992 Labour Code.

such action directly affected the employees or the trade union.[80] The government argued that this trade union right is a remnant of the socialist political system, which doesn't comply with market economy, for it unduly restrains the employer's proprietorial rights. In our view, this is a remarkable loss for trade unions which should have been compensated by the introduction of their new right to actio popularis, already set forth by the Equal Tretament Act regarding discrimination disputes.[81]

4.4. Trade unions: surely not the winners of the reform

It is clear from the text of the Labour Code, that trade unions are not the favourite actors in the labour policy of the government, since they lost several of their former privileges, moreover, some of their former rights were entrusted to works councils. To the passive observer it rather seems like the legislation wanted to weaken trade unions, strengthening at the same time the works councils to the detriment of trade unions. However, the real reason behind this trend is unclear, since government documents did not formally declare these as general objectives of the law, failing to explain the reasons for all these changes. In our opinion, flexibilisation does not explain the diminishing and reshuffling collective rights, since these amendments did not in fact significantly decrease employers' costs, especially compared to the amendments regarding individual (employee) rights. Therefore, it much rather reflects the will of the government to weaken trade unions and to replace them with works councils to the extent possible.

Despite these restrictions, the position of trade unions will be reinforced by the changing role of collective agreements in the regulation of employment relations. According to the new rules, trade unions can derogate from most of the rules of the Labour Code to the detriment of employees (see above). Trade unions may thereby gain a stronger bargaining position against employers and

[80] A demurrer may not be submitted if an employee is entitled to file for legal action against the action in question (Article 23 of the 1992 Labour Code on demurrer).

[81] A lawsuit under civil law or labour law because of a violation of the principle of equal treatment before the court can be initiated by the Equal Treatment Authority or trade unions, if the violation of the principle of equal treatment was based on a characteristic that is an essential feature of the individual, affecting a larger group of persons that cannot be determined accurately (Act No. 125 of 2003 on Equal Treatment, Article 20).

their responsibility is also greater concerning the result of such bargaining.[82] However, as we will point out it in the next Chapter, the number, coverage and regulatory role of collective agreements did not improve at all in practice, thus, this opportunity remained on dead letter on paper.

5. Objectives and reality

As described in Chapter 1.3, the government documents determined the following objectives for the new Labour Code: flexibilization of labour law to create more jobs; minimum harmonisation of EU law; approximation of labour law to civil (private) law; increasing the regulatory role of the contractual sources of labour law; adjustment of the regulation to the needs of small- and medium sized employers and simplification of the legal text. In this Chapter we will try to answer the rather complex question, whether these government objectives and desires may be fully or partly fulfilled by the new Labour Code.

5.1. Creation of new jobs through the flexibilization of labour law?

The central objective of the new labour Code is to create new jobs among others by way of the flexibilisation of employment law. In this context, flexibilisation means less employee protection and less trade union rights, decreasing the cost of employers, so that they will be able to employ more employees. According to the government the Hungarian labour market shall be "the most flexible in the world"[83], helping to create one million new jobs in ten years (2010-2020).[84] The main question concerning the 2012 labour law reform is therefore, whether it was the rigidity of the former Labour Code that constituted the main obstacle to increasing employers' competitiveness and the number of employees in the Hungarian labour market. In case the answer is yes, the new strategy may be successful, otherwise it is doomed to fail.

The above mentioned strategy stands is stark contrast to studies, which show that the Hungarian Labour Code of the last two decades had been fairly flexible

82 http://www.hrblog.hu/azujmt/2012/01/27/uzemi-tanacs-kontra-szakszervezet-ki-az-erosebb-1-resz-2/

83 The Prime Minister's speech: http://index.hu/belfold/2012/04/23/.

84 Government Program 2010 (Nemzeti Megújulás Programja), 18. (http://www.kormany.hu).

in an international comparison.[85] The flexibilisation strategy of the government identified the following areas, where the provisions of the 1992 Labour Code shall be fundamentally changed: regulatory role of collective agreements, termination of employment, working time, liability of employers for damages and trade union rights. The crucial question concerning the success of this governmental policy is whether these new flexible rules will generate one million new jobs.

In our opinion, the new Labour Code may be a successful element in the regional competition for foreign investments, since large, predominantly multinational companies may benefit the most from these flexible employment provisions, such as the relaxed working time chapter. But the small and micro sized enterprises hardly apply the Labour Code in practice, since the enforcement of the Labour Code is generally problematic in this segment of the economy.[86] Thus, while weaker employment protection may contribute to economic growth (higher GDP as a result of new large car factories like Mercedes, Audi), it shall hardly generate mass employment at the micro and small sized employers, which contribute to two-thirds of all employment. Consequently, the new labour rules will decrease employment rights and worsen working conditions, at the same time, they will surely not increase the employment rate by themselves.

The main criticism of the new Labour Code is that the new rules reduced the protection of employees. Approximately half of the former labour law rules were fully or fundamentally amended, and many of the modified provisions are disadvantageous for employees.

More than two years have passed since the new Labour Code came into force, therefore, it may be helpful to examine the data on labour market developments, especially the trends in the employment rate. The employment rate was 55.4 % in 2010, constantly the second lowest in the EU after Malta (EU average 64,6 %) and it was very far from the targets set by the Europe 2020 Strategy.[87] After 2010 the employment rate increased, however, almost exclusively in the ambit of public work programs.[88]

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85 S. Cazes – A. Nesporova: *Flexicurity: a relevant approach in central and Eastern Europe*. Geneva, ILO, 2007. 147.; C. Wallace: Work Flexibility in Eight European Countries: A Cross-national Comparison. *Czech Sociological Review*, Vol. 39, 2003/6.

86 Laky op. cit. 14.

87 Hungarian Work Plan, 9.

88 57.2% in 2012 (http://www.ksh.hu/docs/hun/xftp/gyor/fog/fog21206.pdf) and 60% in January 2014.

The employment rate slightly increased in 2012-2013, but this increase was due to the public work program and Hungarian migrant workers in Europe, who

Number of employed and unemployed in Hungary
(in population aged 15-74, 3-month moving averages, ths people)

Source: KSH, Portfolio.hu calculation

are strangely also included in the employment rate. The number of migrants is constantly increasing, according to estimates around 600.000 Hungarians are working abroad at the moment.[89] If we look at only the number of employees in the open labour market, excluding the number of civil servants, Hungarians working abroad and public workers, there was no considerable increase since July 2012.[90] However, the surge of the number of employed persons in 2014 needs explanation: half a year before the Parliamentary elections the government launched the largest public work program ever, employing almost 300.000 public workers[91] in order to improve the statistics.

It is clearly difficult to isolate the impact of the new Labour Code on employment growth, as it is a complex issue influenced by several policies beyond labour law, such as economic trends, taxation, active labour market measures, etc. However, we may conclude, that the labour law reform did not give an impetus to the growth of employment, as the number of employees in the open labour market did not increase after and as a result of the labour law reform.

89 http://propeller.hu/itthon/2922604-mar-600-ezer-magyar-dolgozik

90 http://*www.ksh.hu/docs/hun/xftp/gyor/fog/fog21401.pdf.*

91 http://www.vg.hu/kozelet/kozelit-a-300-ezerhez-a-kozmunkasok-szama-416015

5.2. Minimum harmonisation of EU law

The implementation of the labour law directives was accomplished in three waves (in 1997, 2001 and 2003) and in the form of the so called 'package legislation', where several directives were implemented at the same time.[92] This means that the approximation process started in 1997[93] and the final steps were taken in 2003[94]. Even though legal harmonisation has been ongoing since 2003, the general review of the Labour Code included several rules implementing EU law. With due regard to this fact, the European Commission initiated a general examination of the 2012 Labour Code in light of EU labour law directives. Following the consultations with the Commission, the Parliament adopted amendments of the 2012 Labour Code just a few days before it came into effect on the 1st of July 2012.[95]

One of the aims of the legislator was to review national rules implementing EU law and, whereever possible, to bring national law closer to the directives' minimum. One of the main regulatory principles of European labour law directives is that they only lay down minimum standards, a floor of rights from which there may be no negative derogation but which leave it up to the member states to introduce more protective rules.[96] One of the declared aims of the labour law reform was that the rules of the Labour Code should be as flexible as possible, and they should only lay down minimum standards where possible. In order to achieve this goal, the legislator set the objective of also reviewing already harmonized national law in case they could be flexibilized and brought closer to the minimum requirements of the directives. This also reflects the consideration of the legislator that labour law rules should not create unnecessary burdens for employers and that regulation should provide more room for private law regulation.

One example could be the changes introduced to the rules on consultations with workers' representatives in case of collective redundancies. According to the new Labour Code, where an employer is contemplating collective redundancies,

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92 For instance, Act No. 16 of 2001 transposed nine Directives in the Hungarian Labour Code, including the directive on the posting of workers, the working time directive as well the directive on the European works council.

93 Act No. 51 of 1997.

94 Act No. 20 of 2003.

95 Act No. 86 of 2012.

96 S. Deakin: Labour Law as Market Regulation: the Economic Foundations of European Social Policy. In: P. Davies – S. Sciarra – S. Simitis (ed.): *European Community Labour Law: Principles and Perspectives*, Oxford, Clarendon Press, 1996. 78.

he/she shall begin bargaining with the works councils. Such bargaining should be continued until an agreement is reached between the parties, but at least until 15 days.[97] Consequently, if there is no works council at the employer, it does not have to comply with the consultation obligations of the directive.

In order to avoid such a situation, the rules of the 1992 Labour Code established a three stage system for workers' representatives for the purposes of consultations. The employer had to begin negotiations with works councils, if there were no competent works councils, then with representative trade unions or with an ad hoc committee of employees. This system ensured that employers could not avoid the application of the directive if there was no works council at the workplace.

The directive refers to national law on the definition of workers' representatives[98], therefore, the new rule of the 2012 Labour Code amounts to a formal compliance, albeit a less effective implementation of the directive. This provision is contrary to the similar consultation provisions on the transfer of undertakings where the legislator prescribes direct consultation with workers' representatives if there is no works council at the workplace. It is worth noting that the original draft of the 2012 Labour Code included a provision according to which the employer must consult an ad hoc committee of employees in case of collective redundancies, also in case there is no works council at the workplace. On the other hand, it is still questionable whether national law provides full compliance with the directive in this form.

The directive does not require Member States to provide for a specific mechanism of worker representation where an undertaking has no workers' representatives by virtue of national law. However, as the Court of Justice pointed out in the Commission v UK case, the combined effect of Articles 2, 3 and 6 of the directive is that Member States must take all measures necessary to ensure that workers are informed, consulted and in a position to intervene through their representatives in the event of collective redundancies.[99]

The new Labour Code further introduced a new general principle of interpretation, which stipulates that "the rules of the Labour Code shall be interpreted in accordance with the Hungarian legal system and the law of the

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97 Article 72 of the 2012 Labour Code.

98 According to Article 2 (1) of the Directive 98/59/EC, where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives. The term workers representatives means the workers' representatives provided for by the laws or practices of the Member States (Art. 1. (1) b).

99 C-383/92 Commission v UK [1994] ECR I-2479, para. 23.

European Union".[100] The function of such general principles of interpretation is to draw the attention of those applying the rules of the Labour Code to the fact that they must take into account the context of regulation. Labour law rules should not be interpreted in isolation, but much rather in light of the entire legal system, including the law of the European Union.

Furthermore, the legislator also seeks to prevent an interpretation of the rules of the Labour Code which would fly in the face of the general objectives of regulation. This is all the more important, since the impact of EU labour law is becoming ever so significant in Hungarian legislation and legal practice. This is because several provisions of the Labour Code originated from EU law measures. This principle draws the attention of those applying the rules of the Labour Code to the fact that they must also take into account the case law of the European Court of Justice. For instance, the rules on transfers of undertakings cannot be interpreted without taking into consideration the well-established case law of the ECJ on the concept of transfers of undertakings, or an economic entity which retains its identity following the transfer.

5.3. Approximation of labour law to civil (private) law

Approximation of labour law to civil (private) law is a fundamental change, which leads us back to the period preceding the Second World War, when the regulation of employment formed integral part of civil (private) law.[101] The socialist labour legislation (1948-1990) broke away from this tradition and treated the Labour Code as an inherent part of public law. Evidently, the political change brought about a gradual reorientation towards the legal traditions of private law, which process started with the 'cautious' 1992 Labour Code and was later 'crowned' by the 2012 Labour Code.

This approximation process involved two different lines of development. Firstly, the regulation of certain labour law institutions became similar to or even exactly the same as the civil law regulation of the same topic. The best example of such a measure is the regulation of the liability of the employer for damages incurred by the employee. As described above, the new exemption clause significantly restricted the objective liability of the employer, resulting

[100] Article 5 (1) of the 2012 Labour Code.

[101] Szladits, K*ároly*: *A magyar magánjog vázlata*. 2. rész. 4., átdolg. kiad., Budapest, 1935. 234–236.

in a situation where the relevant labour law provision is now the same as the civil law rule on liability for the breach of contract. Secondly, approximation to private law entails reducing the statutory protection of employees, since the relationship of the parties shall be regulated by contractual sources, such as the agreement of the parties or collective agreements, instead of cogent statutory rules.

5.4. Increasing regulatory role of contractual sources of labour law

The new labour policy intends to significantly extend the role of contractual sources, collective agreements as well as employment contracts, in the regulation of employment relationships. In order to achieve this policy aim, a new hierarchy of labour law sources was introduced: the collective agreement may deviate in peius and in melius from the dispositive (not cogent) provisions of the Labour Code. This measure was based on the assumption, that the enhanced contractual freedom of the parties of collective labour law will automatically double the number and coverage of collective agreements.

Unfortunately, we have no data for the period following 2009 on the coverage and number of collective agreements, however, according to the reports of social partners, no increase in the coverage and number of collective agreements resulted from new Labour Code. Therefore, it seems that the new strategy failed and the freedom to deviate from the Labour Code did not motivate parties to conclude more collective agreements.

In our opinion, this issue is much more complex, since the low coverage of collective agreements is a decisive, general characteristic of all former socialist Member States of the EU. „Although before 1990 sector level bargaining never played an important role in most of the CEE countries and collective bargaining has always taken place mainly at company level, the central state had an important influence on wage setting and coverage rates were high. After 1990, in most CEE countries central elements disappeared from the wage-setting process (with the important exception of the minimum wage) and coverage rates declined rapidly."[102] "Collective bargaining structures and practices remain

[102] *Industrial Relations in Europe 2010.* European Commission, 2011. 131.

fragile in Central and Eastern Europe and coverage is low — the average of 43 % around the end of the decade is 4 percentage points below that in 2000."[103]

There are several further reasons explaining the weak regulatory function of collective agreements in Hungary. Firstly, mass privatization hampered the spreading of collective agreements. With the cessation of the 'socialist firm', the basis of trade union activities, trade unions were not strong enough to enforce collective agreements in the years following the regime change.[104] Micro, small and medium sized workplaces became the dominant employers, employing over half of all workers, and in these workplaces the enforcement of the Labour Code is generally problematic.[105]

In our view, the above described historic barriers remained intact and parties are still not interested in or ready for collective bargaining. One explanation for this may be that the statutory level of protection provided for in the 2012 Labour Code is already so low, that employers cannot save enough money on further concessions from trade unions. Another explanation suggests that Hungarian companies are too wound up in other issues, such as economic, financial and tax changes, and labour law is not a real issue in this game of survival in the market. In addition, the lack of tradition and know-how of collective bargaining cannot be remedied by relaxed rules on derogation from one day to another.

Unfortunately, the increased regulatory role of employment contracts is also mentioned together with collective agreements, however, the government and its policy documents remained silent on its reason, theoretical basis or the way they sought to achieve this aim. We are convinced that the provisions allowing for the employment contract to derogate in peius from the Labour Code are rather harmful and should be deleted from the Labour Code, since they in fact enable the employer to unilaterally worsen certain working conditions.

5.5. Adjustment of the regulation to the needs of small- and medium sized employers

I agree with the overall aim to take into account the special situation of micro- and small sized employers, however, it is hard to elaborate a codex for so many different actors, such as large, multinational companies (Audi, Tesco etc.) and

[103] *Industrial Relations in Europe 2010*. European Commission, 2011. 36.

[104] Laky–Neumann–Boda (2001) op. cit.

[105] Laky op. cit. 14.

Hungarian one-man-companies. The special economic conditions of small employers may be taken into account in the Labour Code in two ways.

Firstly, there may be exceptions and specific provisions for small enterprises. It is important to note, however, that the decision of the Constitutional Court limited the possibility of the Parliament to establish different rules for employers with different numbers of employees (eg. employers with more or less than 10 employees).[106] Therefore, the new Labour Code brought about only a few minor regulatory changes addressing the problem of small enterprises. For example the court, under special and equitable circumstances, may grant partial exemption from liability to the employer held liable for damages, after weighing the financial standing of the parties, the gravity of the infringement and the consequences of providing compensation.[107] All in all, however, these very few special provisions do not play an important role in employment law.

Secondly, the general level of protection may be lowered in order to favour small employers. However, this policy has painful side effects. The Labour Code uses this method primarily to reduce the burden on small employers ensuing from labour law; the best examples include the flexible regulation of working time and wage supplements, the downgraded protection against unfair dismissal by the employer and the limited liability of employers for damages through the insertion of a new exemption clause.

It is worth noting however, that the flexibilised Labour Code is only useful for large companies – small and micro sized employers can hardly benefit from it. According to a survey conducted in March 2014[108], 55% of the 500 small and medium sized employers interviewed online are of the opinion that the new Labour Code has the exact same effect on them as the old one, 28% find the new Labour Code worse than the old one, while only 18% prefer the new one. We may safely say that the government failed to achieve the above described aim of adjusting labour law to the real needs of small and medium sized employers.

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106 41/2009. (III. 27.) AB határozat (Decision No. 41/2009 of the Hungarian Constitutional Court), http://www.opten.hu/41-2009-iii-27-ab-hatarozat-j117850.html (in Hungarian).

107 Article 167 (3) of the 2012 Labour Code.

108 http://www.policyagenda.hu/hu/nyitolap/a-cegvezetoknek-sem-tetszik-a-munka-torvenykonyve, quoted by Lehoczkyné Kollonay (2013) op. cit. 28.

5.6. Simplification of the Labour Code

The simplification of legislation has been demanded by a wide range of academics, judges, labour law and human relations practitioners, since the former Labour Code became extremely complicated and difficult to apply. The Labour Code may be considered a success in this regard, for the new legal text is clearer and the structure of the law is more transparent.

At the same time, we may already discern a few problems, staining this optimistic picture. Firstly, the law contains many double or even triple cross references, rendering the text a difficult read that is hard to understand. Since the Labour Code is always written for all employers and employees, the simplicity of legal language is of outstanding importance. Unfortunately, the 2012 Labour Code provides great market opportunities for labour lawyers, since at many points the Code is very difficult to understand and apply.

Secondly, certain subchapters are very detailed and sophisticated, especially those of special interest for employers (eg. calculation of certain payments), while others are rather rough-and-ready, particularly those on certain employee rights. Moreover, the Labour Code contains several new general clauses (eg. unforeseen circumstances within the control of the employer[109]). For lack of explanatory notes or former practice, the meaning of these terms will remain unclear until judicial interpretation clarifies their meaning, which usually takes five years.

Thirdly, the new Labour Code has already been amended three times within its first two years,[110] and the first amendment was passed only a few days before the coming into force of the Labour Code on the 1st of July 2012. Therefore, we may say that the same practice started as with the 1992 Labour Code, foreshadowing that the danger of an 'over-amended' text is imminent.

5.7. Flawed implementation of flexicurity: flexibility above all

Notwithstanding the lipservice paid in government documents according to which flexibilization of labour law is insufficient in itself, it remains the only pillar of the 'Hungarian flexicurity model'.[111] Flexible labour law must be

[109] Article 166 (2) of the 2012 Labour Code.

[110] Act No. 86 of 2012; Act No. 2013 of 2013; Act No. 252 of 2013.

[111] Hungarian Work Plan, 23–26.

supplemented with a new type of security: instead of job security employment security should be promoted, increasing the adaptability of employees to the changing needs of the labour market, as well as supporting labour market transitions.[112] Similarly, the Green Paper on modernizing labour law highlighted that „adopting a lifecycle approach to work may require shifting from the concern to protect particular jobs to a framework of support for employment security including social support and active measures to assist workers during periods of transition."[113]

However, the Labour Code increased flexibility solely by reducing the protection of employees, meanwhile, security was not strengthened through any new measure. At the same time, the public work program has been the only remarkable employment policy measure taken since 2010, therefore, we may conclude that employment security was not promoted and the adaptability of employees to the changing needs of the labour market and labour market transitions were not supported. As a result, only the flexibility part of the flexicurity concept was implemented.

6. Appraisal of the reform: an unambiguous move towards flexibility

Although the main aim of the new Hungarian Labour Code is clear, that is to rapidly increase the employment rate, it is rather doubtful whether a more flexible regulation of labour law is the appropriate way to achieve this ambitious goal. The most contested issue is whether and to what extent the reform will contribute to attaining the desired employment objective of the government, i.e. to create 1 million new jobs within 10 years. A further question is, whether the weakening protection of employees will have serious side effects, namely growing social inequalities.

The new Labour Code amended about half of the text of the 1992 Labour Code and introduced fundamental changes. It is still far from being the most flexible labour law in Europe, at the same time, it is true that the changes mainly favour employers' interests to the detriment of employees.[114] It is of course

[112] Hungarian Work Plan, 38.

[113] European Commission: *Green Paper – Modernising labour law to meet the challenges of the 21st century.* COM (2006) 0708 final, 10.

[114] Gyulaváři, Tamás – Hős, Nikolett – Kártyás, Gábor – Takács Gábor: *A Munka Törvénykönyve 2012, egységes szerkezetben állásfoglalásokkal és magyarázatokkal.*

questionable whether labour law really does play such an important role in investment decisions that this reform will be an effective instrument in creating more (and especially better) jobs.[115]

Nevertheless, we may conclude that this truly much more "flexible" labour law regulation will contribute to the deepening of social inequalities. As a recent OECD report points out "a key challenge for policy, therefore, is to facilitate and encourage access to employment for under-represented groups, such as youths, older workers, women and migrants. This requires not only new jobs, but jobs that enable people to avoid and escape poverty. Policy reforms that tackle inequalities in the labour market, such as those between standard and non-standard forms of employment, are needed to reduce income inequality."[116]

Finally, the new regulation poses an enormous challenge for Hungarian trade unions. Whether they can grow up to their new role under the changed legal circumstances and become an equal bargaining partner with employers is yet to be seen.

Budapest, Kompkonzult, 2012.

115 *More and better jobs: Patterns of employment expansion in Europe*. European Foundation for the Improvement of Living and Working Conditions, 2008.

116 *Divided we stand: Why inequality keeps rising.* An Overview of Growing Income Inequalities in OECD Countries: Main Findings. OECD, 2012. 41.

II.

STRUCTURE OF LEGAL RELATIONSHIPS AIMED AT WORK: UNDER CONTSRUCTION?

Hungarian employment regulation has traditionally been divided into subordinated employment governed by different forms of employment contracts and independent, non-subordinated work governed by two kinds of civil law contracts (service contract and supply contract). Firstly, we will explain the statutory and case law concept of employment relationship. Secondly, the meaning of self-employment, prohibition of bogus self-epmployment and the various other legal relationships aimed at work will be examined.

This chapter also seeks to answer the question, whether it is essential to remodel this binary system by the enactment of a third category of economically dependent work. In light of the fact that the concept of economically dependent work would be beneficial both from a theoretical and practical aspect, the chapter offers a constructive critique of the proposal enshrined in the first Draft of the new Labour Code with a view to improve it for future legislation.[117] Overall, we will try to analyse the inherited structure and recent changes to work relationships.

1. The present system of work relationships

1.1 Origins and recent development of the binary system

Hungarian employment regulation has traditionally divided legal relationships aimed at employment into two clusters: employment relationships and civil law

[117] For a shorter version of this article, see: Gyulaváry, Tamás: A bridge too far? The Hungarian regulation of economically dependent work. *Hungarian Labour Law E-Journal,* 2014/1. 1–22.

relationships. First of all, we will review the reasons for and the development and peculiarities of this binary system. This binary system of work relations was established by the separate Civil Code (in force since 1959[118]) and Labour Code in the socialist period, and this division was asserted by the labour law legislation of the last decades. Therefore, the division of the working population into two spearate groups has become the classic paradigm of Hungarian labour law. The first group includes subordinated work relationships in typical and atypical forms of employment relationship. The second group consists of civil law work relationships, that lack strong personal subordination and are strongly charactarized by independent economic activities.[119]

Hungarian labour law literature considers typical employment relationship to be a construct where the employee works for one employer according to his/her instructions, with the employer's equipment and materials, at the employer's place, according to fixed working hours, integrated within the employer's organization.[120] The typical employment relationship has been and still remains the dominant and decisive legal form of work in labour law regulations (Labour Code) as well as on the labour market, since around 90% of all employees still work full-time with an undefined term of contract for one employer, mostly at the employer's premises etc.[121]

Civil law work contracts have always provided a lawful alternative to those parties who wanted to contract for work without establishing a personal subordination bond between the parties, which may be natural in the field of commerce or agriculture etc. However, civil law contracts were an exceptional form of work before the political and economic changes that took place in 1990, as the employment relationship provided a perfect legal form for long-term employment under the erstwhile economic circumstances. This situation quickly changed after 1990, since the market economy rapidly and remarkably increased the improtance of civil law work contracts. At the same time, these contracts were also increasingly used to cut the cost of employment in the form of bogus (false) self-employment. Therefore, false civil law contracts somehow

118 Act 4 of 1959 on the Civil Code.

119 Radnay, József (2004): A látszólagos önállóság és a munkavégzési kapcsolatok jogszerű alakítása. In: Rácz, Réka – Horváth, István: *Tanulmányok a munkajog jövőjéről.* Budapest, Foglalkoztatáspolitikai és Munkaügyi Minisztérium, 2004. 140.

120 Kiss, György (2005): *Munkajog.* Budapest, Osiris, 2005. 95.

121 Hárs, Ágnes: Atipikus foglalkoztatási formák Magyarországon a kilencvenes és a kétezres években. *Közgazdasági Szemle*, 2013/2. 224–250.

corroded the clear division of work contracts (their role will be analysed later in detail).

1.2. The effect of harmonisation on the labour law structure

Besides legal traditions, EU labour law and the entire harmonisation process also played a significant role in the development of work relationships and in particular the stability of the above described binary system of legal relationships aimed at work. As a consequence of the exclusive focus of harmonisation on typical and atypical employment relationships and the efficient protection of employees, the implementation of EU labour law did not dissolve, but much rather conserved the binary system, even leading to an increasing gap between the protection of employees and all other workers, including independent contractors and economically dependent workers.

The EU Directives on working conditions foresee a very limited personal scope, since labour law harmonisation is confined to employment relationships, thus, labour law harmonisation amendments affected the Labour Code exclusively. The Hungarian labour law harmonisation strategy strived for the minimum, which meant the implementation of binding EU norms on a minimum level and only with regard to the regulation of employment relationships.[122] Labour law harmonisation focusing on employment relationships was remarkably facilitated and simplified through the existence of a separate labour law code (Labour Code), which contains most, even if not all the relevant provisions on employment relationships.[123]

As a result of the above, harmonisation merely improved the protection of employees, with the implementation of EU law even increasing the gap between the protection of employees and non-employees, since labour law Directives did not affect the employment rights of independent contractors (self-employed)[124] and economically dependent workers (formally self-employed). Although the employment rights of economically dependent workers have been analysed and proposals were made in several EU documents and reports, the regulation

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122 See in particular the following harmonisation amendments of the Labor Code and other relevant employment Acts: Act 16 of 2001, Act 20 of 2003.

123 See further Acts as well, for instance Act 7 of 1989 on the Right to Strike, Act 125 of 2003 on Equal Treatment, Act 4 of 1991 on the Promotion of Employment and Act 93 of 1993 on Labour Safety.

124 At this stage, we do not take into account the freedom of establishment, because it is irrelevant in the assessment of employment protection.

of this category is, nevertheless, only a recommendation put forward by the European Commission, without it being an EU law requirement. Consequently, the regulation of economically dependent work is only an opportunity for Hungarian legislation and not an obligation deriving from international labour law instruments.

1.3. The proliferation of atypical employment relationships

The regulation of atypical employment relationships is evidently not an absolute novelty in Hungarian labour law, since fixed-term and part-time employment contracts were already regulated by former Labour Codes. It must be emphasized, that harmonisation contributed to a more detailed regulation of these two atypical forms, also prompting the insertion of two new atypical forms: temporary agency work in 2001[125] and telework in 2003.[126]

Meanwhile, the new Labour Code boosted the number of atypical employment relationships, however, this development is unrelated to harmonisation, since the new atypical forms of employment are without an EU law basis. The new atypical employment relationships set out in the Labour Code derive from three different sources. First, there are three absolutely new forms of atypical employment: on-call work, job sharing and employee sharing.[127] Second, the labour law aspects of simplified (casual) employment are now regulated by the Labour Code. This form of employment was considered an employment relationship earlier as well, however, it was formerly regulated entirely by a separate Act.[128] Third, home workers are now regulated by the Labour Code[129] and are considered at least formally to work in an employment relationship. However, home work is much rather a legal relationship located between the employment relationship and the civil law relationship, thus, in our opinion it belongs to the grey zone of economically dependent work instead of the category of the employment relationship.

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125 Act No. 16 of 2001 on the harmonisation amendment of the Labour Code.

126 Act No. 20 of 2003 on the harmonisation amendment of the Labour Code.

127 2012 Labour Code, articles 193–195.

128 2012 Labour Code, articles 201–203. Other technical provisions are now contained by: Act 75 of 2010.

129 Home workers may be employed in jobs that can be performed independently, remunerated exclusively on the basis of the work done (articles 198-200 of the 2012 Labour Code).

The expansion of atypical employment relationships detailed above led to the extension of the personal scope of employment. This policy change clearly indicates the intention of the legislature to retain and even reinforce the binary division of work relationships. In particular, the regulation of home workers shows that economically dependent work shall be clustered either as an employment relationship or as a civil law relationship, but the grey zone in between them is not accepted by the Labour Code as a third category.

2. The legal notion of ’employment relationship’

2.1. The statutory definition of emloyment relationship

The elaboration of a definition of ’employment relationship’ was required or even compelled by legal practice, it being a crucial legal instrument in the fight against false civil law contracts by differentiating between labour law and civil law contracts. At the same time, the statutory definition of employment relationship is also an essential method to ensure the theoretical clarity of employment law. The insertion and clarification of basic labour law definitons had been a long standing debt of Hungarian labour law legislation, since the former Labour Code (in force between 1992 and 2012) did not contain any of the fundamental definitions (employment relationship and contract, employee, etc.).[130] For instance, the notion of employment contract could only be inferred from the detailed articles on the rights and obligations of the parties, meaning in essence almost the entire part three of the Labour Code on individual employment rules.[131] This shortcoming was criticised again and again by academics and certain proposals on labour law definitons were also published.[132]

Therefore, it is a noteworthy and very positive development that for the first time in the history of Hungarian labour law the new Labour Code includes all the relevant labour law definitions, namely the short statutory defintion of employment relationship, employer and employee. Accordingly, an employment relationship is established by entering into an employment contract, whereby the employee is required to work as instructed by the employer and the employer is

130 In addition, the Labour Codes of 1951 and 1967 did not contain such basic definitions either, continuing the series of a defective tradition.

131 Articles 71-194/F of Act No. 22 of 1992, that is more than half of the law.

132 See for example: Kıss, György: A magyar munkajog megújulásának esélye az Európai Unió munkaügyi politikájának tükrében. *Pécsi Munkajogi Közlemények,* 2008/1. 28.

required to provide work for the employee and to pay wages.[133] Employer means any person with the capacity to perform legal acts who is party to employment contracts with employees,[134] while the employee is any natural person who works under an employment contract.[135]

Based on the above mentioned statutory definition and also on several other provisions of the Labour Code, an employment relationship is a legal relationship aimed at employment, that is established by an employment contract concluded by the employer and the employee to regularly perform work defined by the scope of work set forth in the employment contract. Furthermore, the strong personal subordination between the parties within the employer's organisational hierarchy is substantiated by the obligation to provide work and the broadly framed rights of the employer to instruct, supervise and control the work performed by the employee. The employee is obliged to perform the work personally in return for remuneration according to the instructions of the employer.

As it is obvious from this extended description, the above mentioned normative definition of employment relationship is complemented by several relevant provisions of the Labour Code, such as the obligatory insertion of the scope of work in the employment contract, the obligation related to the personal performance of work as well as the existence of a written agreement etc.

2.2. The potential impact of collective agreements on the features of employment relationships

These criteria of employment relationship may nevertheless be undermined or at least weakened by the new legal hierarchy of the national sources of labour law, according to which the collective agreement may deviate from the dispositive rules of the Labour Code to the benefit (in melius deviation) as well as to the detriment of the employee (in peius deviation). Article 277 of the new Labour Code allows collective agreements to freely deviate from the Labour Code in both directions, in case the Labour Code does not provide otherwise.

Article 57 of the Labour Code does not prohibit deviation in both directions when it comes to the provisions on basic rights and obligations of the parties.

133 2012 Labour Code, article 42.

134 2012 Labour Code, article 33.

135 2012 Labour Code, article 34 (1).

For instance, collective agreements may erase the personal performance of work from among the obligations of the employee. As a result, the collective agreement may fundamentally change the legal character of the emplyoment relationship between the employer and his/her employees falling under the scope of the collective agreement.

2.3. Primary and secondary features of an employment relationship

In spite of the introduction of the aforementioned labour law definitions, it is still indispensable to define the criteria of an employment relationship in harmony with the judicial practice of the last two decades.[136] Although the basic definitions of the Labour Code may help clarify this list of criteria, the definitions are insufficient to adequately guide legal practice. In Hungarian labour law theory and practice, there is a tradition of differentiating between primary and secondary evaluation criteria of an employment relationship. In our opinion such a hierarchy may be useful in helping legal practice define the weight of the various criteria and their joint assesment may help us avoid problems that inevitably arise in the course of their individual evaluation.

The system of primary and secondary criteria was introduced by a governmental guidance in 2005, which was a non-binding policy document issued by the ministries of employment and finance.[137] This guidance described the taxative list of primary and secondary criteria based on formerly published decisions of the Supreme Court. In accordance with the guidance, but slightly amending its list, we propose the following list of primary citeria of an employment relastionship: a) strong personal subordination, substantiated by the broad direction, instruction and control of the employer; b) an obligation of the employee to perform work personally (substitution is unlawful); c) an obligation of the employer to regularly pay wages in return for work; d) regular performance of work activity defined by the scope of work set forth in the employment contract; e) an obligation of the employer to provide work and of

136 Gyulavári, Tamás szerk. (2013): *Munkajog*. Budapest, Eötvös Kiadó, 35–43.

137 Joint Guidance of the Ministry of Employment and the Ministry of Finance No. 7001/2005. on the evaluation of legal relationships aimed at employment. This guidance was used by Tax and Labour Authorities and also by Labour Courts. The guidance has been repealed as of 1 January 2011 (by Act No. 130 of 2010).

the employee to perform work and be at the employer's service (mutuality of obligations).

The list of secondary criteria is as follows: a) the employer organizes working time; b) the employer defines the place of work; c) the employer provides the equipment, technology and raw materials; d) the employer ensures health and safety at work.

In our view, the real difficulties in judicial practice were not induced by this hierarchy of the criteria of en employment relationship, but rather the lack of clarification of the central role of personal subordination and the unsteady interpretation of its variable manifestations. The main task of future judicial review shall be to shed light on the fact that all these primary and secondary criteria simply verify the existence or lack of the high level of personal subordination characterized by an employment relationship. According to former case law, the primary and secondary criteria must be evaluated and assessed altogether, with due consideration to the conditions and circumstances of the given case in order to decide, whether the work relationship is characterized by the necessary degree of personal subordination required in an employment relationship.[138] This stream of judicial interpretation needs to be reinforced by the consistent application of the new definitions.

2.4. Legal aspects of the legal relationship's qualification

It is questionable, whether the assessment of the legal relationship aimed at work, i.e. whether it is an employment relationship or a civil law relationship, may be based on several aspects, such as for example the negotiations between the parties prior to the agreement, their declarations at the time of concluding the agreement and during work, and the actual features of the performance of work. Since 2003, Article 75/A of the 1992 Labour Code expressly declared that these circumstances of the case must be taken into account in rendering the decision regarding the legal nature of the work relationship of the parties.[139]

[138] All working relations are characterized by a certain level of personal subordination, thus, qualification as an employment relationship depends on the quality of the subordination bond. The level and depth of subordination may be decided by the court based on all the circumstances of the case in the light of the primary and secondary assessment criteria.

[139] 1992 Labour Code, article 75/A (1) The type of contract underlying an employment relationship may not be chosen with a view to restricting or violating the provisions that provide for the protection of the employee's rightful interests. (2) The type of contract, irrespective of the name, shall be chosen so as to best accommodate all applicable circumstances, such as the

By contrast, the new Labour Code is silent on this issue, which may lead to an uncertainty in interpretation. In our view, the above mentioned criteria, particularly the actual characteristics and conditions of work must be taken into account when qualifying the concrete type of the legal relationship. The will and intent of the parties cannot override the factual and substantive characteristics of the given work relationship so as to protect the employee's long-term interests, even against his/her own decisions.

3. Self-employment: is a statutory definition indispensable?

The notion of self-employment is not defined under Hungarian labour law,[140] just like in most of the national laws of the Member States and EU law. The main reason behind this lack of regulation is that self-employment is in fact not a legal notion, therefore it is difficult to define by law. At the same time, in EU law the notion of self-employment is used exclusively to ensure the wide scope of certain EU law instruments. The word is most often used to refer to persons who work for a living without being employees, such as owners of small business or people in other ways working on their own-account. [141] As such, the notion of self-employment is usually perceived by EU law as an economic activity which is not subordinated employment, therefore, this definition also serves the delimitation of the free movement of workers and the freedom of establishment available to self-employed persons.

In legal practice, self-employed persons are perceived as independent contractors working under the scope of civil law contracts. This wider, practical concept includes economically dependent workers as well, since they are formally self-employed persons in case the third category (economically dependent work) is left unregulated by national law, for example in German labour law as Arbeitnehmeränliche person, in English law as worker, in Italian

parties' prior negotiations and their statements made at the time of contracting or during the performance of work, the nature of the work to be performed, and the rights and obligations set out under Sections 102–104.

140 Hajdú, József (2002): Social security protection of the self-employed persons in Hungary. In: *Nagy Károly-emlékkönyv.* Szeged, 175.

141 Samuel Engblom: *Self-employment and the Personal Scope of Labour Law. Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States*. EUI, Thesis Paper, Florence, 2003. 12. http://cadmus.eui.eu/bitstream/handle/1814/4616/2003_Engblom.pdf?sequence

law as parasubordinati, or in Spanish law as Trade[142]. However, bogus self-employed persons are not covered by the category of self-employment, as they are in fact employees unlawfully deprived of employment protection (see later).

For example, Polish law does not provide for a definition of self-employment. Providing services within the framework of a business activity conducted for one contractor or a narrow group of contracting parties is usually considered to be self-employment. The direct basis for the provision of such services is one of the available civil law contracts provided for under law and concluded with the contracting party.[143] According to the Polish concept of self-employment, it means: „offering services (work) to one (or several) entities by natural persons that run, on their own behalf and responsibility, economic activity as entrepreneurs who do not employ other persons or use other persons' services on the basis of civil contracts".[144]

The meaning of self-employment had to be clarified as to the scope of the application of the equal treatment principle in the framework of the implementation of the Sex Equality Directives. In Hungary, the notion of self-employment was dealt with in the course of legal harmonisation, otherwise it would not have had any relevance at all. As a result, the interpretation of the notion of self-employment is still not a theoretical issue of Hungarian labour law, but merely a technical problem confined to labour law harmonisation.[145]

It must be mentioned, that there is a common misunderstanding in relation to the meaning of self-employment, since Hungarian labour law scholarship perceives it as the grey zone between employment contracts and independent contracts, considered to be a synonym of economically dependent work. In our view, this is obviously a misconception, since self-employment merely means independent work under a civil law contract, the subjects of which will be self-employed persons irrespectively of their legal status (member of a company personally carrying out work, individual entrepreneur etc.).

142 Trabajador Autónomo Económicamente Dependiente (TRADE).

143 The evolution of labour law in the EU-12 (1995-2005), Vol 3. European Communities 2009, 403.

144 Adam Turowiec: *Case Study: self-employment in Poland. The impact of new forms of labour on industrial relations and the evolution of labour law in the European Union*. Manuscript, 2007. 5.

145 Kiss, György (2001): *Az Európai Unió munkajoga*. Budapest, Osiris, 115–125.

4. Prohibition of false self-employment: fighting windmills?

4.1. Are the parties free to choose the type of contract?

In theory the parties may freely choose between employment contracts, civil law contracts (construction contract, supply contract), or other types of work contracts respectively (e.g. contract of independent commercial agent). In case the nature of the work allows the parties to perform it both in an employment relationship and a civil law relationship (self-employment), then the declared will of the parties will be desicive regarding the assessment of the legal nature of the parties' relationship.[146] In such cases the parties have the freedom to choose the type of contractual relationship, possibly avoiding the employment relationship and substituting it by a cheaper legal relationship aimed at employment.

Nevertheless, this freedom of choice regarding the type of contract (as part of contractual freedom) is not without limits, since the absolute, unrestricted autonomy of the two sides of work relationships would inevitably lead to abuse.[147] The fight against bogus (false) civil law contracts, which in fact disguise employment contracts, is indicative of the exigency in Hungarian labour law regarding a certain level of cogency concerning the type of the contract. All contracts are considered false, in which the expressed will differs from the genuine, actual will of the parties.

The Labour Code specifically stipulates, that false agreements shall be null and void, and if such an agreement (civil law contract) is intended to disguise another agreement (namely the employment contract), it shall be adjudicated on the basis of the latter, disguised agreement.[148] If work is performed in accordance with labour law provisions and the characteristics of an employment relationship, then the parties must conclude an employment contract and evidently the rules of the Labour Code must be applied.[149] The legal consequence of false civil law contracts is nullity declared by the court with the automatic application of the

146 Published decision of the Supreme Court: BH 1982/347.

147 Kiss, György (1999): A munkaviszony, a megbízási és a vállalkozási szerződés elhatárolása. *Cég és Jog,* 1999/1. 23.; Bán, Péter (2003): A munkaviszony fogalmával kapcsolatos jogi problémák, különös tekintettel a leplezett munkaszerződésekre. www.jogiforum.hu, 10.

148 2012 Labour Code, article 27(2).

149 Bankó, Zoltán (2008): *Az atipikus munkajogviszonyok – a munkajogviszony általánostól eltérő formái az Európai Unióban és Magyarországon.* Doktori Értekezés. Pécs, Manuscript, 28.

Labour Code. Accordingly, the civil law contract must be deemed an employment contract, as the parties in fact established an employment relationship, since the factual conditions of work shall prevail over the will and legal statements of the parties.

At the same time, a civil law contract may be deemed a bogus contract, if both parties wanted to conclude a different contract from what they both signed, since „unilateral pretense is indifferent concerning the invalidity and interpretation of the debated contract".[150] Invalidity of the contract, due to its false, pretended contents, may be established by the court if both contracting parties wished to establish another kind of legal relationship (differing from the one described by the signed contract).[151] Although civil law contracts are false only if both parties agreed on its contents, the legal consequences will be imposed on the employer only, since within the legal relationship the employer is considered to have overwhelming authority regarding such decisions.

The peculiar and illusory common interest of the employer and the employee is to exit the personal scope of labour law, with the goal of minimizing taxes and social security contributions. While employers are the obvious winners of this game in the long run, by contrast, employees will sooner or later regret their choice (e.g. due to a work accident, termination of employment or lower pension). For that very reason, the general rule of Hungarian labour law is indirect cogency regarding the type of the contract in order to protect employees even from their own misguided decisions.

4.2. The incentives of bogus self-employment

There are two fundamental reasons for the rapid spread of bogus self-employment: firstly, the by-passing of the Labour Code to diminish indirect production costs, secondly, the exploitation of the lower taxes and social security contributions of civil law working relationships in order to minimize the direct expenses attached to employment. Since the application of the Labour Code, or at least a certain number of labour law provisions is the very substance of employment regulation, the cost of labour law is inevitably present in any work relationship characterized by personal subordination.

150 Published decision of the Supreme Court: BH 1997/583.

151 Published decision of the Supreme Court: BH 1998/292; Pál, Lajos (2007): *A munkavégzésre irányuló jogviszonyok minősítéséről.* Pécs, Justis, 7.

The strength and rigidity of labour law provisions and thereby the level of indirect costs may be different depending on labour law policy. During the financial crisis national legislatures opted for the flexibilization of labour law to reduce the indirect costs of employment and increase the competitiveness of employers in Hungary and the majority EU Member States, which legislative process resulted in shifting the risks of employment from employers to employees. Due to this shift, the flexibilization process is widely criticised by academics.[152] Even though the new Labour Code significantly decreased the labour law protection of employees, this most probably failed to effectively discourage employers from using the possibility of false self-employment.

At the same time, the gap between employment and civil law relationships concerning the direct costs of employment could be reduced or even filled, since the lower social burden (taxes and contributions) of civil law working relationships is simply the detrimental consequence of misguided financial legislation. The lower cost of non-employment (meaning unprotected) work relationships is contrary to ILO Recommendation No. 198, which requires Members to develop effective measures aimed at removing incentives to disguise an employment relationship.[153]

It is easily understandable, that taxation policy-makers wish to perceptibly reduce the production costs for a narrow circle of economic actors (e.g. individual entrepreneurs, small and micro companies) at the lowest expense for the state budget. However, this financial policy inevitably causes enormous damage to labour law by enticing many working persons to leave the scope of the Labour Code to move on to worse (less protected) working relationships, such as the least protected civil law contracts.

Consequently, this unequal financial regulation is very harmful in the long-term. In such a legal environment only those will employ employees in an employment relationship, who are effectively obliged to do so or fear regular investigations of labour authorities (e.g. large multinational companies, state employers). Thus, it would be an urgent and extremely logical legislative step to equalize the tax burden of employment relationships and all other work relationhsips (and taxation forms) in order to scale down bogus self-employment. Even though there have been attempts to countervail the taxes applicable to the various working relationships, several new taxation forms recently gave new

[152] See for example: Marie-Cécile Escande Varniol – Sylvaine Laloum – Emmanuelle Mazuyer (eds.) (2012): *Quel Droit Social dans une Europe an Crise?* Bruxelles, Larcier, 2012.

[153] ILO Recommendation No. 198 (2006): „17. Members should develop […] effective measures aimed at removing incentives to disguise an employment relationship."

impetus to false self-employment by introducing extremely low taxes for small companies and individual entrepreneurs.[154]

At the same time it would be an illusion to believe that false self-employment may be eliminated through ideal financial legislation or other legal or administrative measure (laws, sanctions, investigations, etc.). For that very reason, the elaboration of a reliable and predictable notion (test) of employment relationship will always be an essential task of labour legislation and judicial practice. However, the statutory definition may only provide a short list of the basic elements of such a labour law definition, but the rest of the work, namely the elaboration of a sophisticated test lies with the labour courts, which is usually the case in all European legal systems. Finally, the elementary requirements this judicial test must meet are compliance with labour law dogmas and predictability.

Compliance with labour law doctrines means that a clear, uniformly interpreted notion of employment relationship must exist, which shall be based on personal subordination albeit in a broad sense. The new Labour Code has made a great step towards establishing such a definition, but it is still an open question, what changes the new definition will induce in case-law, if at all (see above). It may result in a narrow understanding of personal subordination similar to the control test in English law,[155] but hopefully it will much rather contribute to a wider and more foreseeable interpretation of the employment relationship.

As for predictability, the above mentioned governmental guidance of 2005 on the evaluation of work relationships may be criticised for lack of a solid theoretical basis with special emphasis on the precise meaning of personal subordination and its relationship with the employer's rights of instruction and control. Improvement in this field is inevitable in order for judicial decisions to become more stable and reliable, leading to savings on the side of all parties, including society as a whole.

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154 See for example Act No. 147 of 2012 on small taxpayers.

155 Yewens v Noakes (1880) 6 QBD 530; Performing Rights Society Ltd. v Mitchell Booker Ltd (1924) I. K. B. 762.

5. 'Other legal relationships' aimed at work: the grey zone?

5.1. What is the grey zone?

There are a few contractual forms in Hungarian labour law, which cover partly or only economically dependent work. These legal relationships are usually called 'other legal relationships' aimed at work, or the 'grey zone' between employment relationships and self-employment. These legal relationships are customarily characterised by a high level of economic dependence, at the same time, strong personal subordination is usually not present.

At present, there are two kinds of contracts representing the cluster of 'other legal relationships' aimed at work: home work contract and security guard, private detective contract.[156] These contractual forms follow the French labour law concept (assimilation aux salariés), in which certain labour law provisions must be applied, in case the given contractual form meets the statutory conditions.[157] Nonetheless, the legal technique of applying certain labour law rules differs in these cases.

5.2. Home work: an employment relationship with features of independent contracting

Since home work was formally an employment relationship, the Labour Code must be applied with exceptions and altering rules to home work.[158] According to the statutory definition, home work „may be employed in jobs that can be performed independently, and which are remunerated exclusively on the basis of the work done".[159] The regulation of this work relationship contains several

156 The independent commercial agency contract was the third type of such contracts, regulated by Act No. 117 of 2000. This separate law on commercial agency contained certain provisions on labour law protection, such as obligatory rules on notice period. This law was repealed and replaced by the new Civil Code (Act No. 5 of 2013) from 15 March 2014.

157 Code du Travail, Art. 781-782; Adalberto Perulli: Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries. In: Giuseppe Casale: *The employment relationship. A Comparative Overview.* Geneva, Hart Publishing, 2011. 182.

158 These special provisions on home work are contained in Articles 198–200. of the 2012 Labour Code.

159 Article 198 (1) of the 2012 Labour Code.

elements typical for an employment relationship and also many other rules, which are usually present in civil law relationships. As such, home work is de iure an employment relationship, de facto however, it is a mixed contract. This is a good example for the incorporation of flexibility with a certain degree of employee protection.

5.3. Security personell: civil law contract with some employee protection

Security guard and private detective contracts are indeed civil law contracts and the workers are formally considered as pivate entrepreneurs. However, their work relationships are regulated by a separate law[160] containing a certain level of labour law protection, such as rules on working time, rest periods and annual leave.[161] Interestingly, security guards and private detectives are privileged civil law contractors, since they enjoy at least a minimum level of protection, unlike all others working under a civil law contract. This uneven protection of independent contractors raises some doubts concerning the constitutionality of these provisions and the application of the principle of equal treatment.

6. Minimum floor of rights

6.1. Development of the minimum protection regimes

All working persons are entitled to a short list of minimum rights under Hungarian law, such as equal treatment, health and safety at work and social security. Due to their fundamental nature, these rights have a wider scope extending beyond employment relationships. The development of this minimum protection of the working population looks back on a long history, albeit the general, almost unlimited scope of the Equal Treatment Act[162] is the result of the implementation of the Equal Treatment Directives, closely connected to the harmonisation process that took place after 1998.

160 Act No. 123 of 2005.

161 Article 18-21 of Act No. 123 of 2005.

162 Act 125 of 2003 on Equal Treatment and the Promotion of Equal Opportunities.

The Health and Safety Act[163] and the Social Security Act[164] provided for an extremely broad personal scope for a longer period of time reaching back even to the socialist regime preceding 1990. In socialist law there was no reason to limit the scope of the social security and labour safety regimes, since the state strictly controlled all work relationships. Under such circumstances, the wide scope of protection was evident.

At present the following group of employment related rights are afforded to all working persons regardless of their legal relationship aimed at employment: equal treatment, free movement and social security services. However, this statement is only partly true for the provisions regarding health and safety at work, since private entrepreneurs are exluded from this protection. Thus, the amendment of the Health and Safety Act proves to be necessary (see later).

This list of minimum rights for all is rather short and employment protection is completely missing from this list. Furthermore, labour law harmonisation did not contribute to the improvement of this minimum rights catalogue aimed at labour law protection. Consequently, the labour law protection of independent workers, including economically dependent workers are far removed from that of employees falling under the scope of the Labour Code.

6.2. Equal treatment for all workers

The provisions of the Equal Treatment Act (ETA)[165] regulating its scope are extremely complicated. The only execption is the labour market, where the scope of the ETA is very simple, since the equal treatment principle must be applied to all legal relationships aimed at employment.[166] This result is achieved by the ETA through the use of two clusters of work relationships: a) employment relationships[167] and b) other relationships aimed at work.[168] Employers shall observe the principle of equal treatment in respect of employment relationships,

163 Act 93 of 1993 on the Labour Protection of Employees.

164 Act 80 of 1997 on Social Security Services and Entitlement to Private Pensions.

165 http://www.egyenlobanasmod.hu/data/SZMM094B.pdf (in English).

166 Gyulavári, Tamás: Három évvel az antidiszkriminációs jog reformja után. *Esély*, 2007/3. 4–5.

167 Article 3.a of ETA: „*Employment relationship*: employment, public service relationship, civil service relationship, judicial service relationship, legal service relationship, prosecution service relationship, professional and contracted service relationship, professional foster parent relationship."

168 Article 3.a of ETA: „b) *Other relationship aimed at work*: work-from-home employment relationship, relationship created pursuant to a contract for employment, membership in a

as will persons entitled to give instructions in respect of other relationships aimed at work.[169] These two groups of work relationships cover all possible legal relationships aimed at work.

As it is described in the Chapter on anti-discrimination law, there was considerable academic debate regarding the unlimited scope of the equal treatment principle, since it included all civil law contracts (independent contractors, self-employed persons). In our view, the weak labour market position is often true for those independent contractors as well, who may be considered economically dependent workers, this weak position may in turn justify the wider scope of the ETA.

6.3. Social security services with a general personal scope

According to the Social Security Act all working persons must be insured under the statutory social insurance scheme, accordingly, the scope of social security services is framed as broadly as possible, reaching far beyond employees. This way all self-employed persons (individual entrepreneurs, working members of companies etc.) have statutory insurance, except for those entitled to a pension.

All persons performing work personally in a legal relationship established by a civil law contract are insured by the statutory social insurance scheme as well, in case the income generated by this economic activity is at least 30%[170] of the minimum wage.[171] As a result, the scope of the statutory social security scheme extends over all working persons regardless of their legal status with the above described limited exceptions.

The entitlement of self-employed workers to certain social security services may, however, be restricted by various conditions set forth in selected countries in Central-Eastern-Europe. For example, in Slovakia self-employed persons become obliged to join the statutory sickness insurance and pensions' insurance schemes, if their gross income earned in self-employment in the preceding calendar year exceeded twelve times the minimum assessment base (3.546 euros in 2009).[172] At the same time, the Romanian social security system is

professional group, and elements of the co-operative membership and partnership activities under economic and civil law involving personal contribution and aimed at employment."

169 ETA, article 5 (d).

170 Amounting to approximately 120 euros in 2014.

171 Social Security Act, articles 4–5.

172 Milos Lacko: *Slovak Social Security Law.* Plzen, Ales Cenek, 2010. 26.

open to all persons who gain their income as a result of a professional activity or who voluntarily join these systems. Persons who obtain a certain annual income must join and pay social contributions to unemployment, health and pensions schemes. As a result, all workers, including economically dependent workers are protected in Romania in terms of social security, but are nevertheless left totally unprotected in terms of 'labour' rights, including collective bargaining. In reality, no special social protection system is put in place for the economically dependent workers, but the national social protection system, based on individual contribution, is equally open for employees and the self-employed.[173]

6.4. Restricted right to health and safety protection

The scope of the Health and Safety Act is somewhat narrower than that of the equal treatment and social security laws. The scope of health and safety law covers all organised work activities irrespective of its organisational or ownership structure.[174]However, the work of individual entrepreneurs is not considered to be organised work, and as such they do not fall under the scope of the Health and Safety Act.[175] Although the government has been planning to extend the scope of the Health and Safety Act to all self-employed persons including individual entrepreneurs since 2001[176], this has still not been accomplished.

7. Proposal on quasi employees: a feasible concept?

7.1. Efforts to widen the scope of the Labour Code

The extension of the scope of the Labour Code to economically dependent workers was proposed for the first time by the government's structural reform programme including the concept of the new Labour Code in 2011 so as to attract or rather push as many working people as possible into the ambit of

173 Felicia Rosioru: *The legal acknowledgement of the category of the economically dependent workers*. Manuscript, 2013. 13.

174 Act 93 of 1993 on the Labour Protection of Employees, article 9 (1).

175 Act 93 of 1993 on the Labour Protection of Employees, article 87 point 9.

176 Resolution of Parliament No. 20/2001, point 5.2.a.

labour law.[177] Accordingly, the first Draft of the new Labour Code (published in June 2011) contained the definition of the employee-like person and also the list of the applicable provisions of the Code in article 3 regarding the scope of the Act.[178]

The material scope of the Labour Code is a key concept in this respect, since it provided a good opportunity for extending the protection of labour law to a wider range of the working population. Accordingly, the first proposal of the Labour Code[179] suggested the extension of the application of certain basic rules of the Labour Code (on minimum wage, holidays, notice of termination of employment, severance pay and the liability for damages) to other forms of employment, such as civil (commercial) law relationships aimed at employment ('person similar to an employee'), which in principle do not fall under the scope of the Labour Code.

This proposal was motivated by social objectives, but it was also aimed at fighting against undeclared work and bogus self-employment.[180] The article strived for the improvement of the employment protection of economically dependent workers and the diminishment of the number of legal procedures regarding false self-employment (so-called disguided contracts). In consequence, employers would also have benefited from the proposal, since they could have chosen a third type of working relationship with a lower level of employee protection than provided for under the typical or atypical employment relationships.

At the same time, this triple system of labour law definitions (namely employment relationships, employee-like persons and independent contractors) could have further complicated the evaluation of work relationships and the case law of labour courts. The Perulli Report (2002)[181] opposed this solution for the very reason that the regulation of the third category would lead to a

177 Széll Kálmán Plan, 19 May 2011, www.euroastra.hu (downloaded in Hungarian: 10 June 2013), p. 25.

178 *A Munka Törvénykönyve (Labour Code).* Javaslat (Draft), July 2011 (www.pazmanymunkajog.com), article 3.

179 See the Hungarian text of the First Draft of the Labour Code: http://www.pazmanymunkajog.com/images/files/docs/2011/MT_2011_juliusi_Tervezet.pdf.

180 *A Munka Törvénykönyve (Labour Code).* Javaslat (Draft), July 2011 (www.pazmanymunkajog.com), Ministerial explanation.

181 Adalberto Perulli: *Economically dependent/quasi-subordinate (parasubordinate) employment: legal, social and economic aspects.* European Commission, 2002. http://ec.europa.eu/employment_social/labour_law/docs/parasubordination_report_en.pdf

number of legal problems (e.g. the classification of the relationship) and social risks (reduction in subordinate employment).[182]

7.2. Evaluation of the proposal on employee-like person

According to the proposal in the first draft of the Labour Code submitted in July 2011, a person similar to an employee was defined as a person who works under any other contract, than a contract of employment, with

a) the individual undertaking to perform any work personally, for remuneration, on a regular basis for the same person, and
b) beyond performing this contract it cannot be expected from this person to do any other work for remuneration on a regular basis.

The above mentioned presumptions were designed to ensure the theoretical basis of the delimitation of independent work and economically dependent work.[183] In our opinion it would have been a better solution to deal with this problem on the basis of distribution of market risks instead of the above described presumption of working for only one person. Economic dependency also exists in those market situations, where the worker usually works for one main client, but also has a low, but regular income from another small client. We are not convinced that the exclusion of working for any other client is the appropriate way to regulate economically dependent work, since this condition is too rigid and strict. As a result, many economically dependent workers may be excluded from the scope of the provision which was genuinely designed for them. One of the main dangers of regulating economically dependent work is putting the emphasis on preventing abuse of this contractual form, restricting thereby the scope of the potential users of this legal form.

The above described definiton was supplemented by a few explanations so as to refine some elements and also to prevent abuse.[184] Accordingly, 'personal work' also means working on behalf of the worker's own company or the company

[182] Frans Pennings (2011): The Various Categories of Persons Performing Work Personally. In: Frans Pennings – Claire Bosse (eds.): *The Protection of Working Relations.* The Netherlands, Kluwer law International, 12–13.

[183] Kiss, György (2013): A munkavállalóhoz hasonló jogállású személy problematikája az Európai Unióban és e jogállás szabályozásának hiánya a Munka Törvénykönyvében. *Jogtudományi Közlöny*, 2013/1. 12.

[184] *A Munka Törvénykönyve (Labour Code).* Javaslat (First Draft), July 2011 (www.pazmanymunkajog.com), Ministerial Reasoning of article 3.

held in the majority ownership of the worker's relative. Moreover,'same client' includes the relative or the regular business partner of the client, as well as joint companies in accordance with tax law.[185] These explanations slightly opened up the limitations set by the rather narrow proposal. Nevertheless, the proposal still contained several vague notions requiring judicial interpretation, for example work and remuneration 'on a regular basis'.

It is worth noting that the proposal excluded the application of the above rules in case the income stemming from the contract in question exceeded 500% of the national minimum wage applicable at the time of the performance of the contract.[186] No official explanation was provided for this income threshold. Since the aim of the draft – as described above – was to combat unlawful forms of work falling beyond the social protection of economically dependent workers, we do not see any solid dogmatical basis of such a limitation[187] and the considerations behind the amount are more than obscure. The gross amount is approximately 1.700 euros, which is more or less the double of the national average wage, so it cannot be considered a high remuneration at all.

This provision was presumably based on the assumption that low income economically dependent workers may need employment protection for social reasons, thus, this low remuneration was fixed at 500% of the national minimum wage. Whether a person needs social protection similar to an employee depends on different factors. Low income is normally a strong indication of the need for social protection. However, a relatively high income did not prevent German courts from deeming parties to be employee-like persons. The fact that an agent received 10.000 US a month plus value added tax of 16% was without legal relevance.[188] The reasoning underpinning this judgement was that the need for social protection constitutes the real test in German labour law, which may be present in case of a higher income as well.

Therefore, the Hungarian proposal seems to be too rigid both in terms of fixing a wage limit and also the amount. The need for social protection would be a better condition, to be adjudicated by the labour courts. In addition, the technical implementation of the remuneration limit would be also problematic,

185 See article 178.7 of Act 92 of 2003 on tax procedure, respectively article 4 (23) of Act 81 of 1996 on company taxation.

186 Article 3 of the first proposal of the new Labour Code.

187 Opinion of the Workers' Councils trade union on the first draft of the Labour Code, www.pofesz.hu (downloaded: 10 July 2013), 2–3.

188 Wolfgang Daubler: Working People in Germany. *Comparative Labour Law and Policy Journal*, 1999/1. 89–90.

since it is not clear whether this income ceiling shall be calculated on an average within the year or separately, on a monthly basis.

7.3. The place of quasi-employees in the structure of labour law definitions

According to the ministerial reasoning of the proposal, the above described criteria of an employee-like person shall be assessed with due consideration to all the circumstances of the case, as in the case of the notion of an employment relationship. At the same time, the draft failed to clarify, whether the parties enjoy the freedom of choice between hiring a person as an employee or an employee-like person.

In our view, the same cogency of the contractual type should be applied as in the case employment contracts. Labour courts and labour inspectors may thus consider the legal relationship of an employee-like person as an employment relationship,[189] in case the contract of the parties in fact disguises an employment contract. Consequently, this new notion is in itself inept to solve all the problems arising from bogus self-employment (see the warning in the Perulli Report of 2002). At the same time, precise definitions of the notions of employment relationship and economically dependent worker may contribute to the dogmatical clarity of labour law.

The ministerial reasoning of the Draft of the Labour Code refered to similar regulations in German law (Arbeitnehmerähnliche Person) and English law (worker concept), yet the Hungarian proposal is far more restricted. One of the fundamental issues was the exclusion of persons working for more than one client. To improve this provision we would propose to include the requirement of acquiring the majority of income from one client, as set forth under German law (minimum of 50% of income from one client) and Spanish law (threshold of 75%).

At the same time, the technical problems of interpretation regarding the calculation of this threshold should also be resolved, for example by way of a general clause stipulating simply „the majority of income from one client" rule without a fixed amount. The clause itself would be open to interpretation by courts and authorities.

[189] See article 27 of the 2012 Labour Code on nullity.

Furthermore, the exclusivity of personal work performance is also an unduly strict and narrow rule. In our opinion, some minor works should be allowed to be carried out by subcontractors[190] or family members. In this regard, the above described solution could apply, by simply stating that work must be predominantly performed personally, without excluding some minor assistance from other contributors. For example, a translator should be accepted as an employee-like person, even if he/she regularly receives assistance from a typist.

Our main concern regarding the inherent limitations of the employee-like person's definition is that such rigorous requirements are hard to comply with, unduly constricting the potential personal scope of this third labour law category. Frankly, we do not believe that too many people would have chosen to work as an employee-like person, but it could rapidly have ended up as an empty clause.

It seems to us that the substance was lost in these rather technical paragraphs. The substance is not the existence of one client or the exclusivity of personal work, but much rather the very presence of economic dependency in the relationship of the parties, especially when it comes to the situation of the worker. It is the economic dependency that renders the situation of employee-like persons similar to that of employees, and this is the dogmatical basis of extending employment rights to this group of the working population.

7.4. The proposed employment rights: unambitious advance

Beyond providing a definition, the second pillar of the proposal was the precise stipulation of the applicable Labour Code provisions. Accordingly, the proposal suggested extending the application of rules on minimum wage, holidays, notice of termination of employment, severance pay and the liability for damages. The application of the Labour Code on holidays was explained by the proposal with reference to the regular performance of work. The inclusion of the articles on minimum wage, notice period and severance pay were substantiated by the social objectives of this legal institution.[191]

On the whole, the intention to extend a certain level of employment rights to economically dependent workers is highly welcomed, however, the list of applicable rights is extremely ungenerous and too weak to achieve the ambitious

[190] For example, the translator may employ a typist to help with typing up the translation of a book.

[191] *A Munka Törvénykönyve*. Javaslat, 2011. július (www.pazmanymunkajog.com), 3. § részletes indokolása.

social objectives proclaimed. It is worth noting that the draft excluded numerous employment rights already applied by several national legislations in relation to employee-like persons, such as provisions on working time, labour disputes and collective bargaining.

Thus, the following provisions should be included in the above list: written contract, amendment and termination; exemption from duty to work; rules on confidence; collective bargaining; obligatory reasoning of termination by the employer; legal consequences of wrongful termination of employment; labour disputes; working time; rest periods; legal consequences of the employee's wrongful breach of duty. Of course, we do not propose the automatic application of all these Labour Code provisions, but much rather popose topics that could form the subject of special regulation adjusted to the peculiarities of certain forms of economically dependent work. For example, the conclusion of a collective agreement at company level would be rather problematic in light of the present rules of the Labour Code. Notwithstanding, such obstacles, we are convinced that special provisions for specific groups of economically dependent workers may be designed.

At this point we would like to offer two principles concerning the selection and the adjustment of the applicable labour standards. On the one hand, the theoretical limit of extended employee rights shall be the lack of personal subordination between the worker and the client. In this category, the employer does not have a broad right to instruct, direct, supervise and control the worker.

On the other hand, the reason for regulating this third, transitional form of work is to provide a level of protection falling between employment and self-employment, as such, it is weaker than that of employees, but stronger than that of independent, self-employed persons. The adequately balanced protection of quasi-employees would guarantee a sensible level of employment protection, without overburdening employers with oversized labour law protection. Evidently, the right balance between flexibility and security is a key issue here as well.

By contrast, the Hungarian proposal could not have perceptibly improved the employment protection of the small number of workers falling under the scope of the restricted definition and the new provisions would not have achieved their true social objectives. Consequently, flexibility was put in the forefront, where any future regulation should extend to a far broader circle of rights afforded to these persons, including all those Labour Code provisions, which do not require the personal subordination between the parties.

7.5. Critique and aftermath of the proposal

The proposal on employee-like persons was innovative and promising, although it was also much more restrictive both in terms of its personal scope and the attached rights than similar rules in Germany, Spain or the United Kingdom. In our opinion, this form of work would not have been popular at all (as compared to Spain[192]) and would not have perceptibly improved the employment situation of economically dependent workers, as such, it was incapable of achieving its own declared objectives. As for the personal scope of the proposal, the main mistakes were the overly restrictive conditions related to the single client, exclusively personal work and the low income threshold.

In spite of these legislative problems it is regrettable that this article was deleted from the second Draft of the Labour Code after the first discussions as a consequence of the criticisms voiced by trade unions and employers' organizations, since it would have been the first such regulation to be adopted the whole Central-Eastern-European region.[193] This article could have been a huge step towards the regulation of economically dependent work and the detailed provisions could have been revised and polished step by step.

It is quite interesting to consider the arguments of the opposing actors. Firstly, the main critique put forward by trade unions focused on the problems of interpretation regarding the definition. In our opinion, trade unions rather opposed this concept, since they worried about negative social consequences that may be brought about by this legislative change: they feared that a possible reduction in the numbers of employees in subordinate employment may take place, instead of a decrease in the incidence of false self-employment and genuine self-employment. Trade unions usually see the third labour law category as a new impetus for bogus self-employment.[194] If we keep in mind

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192 The Spanish legal form of economically dependent work (TRADE) has not become popular in practice, as only 3.240 persons registered as Trade from the 300.000 economically dependent self-employed persons by July 2009 (Carmen Agut García – Cayetano Núñez González (2012): The Regulation of Economically Dependent Self-Employed Work in Spain: A Critical Analysis and a Comparison with Italy. *E-Journal of international and comparative Labour Studies,* 2012/1–2. 121–122).

193 The Draft of the new Polish Labour Code (pubslihed in 2006) also contained a similar article, but this Labour Code has not been passed yet (Andrzej Marian Swiatkowski (2011): The protection of working relationships in Poland. In: Frans Pennings – Claire Bosse (eds.): *The Protection of Working Relations.* The Netherlands, Kluwer law International, 122–123).

194 *Szakértői vélemény az új Munka Törvénykönyve javaslathoz*. Független Szakszervezetek Demokratikus Ligája, Munkástanácsok Országos Szövetsége, Budapest, 2011. augusztus 4. www.erdek.u-szeged.hu (downloaded: 2013. június 10.); A Munkástanácsok Országos

the Italian experience concerning the effects of the employment rules on economically dependent work (parasubordinati),[195] there is a real danger that this third category will be used for disguising employment relationships. Even so, it is a badly mistaken decision to throw out the whole concept instead of conducting careful regulation.

Second, the employers' organizations were not interested in supporting this concept since it put extra burden on employers by ensuring costly employment rights for a wider range of workers, who, up to now, fell under the scope of civil law. Interestingly, the two sides of industry discouraged this legislative change on the basis of totally opposed reasons, with trade unions worrying about diminishing employee rights on the one hand, and employers anxious about increasing worker protection on the other.

A further intriguing question is why the government backed off from its own proposal. It is not a convincing explanation in itself that the government withdrew due to the opposition of the social partners, since they insisted on several articles which were even more disputed by both sides of the industry.[196] It is most likely, that this issue was not so important for the government, since they relinquished it so easily after the first resistence of the social partners.[197]

The probable reason behind this move is the basic concept of the new Labour Code, which is based on a radically increased flexibility of the labour market in order to create new jobs. The concept of employee-like persons does not fit well into this deregulation policy, it would have been alien to the new Code. This proposal was really a positive surprise in such a „flexible legal text", which was most probably inserted by the labour law experts in the name of the modernization of Hungarian labour law. The government happily got rid of this 'strange provision', which move was promoted and even keenly greeted by all the social partners.

Tanácsának véleménye a Munka Törvénykönyve 2011. július 18-i Javaslattervezetéről, annak a munkavállalókra való hatása alapján, 2011. Augusztus 2, www.pofesz.hu (downloaded: 2013. junius 10.).

195 Maria Teresa Carinci (2012): The Italian Labour Market Reform under the Monti Government (Law No. 92/2012). *European Labour Law Journal*, 2012/4. 308.

196 See for example the provisions on the legal consequences of wrongful termination of employment (article 82 of the Labour Code).

197 György Kiss expressed a similar opinion in his article [Kiss (2013) op. cit. 13.].

8. Regulation of public employment: extreme fragmentation

Public employees are *de facto* employed in employment relationships as well, since their legal relationship aimed at work is also characterised by personal subordination and economic dependence, deriving from the strong powers of the employer over public employees. Therefore, the employment relationships of employees and public employees are rather similar when it comes to the basic features of their legal relationships. Even if public employment is in fact an employment relationship - at least as regards its legal substance -, employment in the public sector was formally separated from the employment relationship. This separation was even strengthened by the special designations of the various public service employment forms.

Prior to 1992, socialist labour law regulated all employment relationships through one single law, the Labour Code, thus, the same rules applied to public employment as to any other employment relationship. In 1992, an extremely complex system of private and public employment relationships was introduced (see table below). The special regulation of public employment became necessary because of the different nature of the employer and the legal relationship itself. Therefore, the employment regulation of persons working in the public sector is detached from 'private labour law' both regarding its form and its contents.

Beyond the Labour Code regulating private employment relationships, two additional laws contained the rules on the employment of civil servants (central administration, ministries etc.) and public employees (budgetary and local institutions in health care, education, social services etc.). Moreover, employment in certain public services (such as the police, military, judiciary, prosecutors etc.) was regulated in special laws. This latter group of the so-called 'service relationships' complicated even further the already far too complex legal structure of public employment forms.

Employment relationships in the public sector and their regulation

Form of the employment relationship	Applicable law(s)
1. Public employees (budgetary and local institutions in health care, education, social and cultural services etc.)	Act No. 33 of 1992 on the Employment of Public Employees + Labour Code as a background law (if Act No. 33 of 1992 does not exclude the application of the given article)
2. Civil servants (ministries, central administration, mayor's offices etc.)	Act No. 199 of 2011 on the Employment of Civil Servants

3. Service relationships	
Soldiers	Act 95 of 2001 on the military service of professional and contracted soldiers
Police, emergency service, prisoners, tax officers, secret service	Act 43 of 1996 on the employment service relationships of armed forces
Prosecutors	Act No. 174 of 2011 on the service relationship of prosecutors
Judges	Act No. 162 of 2011 on the service relationship and wages of judges
Administrative employees in judiciary service	Act 68 of 1997 on the service relationship of administrative employees in judiciary service

9. Conclusions: slowly evolving structure of employment law

Structure of legal relationships aimed at work

1. Employment relationships	**2. Public employment relationships**	**3. Other legal relationships aimed at work**
a) *Typical employment relationship* (general provisions of the Labour Code): full time, undefined term b) *Atypical employment relationship* (general and special provisions of the Labour Code): several forms, such as fixed-term, part-time, telework, temporary agency work, job sharing etc.	a) *Employment relationship of public employees* (Act on the Employment of Public Employees and Labour Code as a background law) b) *Employment relationship of civil servants* (Act on the Employment of Civil Servants) c) *Service relationships* (separate acts on various professions): for example judges, prosecutors, policemen	a) *Special forms of work* (separate laws): home work and security guards b) *Civil law contracts* (Civil Code): service contract and supply contract

Hungarian employment law traditionally divided legal relationships aimed at work into employment relationships and civil law relationships. This binary system of working relations was reasserted by the labour legislation of the last decades, formally divided into a Labour Code and a Civil Code. Futhermore, labour law harmonisation as a focus of labour law legislation, also deepened the gap between employment contracts and civil law contracts, improving only the protection of employees.

At the same time, bogus self-employment has gradually become one of the fundamental structural problems of the Hungarian labour market. This harmful phenomenon was even endorsed by misguided financial policy, inciting employers and employees to by-pass labour law by opting for a cheaper working

relationship (civil law contract) combined with the lack of employment rules and considerably lower social burdens. Nevertheless, legal responses (restrictions) to this damaging phenomenon were weakened by unstable labour law concepts as well as unpredictable judicial practice. Consequently, the modernization of the system of definitions of Hungarian labour law became an urgent task and the new Labour Code made an attempt to remedy this situation. At the same time, it must be noted that labour legislation cannot in itself solve these problems.

The gradual extension of a limited scope of protection offered by the Labour Code to economically dependent workers would be a reasonable and positive step towards the desired modernization of labour law. This was one of the objectives of the first draft of the new Labour Code in 2011, however, the whole concept of employee-like persons was later deleted. This failure was the common consequence of its refusal by the social partners and the withdrawal by the government, as interestingly nobody seemed to be interested in supporting this legislative development. Since we are convinced, that this is an innovative and necessary concept, we presented a detailed analysis of the governmental proposal. In our view, the rules on employee-like persons may only be successul in the future, if its personal scope is designed precisely, but rather broadly, and these workers are provided with substantial employment protection to perceptibly improve their labour market position.

The regulation of public employment seems to be an easier task at first glance, but it cannot really be considered a success story of the labour legislation following 1990. On the contrary, the present structure of public employment relationships is unduly complicated, extremely fragmented and contraproductive. It will be inevitable to reform the present legal structure, while the elaboration of one single public employment act would be the ultimate solution. While the dialogue between the social partners and the government is totally missing from current legislative practice, we are convinced that this new law should be the outcome of a process of thorough social dialogue.

III.
ATYPICAL FORMS OF EMPLOYMENT

1. Atypical employment: always precarious?

The main tendency of labour law in the last few decades was the proliferation of the various forms of employment. In addition to the subordinated employment relationship where an employee works full-time for an indefinite period of time for the benefit of one single employer – often referred to as standard, traditional or typical form of employment – workers and employers may find many other legal frameworks for organising work. The employment contract may be concluded for a fixed term – even for a couple of days – or part-time; the parties may stipulate that the work can be performed from home or through an intermediary (an agency), or without any personal subordination to the employer. Even such cornerstones as the employment relationship stands between one employee and one employer are changing. Job sharing contracts may be signed with several employees who work together on the basis of one legal relationship, while temporary agency work may divide the employer's rights and obligations between two parties.

These forms of work are referred to under a great variety of designations:[198] some call them atypical or non-standard work, in order to highlight their specialities as compared to full time, open-ended employment, others use terms such as peripheral, contingent, marginal or casual work, to express that such forms only have limited significance in the labour market and the standard employment relationship remains the main rule. The term new forms or new patterns of work is somewhat misguiding, since some of these forms of work existed even way before our time. One category of terminology concentrates on the quality or security of such new jobs. Taking on the worker's perspective,

[198] For a Hungarian overview of the issues of terminology see: Bankó, Zoltán: *Az atipikus munkajogviszonyok*. Budapest–Pécs, 2010. 47–57.

when employment is only temporary, the working time is limited to a couple of hours a day (or a week), or the job is of manual nature which can be performed at home and generates a low income, the literature often refers to such work as precarious. The boundaries of this terminology are rather blurry, but the essence of the concept is to express the uncertain, unpredictable or risky nature of such employment, as its characteristic when compared to the standard employment relationship which is associated with regularity, durability and protection from socially unacceptable practices or working conditions. Authors use a variety of terms when referring to precarious work, such as 'insecure work', 'contingent work', 'casual work', or 'vulnerable employment'.

Labelling a job as precarious should rest on a complex approach. There is no clear borderline, no straightforward distinction between low and high quality jobs. We should rather imagine a scale of precariousness. Also, precarious work may be spread across every employment status category, including permanent full-time, permanent part-time, temporary part-time, temporary full-time and even self-employment. This term cannot be regarded as a synonym of atypical or non-standard employment. The increasing heterogeneity of forms of employment renders such a generalization inadequate. It masks the difference between a highly educated agency worker who can achieve higher wages through an agency and an elder employee performing manual work who could not find a job otherwise but through a temporary work agency. Similarly, we cannot consider the job of a factory worker to be secure just because it is of indefinite duration and full time, if the wage hardly exceeds the statutory minimum, the working hours are unpredictable, and there is no training, no collective protection and no real career prospect. What is needed is a proper assessment of all dimensions of the job, going beyond simple employment status comparisons.

Based on the above, there is no cogent correlation between the legal character of a job and its precarious nature. What makes job quality low is a combination of various factors, which can have various outcomes. For instance, temporary jobs are associated with job insecurity, a part-time job usually means low earnings and most agency workers perform low paid, monotonous manual tasks. However, short job tenure may be attached to high salaries and generous fringe benefits, a part-time job could perfectly accommodate one's private life and personal needs, agency work might offer a great variety of experience, training and references. Besides, even a full-time open-ended employment contract may be paid around the minimal wage with no further career options, leading to creeping pauperisation. To sum it up, precarious jobs are apparent

in all employment patterns, or to put it differently, high quality jobs are not necessarily the standard or typical ones.

While some workers may prefer atypical employment, others are involuntary participants in such arrangements. The job seeker usually only has the choice to 'take it or leave it' when offered an atypical form of work. In many cases workers accept non-standard work arrangements not by preference but in the absence of a better option. While a fixed term contract or agency work, etc. might yield advantages for the employee as well, atypical work is often involuntary.

In summary, we recommend distinguishing between the higher and lower end of atypical work. Atypical and precarious are labels that might not overlap with each other. Furthermore, a certain labour market function is attributed to jobs falling outside the core protection of labour law. These forms of work assume the role of stepping stones, meaning that flexible work patterns can (re-)introduce job seekers with low employability into the world of work, and while they perform a lower quality job, they enhance their chances of acquiring a permanent position. While the existence and efficiency of such a springboard effect is still debated, it seems clear that the consequences of precarious employment are quite different in case it lasts for an entire career or merely constitutes a stage in the career-cycle leading towards more stable jobs. No wonder that groups facing higher challenges in the labour market are overrepresented among workers in atypical employment. The proliferation of atypical employment is also enhanced by the increase of female participation in the workforce, the changing family structures, the need to combine family responsibilities with paid work and an increase in the share of student workers.

2. Atypical employment in the new Labour Code

Seeking more flexible ways of employment and to escape the rules of typical employment relationships, more and more people work in atypical employment relationships in Hungary. Such forms of employment are still employment relationships and fall under the scope of the Labour Code, but differ from the classical construct, due to some significant, special attributes. Hungarian labour law was built on the idea of the typical employment relationship. However, during the last 20 years new concepts and institutions were introduced in labour law.

The 1992 Labour Code regulated five atypical employment relationships: part-time employment, open-ended employment relationship, telework, temporary agency work and the employment relationship of executive employees.

Additionally, many other laws determined other forms of atypical employment (e.g. home workers, simplified employment). The new Labour Code – reacting to the practical need for more diverse forms of employment – extended the list of atypical employment relationships. It is clear from the policy documents, early drafts and the ministerial reasoning attached to the new act that the legislator intended to broaden the range of atypical employment forms.

The first published thesis – written by six leading labour law scholars – devoted to the new Labour Code stated that 'It is definitely necessary to encourage the proliferation of atypical forms of employment in the interest of flexible business administration and employment. An obvious procedure for this, however, is to dismount the barriers posed by the agreements between the parties.' The authors argued that there is no need for detailed legislation on atypical employment; instead, agreements between the respective parties should play the major role in defining the character of the new forms of work. The legislator should only use cogent rules when for public policy reasons.[199]

Following the general elections in 2010 the new conservative government expressed its willingness to conduct an overarching labour law reform and to create the most competitive labour market in Europe. The details were set out in the Hungarian Work Plan. The document contained three interesting observations on atypical employment:[200]

- It acknowledged that the flexible forms of work contribute to the general flexibility of the labour market and can therefore assist certain disadvantaged job seekers in finding employment. In other words, the document assumed that atypical employment may have some kind of a springboard effect, helping those who could not find work in the traditional setting to (re-)enter the labour market. Even though atypical jobs are less protected they may serve as a stepping stone towards more stable employment.
- The document confirmed the thesis's regulatory approach by stating that the employers and employees should be allowed to design most of the details of the atypical employment relationship instead of providing for a detailed regulation of this form of work in labour law.

[199] Gyula Berke – György Kiss – Lajos Pál – Róbert Pethő – György Lőrincz – István Horváth: Theses for the regulatory concept of the new Labour Code. *Pécsi Munkajogi Közlemények*, 2009/3. 170.

[200] Magyar Munka Terv 2010. 39., 44., 50. (www.kormany.hu/download/e/a7/40000/Magyar_Munka_Terv.pdf)

– Lastly, in order to improve labour market flexibility, it emphasised that in the cases of atypical employment that are regulated by European Union law, the new Labour Code should make use of all the derogations legally available (this aim was later followed specifically in the field of agency work).

In the summer of 2011, the first official draft of the new Labour Code was published for open discussion. It is clear that the experts who worked on the proposal strictly followed the principle of flexible regulation as regards the new atypical employment relationships. The text contained merely a handful of imperative rules, with all other details were left up to the parties to agree on when discussing the employment contract.

The atypical employment relationships according to the new Labour Code are presented in the chart below, sorted by the attributes of the typical employment relationship.

Attributes of typical employment relationship	**Atypical employment which differs by such attribute**
Open-ended employment relationship	Fixed term employment relationship Simplified employment
Full time employment	Part-time employment On-call work Job sharing
Work at the employer's premises	Telework Home work
Work for one employer	Temporary agency work School association employment relationship Employment relationship with more employers (employee sharing)

The above chart may be supplemented with those atypical employment relationships, which differ from the typical employment relationship due to the special nature of the employee's position, which requires different regulation (e.g. executive employees or employees without legal capacity). For similar reasons, special regulation is needed on the employer's side in case of a publicly owned employer. These employers are financed by the public, thus, the law allows for much less possibilities to deviate from statutory provisions.

While the chart gives a closed list of the atypical employment relationships in Hungarian labour law, distinguishing between typical and atypical employment relationships is always of relative nature, and depends on what we consider to be so different from typical that it has to be treated as an independent category. In our view, the broad interpretation of the concept of atypical employment may be misguided. In general, also employees in typical employment perform their duties differently (e.g. due to their personal attributes, or the special nature of their work), but by separating all of these groups the concept of atypical employment would lose its meaning. As a result, an employment relationship can be considered as atypical in case it differs from the typical by at least one significant attribute.[201]

Below, we present the most significant atypical employment relationships in the Hungarian labour market.

3. Fixed term employment

Insecurity of employment may stem from the fixed-term nature of the employment contract: in this case the temporary nature is known by the employee from the first day of work. However, the fixed end date might also mean a kind of security, since the premature termination of these contracts is very limited in Hungarian labour law.

Fixed term employment is established for the period determined in the employment contract. Its special feature is that following the expiry of such period, it ceases. The Labour Code considers open-ended employment to be the general rule, therefore, the parties must expressly stipulate in the employment contract that it is concluded for a fixed period.[202] According to the data of Central Office of Statistics, in 2012 approximately 323000 employees worked in fixed term employment in Hungary. This amounts to 9% of all employment.[203]

The period of a fixed term employment relationship has no minimum, thus, it may last from a couple of days to a maximum of 5 years. This also applies to the prolonged employment relationship, and for the next fixed term employment relationship established within 6 months from the termination of the previous

[201] For a similar assessment see: Bankó (2010) op.cit. 58. Others choose a broader understanding of atypical employment relationships: Hovánszki, Arnold: A tipikus és atipikus foglalkoztatás Magyarországon. *Munkaügyi Szemle*, 2005/7–8.

[202] Article 45 (2) of the 2012 Labour Code.

[203] http://www.ksh.hu/mpiacal9807_tablak

fixed term employment contract.[204] The period of fixed term employment shall be determined by calendar (e.g. until 31 December 2015) or another appropriate way. Such 'another appropriate way' may be a reference to the completion of a certain task or until an absent employee returns to work again. According to the Labour Code, the date of expiry cannot exclusively depend on the will of one of the parties.[205] For instance, the employment contract lasts for the period of an employee's maternity leave, which is anticipated to last for two years. By contrast, it is against the law to stipulate that the employment relationship lasts until the employer terminates its premise where the employee generally works. According to judicial practice, if the period is not determined precisely (the date of expiry is uncertain), then the employment relationship shall be considered indefinite.[206]

Under the 1992 Labour Code, it was prohibited to terminate the fixed term employment relationship through ordinary dismissal. The idea was that if the parties contracted for a defined term they had to uphold it for that period and could exit the legal relationship only under extraordinary circumstances (such as the serious breach of contract by the other party). The new Labour Code relaxed this stringent rule and allows for the termination of the fixed term contract by dismissal, albeit only in limited cases. The employer may terminate the fixed-term employment relationship by dismissal when undergoing liquidation or bankruptcy proceedings, or for reasons related to the worker's abilities or in case maintaining the employment relationship is no longer possible due to insurmountable obstacles beyond the power of the employer.[207] The employer also has a possibility to terminate the fixed term employment relationship with immediate effect without reasoning. The only requirement is to pay the employee absentee pay due for twelve months, or in case the time remaining from the fixed period is less than one year, for the remaining time.[208]

Employees are also required to give reasons for terminating their fixed-term employment relationship by dismissal. The reason given may only be of such a nature that would render maintaining the employment relationship impossible or cause unreasonable hardship in light of the worker's situation (for instance,

204 Article 192 (2) of the 2012 Labour Code.

205 Article 192 (1) of the 2012 Labour Code.

206 MD. I. 65.

207 Article 66 (8) of the 2012 Labour Code.

208 Article 79 (2) of the 2012 Labour Code.

the whole family moves to another region of the country and the employee cannot travel to work each day anymore).[209]

Labour law must prevent the substitution of constant, open-ended employment relationships by a chain of fixed term employment relationships.[210] To that end, according to the Labour Code, prolonging the fixed term employment relationship between the same parties, or concluding the next fixed term employment relationship established within 6 months from the termination of the previous contract is possible only if it is based on the rightful interest of the employer and shall not violate the rightful interest of the employee.[211] Hence, Hungarian labour law does not exactly determine the number of possible prolongations or the number of repeated fixed term employment relationships. It is not forbidden to prolong a fixed term employment relationship or to conclude another fixed term contract among the same parties, if such practice complies with the double requirement mentioned above. The legality of such cases can only be judged if all circumstances are known. For instance, a case related to the situation of an employee who was employed for five years and his contract was prolonged 19 times. The employer could not prove any legitimate interest for such an uninterrupted chain of temporary contracts, in fact, the number of the employees in the given position remained unchanged during these five years. The Supreme Court ruled that the general aim to reduce costs of employment cannot be accepted as a rightful interest to substantiate the continuous use of fixed term contracts.[212]

According to former regulation, in case of an unlawful chain of fixed term employment contracts, the employment relationship was considered by law to be open-ended.[213] Such a sanction is not included in the new Labour Code any more. Instead, in such cases, the general rules of invalid agreements shall apply. This means an unfavourable change for the employee, because on the grounds of invalidity she can only claim her severance pay and absence pay due for her notice period.[214] However, with the expiration of the fixed term contract, the

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209 Article 67 (2) of the 2012 Labour Code.

210 Just as it is prescribed in Article 5 of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

211 Article 192 (4) of the 2012 Labour Code.

212 EBH 1999/136.

213 Article 79 (4) of the 1992 Labour Code. Bán, Péter: Harmonizáció és jogbizonytalanság – a határozott idejű munkaviszony aktuális kérdései. In: *Liber Amicorum: Studia Ida Hágelmayer dedicata.* Ünnepi *dolgozatok Hágelmayer Istvánné tiszteletére. I.* 2005. 35–61.

214 Article 29 (2) of the 2012 Labour Code.

employment relationship will terminate automatically and cannot be considered open-ended. Nonetheless, some experts argue that in the case of unlawful fixed term employment, another section of the Labour Code shall apply. According to this provision, if any part of an agreement is deemed invalid, the relevant employment regulations shall be applied instead, unless the parties would otherwise not have concluded the agreement without the invalid part.[215] Thus, if the stipulation on fixed term employment is invalid, the Labour Code's general rule shall apply which states that the employment relationship is open-ended. This way, invalid fixed term contracts could be considered as open-ended. However, only future court practice will decide which interpretation of invalidity shall be authoritative.

4. Simplified employment

Act No. 85 of 2010 on simplified employment (SE, *egyszerűsített foglalkoztatás*) came into effect on the 1st of August 2010. The basic aim of the new law was to offer a flexible and cheap way to employ workers for short, fixed term periods. Its predecessor was the casual employee's booklet *(alkalmi munkavállalói könyv)* which proved to be very popular, although it came with a lot of abuse in practice. Simplified employment targets a part of the labour market which is very difficult to regulate. Undeclared work is always a tempting choice in case the employment relationship exists only for a few days or weeks. The legislator defines the applicable labour law rules, administrative obligations and common charges to motivate employers to choose legal employment but also to offer adequate protection to casual workers.

4.1. The predecessor in the nineties: casual employee's booklet

In the middle of the nineties authorities experienced that employers often employed workers without a valid contract and failed to declare the employment to the tax authority in case the employment lasted only for a short fixed term. Thus, they circumvented taxes, social security contributions and stringent labour law rules.

215 Article 29 (3) of the 2012 Labour Code.

The casual employee's booklet was introduced in 1997 (Act No. 74 of 1997) to combat undeclared employment in the sphere of casual work. The essential feature of the casual employee's booklet was that if the employment lasted no longer than five consecutive days, and for maximum of 15 days in a month and 90 days in a year, parties could stipulate the employment relationship by filling a booklet and by sticking a so called 'common charge stamp' (similar to a fee stamp) in it.

The booklet contained a table where the parties had to fill in the next row in the beginning of each work day. The necessary data were the names of the parties, the seat and tax code of the employer, place and date of work and the job profile. By sticking a common charge stamp to the end of the row, the employer paid all common charges attached to the employment relationship. The stamp's price depended on the daily wage of the employee. The law set three wage categories each with an incrementally priced stamp. Finally, parties had to sign each row. The employee had to keep the booklet with him during work and in case of inspection, had to present it to the labour or tax inspectors.

A completely filled in booklet was equivalent with a regular written employment contract and the compulsory information letter due at the beginning of the relationship. It absolved the parties from any other obligation as regards payment of or reporting on common charges. This way, the necessary administration of employment could be completed easily even if the employer employed two dozen casual workers on a given day. Paperwork caused no problems and could be properly done at the edge of a grain field in the morning before harvest or at a construction site in a remote location.

The casual employee's booklet meant exemption from a couple of labour law rules, for example, no annual paid leave was guaranteed to the worker and – as the contract was stipulated for a short fixed term – the rules related to the notice period, protection against dismissal or severance pay were irrelevant. An employee could work for not more than 120 days in a year with the booklet, even if the work was performed to different employers. Through this constraint the law prohibited the substitution of traditional, open-ended employment by the more flexible casual employee's booklet.

Its convenience soon made the casual employee's booklet very popular, until 2000 over a half million booklets were issued and the number increased to one and a half million by 2009.[216] However, such a great number involved a lot

[216] Kelemen, Melinda (2013): A háztartási alkalmazottak foglalkoztatásának kérdései Magyarországon – a láthatatlan munkaerő. *Esély*, 2013/3. 19.

of abusive practices too. The simple administrative procedures constituted the most attractive feature of this form of employment, but it could also be easily circumvented. For example, parties stuck the stamp and filled in all columns in the booklet except for the date of work. The date was added only in case of inspection. If the employer could fill in the date before the inspector checked the booklet, the authority could hardly prove that one stamp covered more than one day's work. Another widely used technique was that the employee confessed that he left the booklet at home or in the office and while the inspector waited for the worker to bring it to the location the missing columns were filled in. Inspectors found booklets where the date was erased, scratched, or even burnt out, while others used ink that evaporated at high temperature. Authorities found that in many cases the casual employee's booklet was used to employ the worker permanently, but under more flexible rules.

As a response to the abusive practices, the inspectorate fined the employer for undeclared employment if the booklet was not present at the time of the inspection or any of the columns were not filled in properly. In 2009, the year before the booklet was abolished, the National Labour Inspectorate found that most cases of undeclared work occurred in relation to the booklet, such breaches were particularly widespread in the agriculture and the construction industry.

By 2009 it became clear that the authorities cannot stop the spreading of abusive practices thus, the legislator decided to amend the respective regulation. The new law on simplified employment came into effect on the 1st of April 2010 (Act No. 152 of 2009). While the aim was to preserve the flexibility of the casual employee's booklet, the emphasis shifted towards constraints and bans in order to prevent abuses. The new act was very complicated. It covered five different regimes of simplified employment, all entailing different rules. As a result, the new simplified employment was rejected by the employers. When the new government came into office in May 2010, the prime minister promised in his first speech – among others – to relax the unpopular rules of simplified employment. The current rules on casual work were introduced on the basis of that programme.

4.2. The features of simplified employment

Simplified employment is never compulsory. The parties are free to choose the typical employment relationship even if the contract is stipulated only for a few

days.[217] However, simplified employment is prohibited if there is already an employment relationship between the parties. Similarly, an existing employment contract cannot be amended to simplified employment.[218] In general, any employer may make use of simplified employment but in the public sphere this form of employment may only be established outside the basic activities of the employer (for example, a public hospital can employ casual workers as janitors, but not as nurses).[219] This employment form is regarded as a benefit, thus, employers with a tax debt of 300,000 HUF (approximately €980) or more are excluded from choosing simplified employment.[220]

Simplified employment covers two types of temporary work: casual work and seasonal work in agriculture and tourism. Seasonal work means that the work can be performed only during a certain part or period of the year and such periodicity is based on objective reasons, i.e. periodicity of the work is irrespective of how the work is organised.[221] For example, vending Christmas trees is a seasonal work, while selling chocolates is not, even if more products are sold before Christmas. Only seasonal work in the aforementioned two sectors fall under simplified employment and cannot exceed 120 days in a year. Seasonal and casual work contracts between the same parties shall be added up when this threshold is calculated.[222] For example, if a wine producer employs a seasonal worker for 90 days for grape harvest and processing, the parties can conclude a casual work contract for winter maintenance works only for 30 days in the same year. In other words, this constraint means that the employer cannot employ the same worker in simplified employment in excess of a total of 120 days in a year.

Casual work preserved the time limits used for the casual employee's booklet, thus, it embraces only very short fixed term employment, not exceeding five consecutive days, 15 days in a month and 90 days in a year.[223] Time limits of simplified employment are summarised in the following chart.

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217 SE Article 1 (5).

218 Article 201 of the 2012 Labour Code.

219 SE Article 3 (4).

220 SE Article 11 (6).

221 Article 90 point c) of the 2012 Labour Code.

222 SE Article 1 (4) and Article 2.

223 SE Article 2 point 3.

Type of simplified employment	Time limits
Seasonal work	120 days/year
Casual work	5 consecutive days
	15 days/month
	90 days/year
Seasonal and casual work together between the same parties	120 days/year

Besides the limited timeframe, the number of casual workers employed in a given day is also restricted. The maximum number of casual workers depends on the average number of full time employees employed by the same employer in the last six months. The exact figures are shown in the table below.[224]

Number of full time employees (average of the last six months)	Maximum daily number of casual workers
0	1
1-5	2
6-20	4
21-	20% of full time employees

Such stringent limits are relaxed as the employer might schedule the daily threshold unequally during the calendar year. For example, if the employer has five full time employees, it may employ two casual workers each day. That means 365x2=730 casual workers for the whole year. The employer respects the limit in case it employs 100 casual employees for seven days during the year, or hires all 730 workers for a single day. However, the unexploited amount cannot be transferred to the next year.

Two categories of casual workers are exempted from the headcount limit. It is not applicable to walk-on actors and casual workers of employment co-operatives. The latter is a special employer, a non-profit organisation operating to enhance the employment of its members. As employment co-operatives regularly offer casual work to hundreds of members, applying the headcount would hamper their operation. The exemption of walk-on actors is a benefit for film studios seated in the country. Nevertheless, their employment includes a different constraint: a walk-on actor falls under simplified employment only if her daily income does not exceed 12,000 HUF (€40).

224 SE Article 1 points 2 and 3.

4.3. The applicable labour law rules

Besides the SE, Title 89 in the Labour Code regulates simplified employment among the other forms of atypical employment. The general provisions of the Labour Code are applicable to simplified employment unless the SE or the separate title provide otherwise. The main differences between the typical employment relationship and simplified employment are the following.

No written employment contract is necessary in simplified employment. As a general rule in Hungarian labour law, the employment relationship is established by a written employment contract. In the case of simplified employment, the declaration on the employment sent to the tax authority establishes the legal relationship.[225] This solution aims to decrease the parties' administrative burdens, albeit it is rather unique in civil law that one party's declaration to an outside party establishes a legal relationship. Authors argue that it is the mutual agreement of the parties that establishes simplified employment, the declaration is only an additional legal condition to apply the more flexible rules.[226] Nevertheless, parties may choose to sign a written contract. The legislator annexed a template to the SE for such purposes. A filled in template is equivalent with an employment contract as regulated in the Labour Code. The template serves as a guarantee that the parties do not forget to include the necessary elements in their contract, however, it has two further advantages. A properly filled in template absolves the employer from registering working time and no written payroll is needed as these data are contained in the form itself.[227]

At the same time, the template also has its shortcomings. For instance, it does not contain any reference to probation period or special rules on responsibility for damages, even though these legal institutions may be used in simplified employment. If parties decide to make use of these rules, they need to supplement the template. The problem is that most employers are not familiar with these possibilities and follow the template without considering what other options they might have in formulating the contract. In case of casual workers, written contracts are rare, as the whole relationship lasts for maximum of merely five days. It is more common among seasonal workers, since it is in both parties'

225 Article 202 (2) of the 2012 Labour Code.

226 Bankó, Zoltán – Berke, Gyula – Kajtár, Edit – Kiss, György – Kovács, Erika: *Nagykommentár a munka törvénykönyvéhez.* Budapest, Wolters Kluwer, 2012. 506–507.

227 Article 203 (4) of the 2012 Labour Code.

interest to have a written proof of the bargained wage and other working conditions when the employment lasts for the whole season.

While the Labour Code is applicable to simplified employment, some general rules are excluded considering the temporary nature of employment. These special rules are the following.[228]

- Parties cannot withdraw from the contract after signing it. However, the employer may withdraw or modify the declaration sent to the tax authority within two hours, which has the same effect (that is, the contract shall be considered as if it had never been stipulated).
- The employee cannot be reassigned to another job profile, place of work or employer than what is stipulated in the contract (or in the declaration sent to the tax authority). However, temporary work agencies may use simplified employment. A casual or seasonal worker employed by an agency can obviously be assigned to different user companies.[229]
- No disciplinary actions can be taken against the employee. Instead, the employer may only issue a written warning to the employee (this is not considered a disciplinary action in court practice) or terminate the employment relationship.
- The employer is not obliged to inform the employee on open-ended or part-time vacancies.
- The employer is not obliged to amend the employment contract to part-time work upon the request of the employee raising a child under the age of three.
- It is not mandatory to raise the employee's wage after returning from a long period of absence. Such long term leaves are excluded anyway (see below).
- No certificates and references are to be issued to the employee at the end of the relationship.
- Annual leave can be scheduled freely by the employer (for example, there is no mandatory deadline to inform the employee in advance on how annual leave is scheduled). Note that since casual work cannot exceed five consecutive days, casual workers never have a contract that lasts long enough to become eligible for annual leave (one day of annual leave requires 12-15 days of employment). Even if they work all 90 days for the same employer, this is broken down into 18 five

228 Article 203 of the 2012 Labour Code.

229 Gyulavári–Hős–Kártyás–Takács op. cit. 264.

day long contracts. The consecutive contracts shall not be calculated together to become eligible for annual leave.
- Limitations on the renewal and prolongation of fixed term contracts shall not apply, chain contracts are not excluded.
- Rules on executive employees shall not apply.

The following special rules render working time scheduling very flexible under simplified employment.

- The employer is not obliged to inform the employee on the working time schedule in advance. In many cases employees work outdoors exposed to unexpected changes in the weather (for example harvesters, spa hosts). In such jobs working time might be rescheduled in the morning, before the work starts. Note that the employee may not refuse work once she is scheduled for a day.
- Working time can be scheduled to working days unequally without having to respect the so-called reference periods (the whole employment relationship is considered to be the reference period during which the working time shall be distributed).
- The employee can be employed on Sundays and on public holidays just like on usual working days, and the employee is not entitled to the statutory Sunday wage supplement. However, work on public holidays means a compulsory 100% wage supplement.
- The employee is not entitled to sick leave, maternity leave, parental leave or other statutory leaves without pay.
- As of 2013, simplified employment is more flexible also as regards the minimum wage. Employers have to respect only 85% of the general national minimum wage [[that is 496 HUF (€1.6)/hour] and 87% of the national minimum wage for employees with secondary level qualifications (591 HUF (€1.9)/hour].[230]
- In addition, the Labour Code offers more flexible rules on rest periods for seasonal work. First, it is enough to schedule an eight hours long daily rest period (the general rule is 11 hours) and it is not compulsory to schedule a rest day following six work days.[231]

230 SE Article 4 (1a).

231 Article 104 (2) and Article 105 (3) of the 2012 Labour Code.

In simplified employment there is no compulsory health examination prior to the commencement of the work. The law prescribes only that the employer must check whether the employee is in adequate condition to perform the work.[232] According to the ministerial reasoning, parties rarely followed the regulations on health examinations if the employment lasted only for a few days. Hence, it would make no sense to oblige them to a time consuming and expensive examination they would skip anyway. While the explanation paints a true picture of the practice, employers should not forget that their liability for any damages occurring during work is the same as in the case of traditional employment relationship. Thus, in case the employer – who is medically untrained – did not spot a health risk in relation to the freshly recruited casual worker (such as for example high blood pressure), and later the worker suffers an injury at work, the employer will still liable for all damages incurred.

Employers can reduce such risks with the so-called employability examination. Here, the health examination is not limited to the employee's abilities related to a given job, but has a wider scope. Its aim is to explore what general limitations shall apply to the employee's work, if any. For example the examination may lead to the conclusion that the employee shall not work in a permanent sitting position, outdoors, or shall not perform heavy physical work, or tasks requiring full eyesight. The certificate of examination is valid for one year, hence, a casual worker may use it in several employment relationships. Both the employee and the employer may initiate the employability examination, its 3,300 HUF (€10.75) fee shall be paid by the party initiating the process.[233] In some exceptional cases the work cannot be taken up without a valid employability certification. Among others, these special rules cover the employment of young workers, pregnant women and breastfeeding mothers, while other special examinations are mandatory in jobs where the worker is exposed to epidemics or in the food industry.[234]

All other rules of the Labour Code not mentioned above are applicable to simplified employment. For example, no special rules apply with respect to the requirement of equal treatment, amendment and termination of the employment relationship, liability for damages or labour disputes.

232 SE Article 6.

233 Government Decree 284/1997 (XII. 23.).

234 Welfare Ministerial Decree 33/1998. (VI. 24.) Article 16/A (1).

4.4. Common charges and administration

Probably the main reason for the popularity of simplified employment's is the favourable regime of common charges. Even its predecessor, the causal employee's booklet meant lower taxes in employment, but the present law contains even more simple rules.

According to the SE, the employer has to pay only a daily flat rate of 500 HUF (€1.6) in seasonal work, 1,000 HUF (€3.25) in casual work and 3,000 HUF (€9.7) for walk-on actors, covering all common charges attached to employment, for example personal income tax, social security contributions, vocational training and rehabilitation contributions.[235] Such flat rates are to be paid after each day of the employment relationship, not only working days. For example, if a seasonal work's contract lasts for 100 days, 50,000 HUF shall be paid, even if such period includes weekly resting days as well. This is also the reason why casual work falls under a higher rate: casual work by law cannot exceed five consecutive days and if the employer still needs the employee the following week, another contract must be offered. This way, the employment relationship consists of only working days, no common charges are to be paid for resting days.

Interestingly, the rate of common charges is unrelated to the hours worked. Thus, a daily 1,000 HUF shall be paid whether the casual worker works four hours or full time. It is no surprise that part-time work hardly exists in simplified employment. This regulation makes payroll calculation very easy while different wage levels may fall under the same amount of common charges.

However, wage levels may acquire significance in two cases. First, the employer shall account the wage as expense only up to twice the amount of the daily minimum wage (9,340 HUF). Hence, personal income tax or – in case of a legal person employer – company tax (10%, 19% over 500 million HUF profit) shall be paid after the wage exceeding this amount. For instance, if the daily wage is 12,000 HUF, the company shall pay 10% company tax after 2,660 HUF.

Second, as of 2013 the employee shall pay personal income tax (16%) after the wage exceeding the daily minimum wage (4,670 HUF). Walk-on actors are exempted from this rule. If the employee's pay is not higher than the minimum wage, her income shall not be declared to the tax authority and no personal income tax shall be paid above the 1,000 HUF daily flat rate.

235 SE Article 8 (2).

Such reduced common charges are applicable only if the employer respects the time and headcount limits of simplified employment. If the employer violates these constraints, the general tax rules shall apply to the employment starting from the time of the breach and the employer will be excluded from simplified employment for a period equivalent with the time it used the favourable rules without authorisation.[236] For instance, if the employer hired casual workers for three months over the statutory headcount, it has to pay all taxes according to the general rules for this period and cannot use simplified employment for the next three months. Similarly, if the employer employs seasonal workers for 125 days, the general tax rules apply for the last five days, as this period exceeds the time limit. Besides, the employer will be excluded from simplified employment for an additional five days.

Due to the low common charges, employees in simplified employment are not covered by social security. They are eligible only for pensions, accidental health services and unemployment benefits.[237] Given the temporary nature of these jobs, simplified employment does not exclude the employee from unemployment benefits). Hence, it is possible to work in simplified employment while enjoying unemployment benefits, the employee must not even inform the employment service of his casual or seasonal work.[238]

As for the administrative obligations, the employer has to declare the basic data of simplified employment to the tax authority before the work starts (among others, the parties' names, the type of simplified employment, the duration of employment). Note that – as mentioned above – this declaration substitutes the written employment contract. The declaration of employment may be completed through an online submission or by telephone.[239] The telephone number may be called on reduced rates countrywide. After the first call employers receive a registration number, by which later the authority identifies the employer and there is no need to rerecord all the data again, thereby speeding up the process. Nevertheless, no practical option is available in case an employer has to declare 30-40 casual workers at dawn before harvest starts, especially as employers in agriculture are often unfamiliar with modern telecommunication devices.

Unlike in the case of traditional employment relationships, employers may withdraw or modify a declaration within two hours from the submission of

236 SE Article 8 (4).

237 SE Article 10.

238 Act 4 of 1991 Article 25 (6) and 58 (5) point n).

239 SE Article 11.

the declaration. If the declaration was made the day before the work started or the employment lasts longer than one day, the deadline is eight o'clock in the morning. For example, if due to an unexpected change in the weather the harvest cannot start, the employer can withdraw the declaration of the casual workers' employment he made the previous evening until the morning. This way the employer does not have to pay wages or common charges for the day the work was cancelled.

5. Household work

The previous legislation (Act No. 152 of 2009) regulated household work as a separate form of simplified employment. Household work was understood as personal services performed for a natural person employer. While such activities are not covered by simplified employment any more – except if the service is performed as casual work –, in tax law this form of work still enjoys a special status.

In 2010 the new government decided that wages paid by natural person employers to household service employees shall not be subject to common charges in case the employer's income was already subject to taxes. For instance, if a family pays its housekeeper from their wages after which they had already paid the applicable taxes, the housekeeper shall not pay common charges after his wage earned the family.[240] The term 'household services' is understood in a narrow sense, as only those activities are exempted from tax that are listed in the act (for example cleaning, cooking, washing, nursing a child, gardening). Individual entrepreneurs and legal entities that provide these services are excluded from the scope of the Act.

While this form of employment is free of common charges, the employer has to send a report to the tax authority each month stating that he or she employs a household worker and has to pay a 1,000 HUF (€3.25) registration fee. The fee is irrespective of the days worked and of the amount of the wages paid. Statistics show that however limited, such registration fee deters most employers from declaring their household workers to the tax authority, or at least natural person employers are not aware that registration is compulsory. Until 2013, not more than 650 employers paid the monthly fee, while the number of household

[240] Act 90 of 2010 Chapter I.

workers is undoubtedly higher. It seems that household workers still form an invisible workforce in Hungary.[241]

The above mentioned rules do not touch upon the nature of the legal relationship between the household worker and the employer. Thus, it might be an employment relationship or a civil law contract (such as the mandate). However, since no contributions are paid, the worker is not covered by social security. Not surprisingly, trade unions opposed such a regime of household work since in case the employer changes the status of its employee to that of a household worker, the worker is no longer covered by social security.

The new model of household work aims to combat undeclared work in this sphere. However, the 1,000 HUF monthly registration fee for household workers seems too rigid resulting in a situation where only a small fragment of all household workers are declared to the tax authority.

6. Part-time employment

As a rule, the employment relationship is established for full-time employment (eight hours a day, 40 hours a week).[242] Consequently, the employee may only have a part-time employment relationship, if the employment contract contains such a stipulation. Part-time employment means that the parties determine shorter working time than full time.[243] Part-time employment has no minimum quantity determined by law. It derives from the concept of full-time employment that part-time must be shorter than eight hours a day, 40 hours a week, but within this, any working time may be stipulated. Even radically short working time is possible (for example one hour a week) – although this is not expedient in most situations. Thus, parties may determine the amount of working time flexibly, according to their own needs, but the most common working time for part-time work is 20 hours a week. In Hungary, the ratio of part-time employment is not significant (7% in 2012[244]), due to the fact that it yields no real advantage in wage expenses, and more importantly, common charges are particularly unfavourable for employers employing workers part-time.[245] From the employee's view, given

241 Kelemen op.cit. 12–13.

242 Article 45 (4) and 92 (1) of the 2012 Labour Code.

243 Article 92 (5) of the 2012 Labour Code.

244 http://www.ksh.hu/mpiacal9807_tablak

245 Bankó (2010) op.cit. 100., 103.

the limited number of working hours, most part-timers suffer from low wage levels and can therefore acquire only negligible benefits under social security (for example unemployment or sickness allowances), and even a long-lasting part-time job may result in meagre pension claims. Nonetheless, all employment relationships are covered by social security, irrespective of whether they are part-time or full time.[246]

Directive 97/81/EC explicitly enables the transition between part and full time jobs, as reduced working hours could better fit an employee's needs.[247] Accordingly, the Labour Code prescribes that employers shall inform their employees regarding available full or part-time jobs. If the employee initiates the amendment of his employment contract from full-time to part-time or vice versa, the employer shall respond within 15 days in writing.[248] Nevertheless, employers are not obliged to accept these initiatives coming from employees, they are free to deny modifying the relationship to full/part-time employment.[249]

According to a new rule of the Labour Code, the employee may request that the employer reduce working time by half as long as his/her child is below 3 years, and the employer cannot refuse such request.[250] The purpose of the regulation is to help employees raising a child in returning to work. However, the freedom of contract is violated on the employer's side, because it is obliged to accept the alteration of working time, potentially resulting in serious problems regarding the organisation of working time. Naturally, the parties can alter working time in any other situation as well, but only by mutual agreement.

By principle, employees cannot be discriminated against for reason of being employed full or part-time. The explicit prohibition of discrimination against part-time employees is enshrined in the Act on anti-discrimination.[251] The EU directive on part-time employment explicitly contains the principle of time-proportionality (*pro rata temporis*) as an exception to the principle of equal treatment.[252] The principle of time-proportionality was included in the 1992 Labour Code, declaring that in case of part-time employment, in respect of directly or indirectly granted wage or allowance in kind, the principle of time-

246 Act 90 of 1997 on social security, Article 5 (1).

247 Article 5 of Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

248 Article 61 (1–2) of the 2012 Labour Code.

249 Kiss (2005) op.cit. 144.

250 Article 61 (3) of the 2012 Labour Code.

251 Act 125 of 2003 Article 8 point r).

252 Article 4 of Directive 97/81/EC.

proportionality must be applied, in case eligibility for allowance is based on the measure of working time.[253] The new Labour Code does not explicitly refer to the principle of time-proportionality, thus, it can only be derived from the rules of the anti-discrimination act. It prescribes that equal treatment is not violated in employment relationships, in case the distinction is proportional, justified by the characteristic or nature of the work and is based on relevant and legitimate terms and conditions.[254] A proportional decrease in the wage of a part-time worker is considered to be such a justified distinction. Nonetheless, from the aspect of practice, preserving the special rule declaring the principle of time-proportionality would have been expedient.

The new Labour Code introduced on-call work and job sharing. New instruments in Hungarian labour law, their characteristics can only be judged after a couple of years of practice. The essence of on-call work is that the employer has no obligation to employ the employee in the full period of the contracted working time, but only when a given task to be accomplished emerges. Wage has to be paid only for the hours actually worked.[255] In case of on-call work, daily working time shall not exceed 6 hours and working time shall be scheduled 3 days in advance.[256]

Due to the obligation to perform work personally, it is rare in an employment relationship that the employee's position is shared by several persons. Such a special situation, called job sharing, was introduced to Hungarian labour law by the new Labour Code. In this form of employment two or more employees fill in one job, and they can schedule working time on their own, deciding who works when. In case of an employee's incapacity to work, either of the other contracted employees is obliged to perform.[257]

7. Teleworking, homeworking

While in the standard employment relationship work is to be carried out on the premises of the employer, in some work arrangements the employee may work from home. The main difference between a homeworker and a teleworker is that

253 Article 78/A (2) of the 1992 Labour Code.

254 Act 125 of 2003 Article 22.

255 Gyulavári–Hős–Kártyás–Takács op. cit. 248.

256 Article 193 of the 2012 Labour Code.

257 Article 194 of the 2012 Labour Code.

the final product of the former is usually of a material character and may not be transferred by means of electronic communication, which the latter specifically entails. According to the definitions of the new Labour Code:

- Teleworking shall mean activities performed on a regular basis at a place other than the employer's facilities, using computers (and other means of information technology), where the end product is delivered by electronic means.[258]
- Homeworkers may be employed in jobs that can be performed independently, remunerated exclusively on the basis of the work done.[259]

Working at home has unquestionable advantages on the side of the employee (such as unbound work schedule, a more comfortable working environment, closer connection with the family etc.), but also gives rise to certain risks. Homework or telework may cause unwanted overlaps in private life and work, isolation from the workplace, limited career options and necessitates special legal provisions to guarantee privacy. To prevent such negative effects, legislation must set forth certain guarantees. These provisions were included in Hungarian legislation during the implementation of the European social partners' agreement on telework.[260]

The relevant provisions are based on the voluntary nature of telework. As telework affects the basic right to the inviolability of the home, the employer cannot order it unilaterally. In case telework does not form part of the initial contract, the change to telework requires an adaption of the contract modifying the job location. The employee can accept or refuse this job alteration.[261]

To combat isolation, the Labour Code prescribes that the employer provide all information to persons employed in teleworking as provided to other employees and shall further provide access to teleworkers to its premises in order to communicate with other workers.[262]

Given the looser bond between employer and worker – unless otherwise agreed –, the employer's right of instruction is limited solely to the definition

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258 Article 196 (1) of the 2012 Labour Code.

259 Article 198 (1) of the 2012 Labour Code.

260 Framework agreement of the ETUC, UNICE/UEAPME and CEEP on telework (2002). Bankó, Zoltán: A távmunka a munka törvénykönyve speciális szabályainak rendszerében. *Jura,* 2004/2. 5–9.

261 Article 196 (2), Article 58 of the 2012 Labour Code.

262 Article 196 (4–5) of the 2012 Labour Code.

of duties to be discharged by the employee. An inspection concerning the completion of the work assignment shall not constitute any right for the employer to inspect any information stored on the computing equipment of the employee used for discharging his duties, which are unrelated to the employment relationship. Possible inspections may not give rise to unreasonable hardship for the employee or on any other person who also using the property designated as the place of work. In the absence of an agreement to the contrary, the teleworker can schedule his working time by himself.[263]

Due to the independence they enjoy, the status of homeworkers seems to be more similar to workers working under civil law contracts than to employees in the typical employment relationship.[264] Unless otherwise agreed, in homeworking:

- the place of work is the home of the employee,
- the employer's right of instruction is limited to specifying the technique and work processes to be used by the employee,
- the employee shall carry out the work using his own assets,
- the employee can schedule his working time by himself.[265]

As the work is performed in the home and with the assets of the employee, he shall be reimbursed for the expenses actually incurred in connection with the work. A further characteristic is yet again reminiscent of civil law contracts: the payment of remuneration and expenses shall be withheld in case the work done is deemed insufficient for reasons within the employee's control.[266]

Even if the work is carried out outside its premises, the employer is not exempted from the responsibilities related to the health and safety of teleworkers and homeworkers. The workstation and working environment of the teleworker/homeworker must be safe.[267]

263 Article 197 of the 2012 Labour Code.

264 Gyulavári–Hős–Kártyás–Takács op. cit. 258.

265 Article 198–199 of the 2012 Labour Code.

266 Article 200 of the 2012 Labour Code.

267 Act No. 93 of 1993 on occupational health and safety, Article 86/A.

8. Executive employees

The executive employees' status differs from that of a standard employee. They stand on the top of the organisational hierarchy and exercise employer's rights themselves. Thus, the law foresees higher requirements in their case, including more stringent rules on their responsibility. Their high employability guarantees them a firm position in the labour market (high qualifications, valuable skills, work experiences and relations) hence, they are less in need of the protective measures set forth by labour law. The special rules on the employment of executive employees are explained by their decisive role in the employer's organisation.

There are two categories of executive employees in Hungarian labour law. The first category comprises the so called general executives who are the employers' directors and all other persons under their direct supervision who are authorized – in part or in whole – to act as the directors' deputies. These persons can only be defined on the basis of the organisational structure of the employer. For example, the 'employer's director' will be different in a civil organisation, a foundation or in a limited liability company. To identify general executives, it is necessary to examine the relevant legal measures and company contract, statutes of the given organisation. As regards the second category, employment contracts may invoke the provisions on executive employees if the employee is in a position considered to be of considerable importance from the point of view of the employer's operations, or fills a position of trust, with a salary reaching seven times the mandatory minimum wage.[268] This latter category is designated qualified executives. The high wage requirement guarantees that only a handful of employees may be qualified executives who are in fact in the most significant positions. The differentiation between the two categories of executives is merely of theoretical importance, as the same rules apply to both statuses. The most important special rules on executive employees are the following.

The employment contract of an executive employee may deviate freely from the entire second part of the Labour Code. This means that the parties are free to deviate from the statutory rules even to the detriment of the employee. The law determines only a couple of exceptions, especially the guarantees protecting pregnant women and nursing mothers which must be applied also to executives.[269] Hence, the legislator presumed that executive employees possess

[268] Article 208 of the 2012 Labour Code.

[269] Article 209 (1–2) of the 2012 Labour Code.

a strong enough bargaining position when stipulating the employment contract, and as such, they need almost none of the cogent rules in the Labour Code to protect their interests. In our view, such a broad freedom to design the parties' agreement does not mean that the parties could exclude the fundamental provisions of labour law from their contract. For example, if – based on the employment contract – the executive is not entitled to paid annual leave, has no right to resting periods, to severance pay or any protection against dismissals and no limitations apply to her working time, then the parties are much rather bound by a civil law mandate than an employment relationship. It is up to future juridical practice to set the boundaries of how and to what limit an executive contract may deviate from the statutory provisions for it to remain within the scope of labour law.

Executive employees fall outside of the scope of the collective agreement.[270] The reason for this is that in most cases they are the ones who represent the employer during the collective bargaining process. The parties may not agree otherwise and stipulate in the employment contract that the collective agreement is applicable also to the executive employee. However, it is not prohibited to insert any rule of the collective agreement directly in the employment contract. This way, the prohibition may be easily circumvented.

Executive employees may schedule their own working time and fall under a stricter responsibility for damages. Unlike employees in the typical employment relationship, their responsibility is not limited to the cases of negligence.[271]

There are detailed, specific rules on the termination of their employment:[272]

- As executive employees fill positions of trust, the employer may terminate unilaterally the employment relationship much more flexibly than in the case of the typical employment relationship. No reasoning is required for a dismissal and most protective rules against dismissal do not apply.
- The right of termination without notice of an executive employee may be exercised within three years of the occurrence of the cause serving as grounds thereof, or in the event of a criminal offense, up to the

[270] Article 209 (3) of the 2012 Labour Code.

[271] Article 209 (3–4) of the 2012 Labour Code. According to the general rule, the amount of compensation payable by the employee may not exceed four months' absentee pay. Compensation for damage caused intentionally or through gross negligence however shall cover the full extent of losses [Article 179 (3) of the 2012 Labour Code].

[272] Article 209 (5) and Article 210 of the 2012 Labour Code. Radnay, József: A vezetők munkavégzési jogviszonyának és a munkáltatói jogkör gyakorlásának egyes kérdései. *Gazdaság* és *Jog,* 1998/11. 17–19.

respective statutory limitation. This deadline is three times longer than that according to the general rules.
- The employer shall be liable to pay up to six months' absentee pay to the executive employee from the remuneration payable upon termination of his employment, if the notice of termination is delivered after the opening of bankruptcy or liquidation proceedings. Any additional sum (such as severance pay or premiums stipulated in the employment contract) shall be payable only upon the conclusion or termination of bankruptcy proceedings, or upon the conclusion of liquidation proceedings. This restriction was necessary, since executive employees have significant influence on the employer's economic operation.
- The executive employee, if having terminated his employment relationship unlawfully, shall be liable to pay compensation in the amount of absentee pay due for twelve months.

Executive employees fall under stringent rules on conflict of interest to protect the rightful economic interests of the employer. Executive employees:
- may not enter into additional employment-related relationships.
- shall not acquire shares, with the exception of the acquisition of stocks in a public limited company, in a business association which is engaged in the same or similar activities or that maintains regular economic ties with their employer;
- shall not conclude any transactions falling within the scope of the employer's activities in their own name or on their own behalf; and
- shall report if a relative has become a member of a business association which is engaged in the same or similar activities or that maintains regular economic ties with the employer, or has established an employment-related relationship in an executive position with an employer engaged in such activities.[273]

According to court practice, the conflict of interest shall be assessed on the basis of the activities of the employer and of the other company listed in the trade register. It is not of significance whether the given activity was actually performed or not.[274] If the executive employee breaches the rules on conflict of

[273] Article 211 of the 2012 Labour Code.

[274] EBH 1999, 134.

interest, the employer may demand compensation for damages incurred and the employment relationship may be terminated without notice.

9. Incapacitated workers

It was long debated among Hungarian labour lawyers whether incapacitated persons could enter into an employment relationship or not. The 1992 Labour Code did not explicitly require that employees possess legal capacity, but it was obvious that an incapacitated employee could not fulfil all obligations an employee had according to the statute. The uncertainties were resolved by the Constitutional Court in 2011, obliging the legislator to adopt the specific rules necessary for incapacitated persons to enter into an employment relationship.[275] The new Labour Code contains the relevant provisions.[276]

Hence, incapacitated persons may become employees but special provisions apply to their employment. First, they may conclude employment relationships only with respect to work that they are capable of performing on a stable and continuous basis in light of their medical condition. The employee's medical examination shall cover the employee's ability to handle the tasks of the work. All such functions shall be determined in the employment contract, thus, it does not suffice to merely stipulate a general job profile. Furthermore, the employee's work shall be supervised continuously so as to ensure that the requirements of occupational safety and health are observed.

Since these workers an incapacitated, they shall bear no responsibility for damages. In consequence, the employer should organise their work in such a manner that the possibility of any damages is restricted to a minimum. Legal acts on behalf of incapacitated persons shall be performed by the legal representatives.[277] For instance, dismissal or the amendment of the employment contract shall be signed by the tutelary.

Given their vulnerability, all protective measures concerning young employees shall be applied to incapacitated employees. Among others this means that they are entitled to five extra days of annual leave, enjoy longer resting periods, their

275 Constitutional Court decision no. 39/2011. (V. 31.).

276 Article 212 of the 2012 Labour Code.

277 Article 21 (5) of the 2012 Labour Code.

daily working time is limited to eight hours and they cannot be instructed to work at night or to perform overtime.[278]

All the above mentioned rules on incapacitated employees are cogent, therefore, no deviation from them can be considered legal.[279] There are no statistics available on the spread of incapacitated employees' employment but it may be estimated to be marginal. At the same time, the employment of incapacitated workers is supported by the rules on rehabilitation contribution. The employer is exempted from this special common charge if at least 5% of its personnel are employees with disabilities.[280]

10. Publicly owned employers

The Labour Code contains special provisions regarding publicly owned employers. Such specific measures were first introduced in 2009 with the aim of protecting the public wealth managed by such organisations.[281] Publicly owned employer means a public foundation or a business association in which the State, a municipal government, a budgetary agency or a public foundation has majority control either by itself or collectively.[282]

Legislation became necessary since in practice executive employees of publicly owned employers often left the company with a generous package of severance pay and other benefits. As the Labour Code permitted deviation from most of its rules in favour of the employee, these agreements were valid from a labour law aspect, although it was clear that the parties circumvented the rules on managing public wealth.

The legislator used two techniques to avoid misuses of public resources in the practice of publicly owned employers' employment. Firstly, in this ambit there are more cogent provisions of the Labour Code than in the standard employment relationship. Second, certain employer's rights shall be exercised by the owner of the employer and not by the executive who otherwise acts on behalf of the company. For instance, these decisions are made by the municipal government and not by the director of the water supply company.

278 Article 114 of the 2012 Labour Code.

279 Article 213 of the 2012 Labour Code.

280 Act 191 of 2011 Article 22–26/A.

281 Act 122 of 2009.

282 Article 204 of the 2012 Labour Code.

As for the first group of special provisions, neither the parties' agreement, nor the collective agreement may deviate from the statutory rules on severance pay and notice period (be it in favour or to the detriment of the employee). Thus, for example, an employment contract guaranteeing more severance pay at the end of the employment relationship is invalid. The parties cannot agree to include breaks in working time and it is prohibited to stipulate reduced daily working time.[283] Moreover, rights of works councils and trade unions cannot be extended beyond the standards that are regulated in the Labour Code. For instance, no more reduction in working time may be offered to the union officials or works council members above the measure guaranteed by law.[284] This latter rule is rather surprising as the relationship between the management and the union or the works council has no or limited relevance in the management of public wealth.

Turning to the second regulatory technique, it is the owner who shall have the right to define:

- those jobs where qualified executive employees[285] must be employed.
- performance requirements for the executive employees, including performance-based wage and other benefits.
- the jobs in respect of which a non-competition agreement[286] may be concluded, with the possibility of prescribing further conditions in a non-competition agreement. The consideration stipulated in the non-competition agreement may not – for the duration of the agreement – exceed fifty per cent of the absentee pay due for such period.[287]

283 Reduced working time means the employee is not working full-time but is nevertheless paid as a full-time employee. See Article 92 (4) of the 2012 Labour Code.

284 Article 205–206 of the 2012 Labour Code.

285 See point 8.

286 According to this agreement, the employee shall not engage in any conduct – for up to two years following termination of the employment relationship – which may infringe upon or jeopardize the rightful economic interests of the employer. In exchange for honouring the employee's obligation, the employer shall be liable to pay adequate compensation. Labour Code Article 228.

287 Article 207 of the 2012 Labour Code.

11. Employment relationships involving multiple employers

Besides temporary agency work, Hungarian labour law regulates other cases when multiple entities appear in the position of the employer. Such a situation may arise when several employers conclude an employment contract with one employee for accomplishing tasks for all of them (employee sharing).[288] In such a scenario the employee works for multiple employers, albeit in the framework of one employment relationship. Unlike agency work, no employer's rights are leased for a fee, but more subjects assume the position of the employer from the very beginning, with all the rights and obligations stemming from the employment relationship.

The employment relationship of a school association is also a three-way legal relationship. In this construction, full-time students are employed by special associations, not directly, but through another company. According to estimates, 100-150,000 students work annually in such a form of employment in parallel to studying, for example in fast food restaurants or working as administrators. Work organized by school associations on the one hand can be an important income supplement and source of experience for students, on the other hand it provides flexible workforce for the employers.

Given their importance, employment relationships with multiple employers are examined in a separate chapter.

12. Summary

The new Labour Code regulated the atypical employment relationships with the view that these institutions can contribute to the flexibility of the labour market and they serve as a stepping stone towards permanent employment for certain disadvantageous groups (like young people or nursing mothers). The new law also introduced new forms of atypical employment, like job sharing or on call work. However, these labour market functions attributed to atypical employment are not verified yet.

The new Labour Code's regulatory approach was to keep the level of statutory regulation to the minimum and allow the parties to design the most possible details of the atypical employment form they choose. While this technique

[288] Article 195 of the 2012 Labour Code.

obviously gives precious flexibility, presumably it will be the employers who will draft the atypical employment contracts with the most suitable content for them. In our view, atypical employment as an employee's preference could remain the exception to the main rule.

IV.
TEMPORARY AGENCY WORK AND OTHER THREE-WAY EMPLOYMENT RELATIONSHIPS

11 years after the first domestic regulation of temporary agency work the legal environment of this form of work radically changed with the new Labour Code coming into effect on the 1st of July 2012. Besides experiences of a decade, directive 2008/104/EC on agency work[289] and a decision of the Constitutional Court[290] also provided guidance for the review of domestic regulation. Although the new Labour Code resolved many former problems, the domestic regulation on temporary agency work still cannot be considered complete, the legal institution is burdened by many deficiencies of legal harmonisation, constitutional questions and practical problems. The aim of this chapter is to reveal the questionable elements of the regulation of agency work by detailed critical analysis. As agency work is not the only employment relationship involving multiple employers, this chapter also explores similar institutions where the employer's position is divided among more parties.

1. The concept of temporary agency work in Hungarian labour law

The most important particularity of temporary agency work is that – unlike ordinary employment – it is based on the legal relationship of not two, but three parties. The employee concludes an employment contract with a temporary work agency, the lessor. The factual employment takes place under the disposal of another employer, the user company, with whom the temporary work agency

[289] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

[290] Constitutional Court decision no. 67/2009. (VI. 19.).

concludes a civil law contract. By virtue of this contract, the agency lends the employee for a certain fee to the user company. During the time the employee is assigned to the user company, the user is entitled to exercise certain employer's rights over the employee (such as giving orders, scheduling working time) and to fulfil the basic obligations concerning the factual employment (for example responsibility for workplace health and safety).

The essence of this construction is that the user company acquires subordinated labour without the obligation to establish an employment relationship itself. Hence, the user company is exempted from dealing with administrative matters, paying taxes and social security contributions, or carrying out legal tasks related to the establishment and the termination of the employment relationship.[291] The legal definition of temporary agency work is based on the theoretical concept outlined above: in case of temporary agency work the agency temporarily lends its contracted employee for work to the user company for a fee.[292]

According to the National Employment Service, the most important features of temporary agency work between 2005 and 2011 were as follows:

Feature	2005	2006	2007	2008	2009	2010	2011
Number of agencies (piece)	584	710	796	948	916	802	856
Change in number of agencies compared to previous year	–	+21%	+12%	+19%	-3,4%	-12,5%	+6,7%
Number of user companies (piece)	2294	2528	3829	6417	4802	7099	7061
Change in number of user companies compared to previous year	–	+10%	+51%	+68%	-36,4%	+47,8%	-0,5%
Number of employees (persons)	76184	102425	99910	116835	79085	130434	111044
Change in number of employees compared to previous year	–	+34,4%	-2,5%	+17%	-32,3%	+64.9%	-14,9%
Number of assignments (piece)	92089	128475	129447	183305	193550	361026	182142
Assignments per employees (piece)	1,2	1,2	1,3	1,6	2,4	2,7	1,6

291 Gyulavári (ed., 2012) op. cit. 422–423.

292 Article 214 (1) point a) of the 2012 Labour Code.

2. The toothless lion: the rule of temporariness

A basic characteristic of temporary agency work worldwide is that the employee can only work for a certain period of time at the same user company. This labour law rule aims to prevent employers from replacing permanent employment through agency work. Such a restriction was unknown to Hungarian labour law until the end of 2011.[293] In 2001 the legislator introduced agency work without any time limit on the assignment spent in one user. Thus employers could use agency work to substitute the traditional open-ended employment relationship which obviously meant less job stability for the effected worker. The temporariness of agency work was introduced through the harmonisation of directive 2008/104/EC. The question was how the employment practice would change in case an employee may only be employed temporarily by user companies.

The legislator determined the maximum period of assignments very widely, in five years. The new Labour Code contains the same flexible rule as well, with the restriction, that lengthened or repeated assignments starting within six months from the termination of the last assignment must be considered together. For example, if the leased employee spent three years at the user company and after four months the user wants to rehire the same employee, the new assignment can only last two years. Such calculation must be applied even in case the assignments are conducted by different agencies.[294]

However, we must add that according to the statistics of the National Employment Service, in Hungarian practice assignments are much shorter than the five year limit, with an average duration of no longer than three-four months (see table below). Hence, it is rather exceptional when a user company must terminate the further employment of an employee due to the five year limit. In such a situation the solution could be to establish an employment relationship with the leased employee by the user company itself. That is actually the very aim of the time limit. Note that unfortunately the National Employment Service has not published data on the average length of assignments since 2010, thus, we have no information on the effect of the rule of temporariness, if any.

293 Introduced by Act 105 of 2011.

294 Article 214 (2) of the 2012 Labour Code. A similar rule applies to fixed term contracts, see Article 192 of the 2012 Labour Code.

Employee groups	Average length of assignments (days)					
	2005	2006	2007	2008	2009	2010
Blue-collar workers	85	123	89	88	44	40
White-collar workers	122	183	129	120	94	73
Employees with undefined duration employment relationship	107	168	106	96	57	40
Employees with fixed term employment relationship	68	66	79	79	35	67
Sum	91	134	96	92	52	44

If the five year limit is exceeded, the employee may no longer be employed at the same user company, the employee can deny further work (as unlawful order)[295], and the labour authority may impose a fine for violation of the rules of agency work.[296] Although it is not specifically included in the Labour Code, the labour authority may qualify the relationship of the parties as an undefined duration employment relationship between the employee and the user company, based on the evaluation of the factual circumstances of the employment.[297] The reason for this is that after five years the user has no right to employ the agency worker under the terms of agency work, however, all rights of the employer concerning the effective work are still exercised by the user. As a result, the labour inspector might argue that – given the factual background – the user acts like the employer, thus, there must be a traditional employment relationship between the user and the employee. This way, the agency worker's assignment transforms into an employment relationship, the sanction inducing users to respect the five year limit. In our point of view this sanction is necessary in order to give the weak rule of temporariness some teeth. At the same time, the five year limit is broad enough to estimate that only a handful of users would ever face this barrier.

3. Who qualifies as an agency? Even foreigners – in principle

Not all employers qualify as temporary work agencies, since these must comply with the specific conditions set out by law. Besides the Labour Code such rules are determined by Government Decree 118/2001 on the conditions of the

295 Article 216 (1) point c) and Article 54 (2) of the 2012 Labour Code.

296 Act 75 of 1996 on labour inspection Article 3 (1) point k).

297 Act 75 of 1996 Article 1 (5).

registration and operation of temporary work agencies and private employment agencies. According to the data of the National Employment Service in 2012 only 13 of 982 agencies were non-profit organisations.

The new Labour Code makes it clear, that temporary work agencies are not limited to domestic, but include also foreign organisations, in case such an organisation has a seat in any EEA-state and complies with the relevant domestic rules on agency work.[298] The antecedent of the modification was the Rani-case[299], in which the European Court of Justice declared that the previous Hungarian rule requiring a domestic seat for carrying out the activity of temporary work agency was against the principle of the freedom to provide services. The decision was not at all surprising as it is settled case law of the Court that the requirement of an inland seat is a clear violation of the freedom to provide services.

Carrying out the activity as an agency is permitted only following registration by the employment service. Registration foresees detailed conditions, including a security deposit of 2 million HUF (€6,500). These requirements are to be applied to foreign agencies as well, in case they provide services in Hungary. The registration is administered by the competent employment centre based on the seat of the future agency. It is an unfortunate error that the question of which organisation would be competent in case a foreign agency without a domestic seat applied for registration is left unregulated. Although in theory the new Labour Code makes the registration of foreign temporary work agencies possible, the necessary technical rules are missing, as there is no competent authority to assess the foreign agency's application for registration. At the end of the day, this results in a situation which might be against the free flow of services in the EU.

If the agency is deleted from the official register, the legal consequences of nullity are to be applied to the employment contract[300] and the temporary work agency is obliged to immediately terminate the employment relationship with its agency workers and pay absence fee due in case of the employer's resignation, and the rules of severance pay are also to properly applied.[301] Hence, the situation must be considered as termination due to the fault of the employer. However, in practice fraudulent agencies often skip this obligation and leave

298 Article 215 (1) of the 2012 Labour Code.

299 C-298/09. Gyula Berke – Zoltán Bankó: A munkaerő-kölcsönzési tevékenység folytatásának feltételei Magyarországon – uniós követelmények. *HR&Munkajog,* 2013/3. 11–13.

300 Article 215 (2) of the 2012 Labour Code.

301 Article 29 (1–2) of the 2012 Labour Code.

their former employees' employment relationship unsettled. In such a situation the employment relationship may be considered as terminated unlawfully by the employer.

4. The legal relationship between the temporary work agency and the user company

The temporary work agency and the user company conclude a civil law contract on the hire of the employee. The Labour Code contains only a handful of provisions on this matter, otherwise the rules of the Civil Code must be applied. Since statutory regulation is rather limited, the parties may decide most of the questions in their agreement. The Labour Code stipulates merely that the contract is valid only in a written form and must contain the significant terms of the assignment and the sharing of the employers' rights and obligations.[302] Such 'significant terms' (such as the duration of the assignment, place of work, fees and reimbursement) depend on the agreement forged between the parties.

The permissive concept of the regulation is particularly important as regards sharing employers' rights and obligations. It is primarily up to the decision of the parties, which rights and obligations shall stem from the employment relationship. The law merely prescribes that the right of termination of the employment relationship can be exercised exclusively by the agency, wages shall be paid by the agency and during the assignment the user company is responsible for health and safety, for the obligation of employment and for ensuring the working conditions in general. All other employers' rights and obligations shall be shared according to the parties' agreement. For example, the user company may provide fringe benefits or the parties may decide who pays the expenses related to the employment (e.g. travel expenses, or health examination fees). The Labour Code stipulates that the user company must be considered as an employer as regards provisions on working time and rest periods. However, the parties' agreement may deviate from this rule. Thus, it may form part of the agency's service that the agency carries out all tasks concerning the administration of the working time of agency workers (for example, by delegating HR personnel to the user company).[303]

302 Article 217 (1) of the 2012 Labour Code.

303 Article 217 (1–2) and (4), 218 (4) of the 2012 Labour Code.

Dividing employers' rights and obligations among the parties could be hampered by a rather technical problem. While the Labour Code explicitly contains that the agency and the user company may agree which one of them will be responsible for fringe benefits and expenses, deviation from the responsibility for working time and rest periods can be determined only in the 'parties' agreement'. In terms of the Labour Code however, 'parties' agreement' shall mean the contract between the employee and the employer. Hence, the deviating rules on working time and rest periods must be included in the employment contract (for instance, prescribing that keeping records on working time is the obligation of the work agency). There is no clear authorisation for the contract between the agency and the user company to differ from the law on this matter. Since the employer's obligations concerning working time and rest periods is obviously a question belonging to the agreement of the two 'employers', the adequate solution would be to allow these parties to decide upon it.

To sum it up, it is primarily the agreement of the user and the agency that determines how the role of the employer is divided among them. Therefore, different types of agency work can occur in practise, depending on how the rights and obligations are shared. The new regulation on the labour inspectorate complies with this concept. Before the new Labour Code came into effect, the act on labour inspection decided explicitly which party shall be held responsible for which obligation. As of the 1st of July 2012 the law contains only that labour inspection extends to the temporary work agency and the user company based on their relevant agreement.[304] Hence the rules concerning employer's rights and obligations in the contract on temporary agency work determine the scope of the labour inspection's authority: the adherence to certain rules may be inspected only the side of the party which is considered to be the employer in the parties' agreement in the given matter.

Due to the shared position of employer, the cooperation between the agency and the user company and the mutual change of information between the same is of crucial importance. It may occur that one party exercises certain rights while only the other has the necessary information related to it. For instance, wage is paid to the employee by the agency, but the user company has the data on the employee's performance required for payroll. Therefore, the Labour Code prescribes that the data needed for payroll shall be given to the agency in due time.[305] Note that the agency is obliged to pay wages even if the user company

304 Act 75 of 1996 Article 3 (3).

305 Article 217 (5) of the 2012 Labour Code.

has not paid the relevant fees to the agency which would otherwise cover the wage expenses. This principle was explicitly included in the former regulation and may still be derived from the actual provisions of the Labour Code.[306]

A significant rule on the liability of the parties is the vicarious liability of the user company. According the 1992 Labour Code, in case the user company leased labour force from an agency which was not entitled to pursue agency work activity or did not conclude a proper employment contract with the agency worker, the employment relationship was established between the worker and the user company by law.[307] This vicarious liability is no longer specifically included in the Labour Code. However, the labour authority or labour court may still conclude that based on the factual circumstances, the employee without an employment contract or employed by an illegal agency is in fact in an employment relationship with the user company. Such a severe sanction could mean that hundreds of agency workers hired out by a company can be turned into directly employed staff. This risk may be avoided by the user company by contracting only trustworthy suppliers. Moreover, the Labour Code stipulates that upon the user's request the agency is obliged to supply the user before the employee takes up work with the documents on the declaration of the employment and a copy of the certification that it is a registered agency.[308] Based on these two documents the user company can make sure that the agency operates legally and the labour or tax authorities cannot establish an employment relationship between it and the worker.

5. Restraints and limitations

While the agency work directive calls for the review of restrictions or prohibitions on temporary agency work, restraints justified on the grounds of general interest and necessary to avoid misuses, may be upheld.[309] The current limitations on agency work in Hungarian labour law are the following.

306 Article 193/F (1) of the 1992 Labour Code; Article 42 (2) of the 2012 Labour Code.

307 Article 193/G (8–13) of the 1992 Labour Code. Dudás, Katalin: Önfoglalkoztató – kényszervállalkozó – munkavállaló. Menekülés a munkajog hatálya alól. In: Rácz, Réka – Horváth, István (eds.): *Tanulmányok a munkajog jövőjéről.* Budapest, Foglalkoztatáspolitikai és Munkaügyi Minisztérium, 2004. 161.; Prugberger, Tamás – Kenderes, György: Az atipikus munkaviszonyok a munkaerő-kölcsönzés és a távmunka tükrében. *Miskolci Jogi Szemle*, 4. évf., 2009/2. 42–45.

308 Article 217 (4) of the 2012 Labour Code.

309 Directive 2008/104/EC Article 4.

The proposed text of the new Labour Code dropped the restraint on owners' relationship. The aim of this rule is to avoid that employers with a high number of employees establish a temporary work agency exclusively for themselves, operating below market prices. In this structure, employers would benefit from employing their entire workforce as agency workers, enjoying the flexible rules of agency work, without having a single employee of their own. This construct is an abuse of temporary agency work. It is obvious that it would lead to continuous misuses if an agency could lease employees to the user company with which it is connected by ownership. It is to be welcome that the finally adopted text of the Labour Code kept this restriction.[310]

Another restriction is that the employee cannot be leased in cases determined by law or collective agreements.[311] Such regulation entitles the parties concluding the collective agreement to determine restraints for hiring agency workers reaching beyond the statutory regulations. This rule demonstrates the legislator's preconception that trade unions at the user company are interested in establishing restrictions on hiring agency workers as a supplement to the permanent staff. By contrast – considering the spread of temporary agency work – a reasonable strategy for unions would be to safeguard the interests of agency workers as well, instead of obstructing the use of agency work. Nevertheless, the directive prescribes the elimination of restrictions and prohibitions on temporary agency work. The Labour Code's authorisation for collective agreements to set up additional restrictions seems contrary to the directive's aims.

The new Labour Code specifies the restraint on strike-breaking through the use of leased employees. According to the 1992 Labour Code, the leasing of an employee at a workplace of the user company was prohibited during strike.[312] Based on this, no agency workers could be employed in case of strike, not even in a position where the employees did not take part in the strike. The new Labour Code narrows down this restraint and only the employees on strike shall not be replaced by agency workers.[313]

The new Labour Code does not uphold the restraint on re-hiring. The previous regulation prohibited the leasing of an employee who was dismissed six months earlier due to a reason concerning the operation of the employer or

310 Article 217 (1) of the 2012 Labour Code.

311 Article 216 (1) point a) of the 2012 Labour Code.

312 Article 193/D (2) point b) of the 1992 Labour Code.

313 Article 216 (1) point b) of the 2012 Labour Code.

during the probation period.[314] The rationale behind this rule is to ensure that the employer won't substitute the ordinary employment relationship through temporary agency work.[315] Otherwise the employer could for example dismiss its own staff and reemploy them the next day to the same position through an agency. However, the prohibition applied only to situations when the same employee was assigned to the vacant position. Therefore, the warranty aiming at the protection of the employee led to a practice where companies dismissed staff but hired out other employees as agency workers to their former (vacant) positions. Another solution was to terminate the employment relationship on different legal grounds which would not hinder re-hiring (for example, the parties terminated the employment by mutual agreement, then the employee was re-hired as an agency worker). Hence, the restraint could easily be circumvented and at the end of the day it punished the directly employed, then dismissed worker. While labour lawyers agree that the rule on re-hires was not adequate, the misuse it was designed to prevent has still not been solved in the new Labour Code. In our opinion, the prohibition of hiring agency workers after dismissals based on an economic reason should be taken into consideration. For instance, the law could restrict the leasing of employees during a given period to users where a mass dismissal took place for positions which were affected by the layoff.

6. Deviating from statutory provisions: collective agreement, employment contract and the civil law contract between the two 'employers'

A particularity of the new Labour Code is that as a main rule the collective agreement can deviate from the regulations in Part II and III of the Code in favour and also to the detriment of the employee.[316] Among the rules of agency work the ones related to liability for damages and the principle of equal treatment can be determined in a collective agreement to the detriment of the employees.[317]

It should be noted that such deviating rules shall be included in the collective agreement of the agency. In Hungarian labour law, employees fall under the

314 Article 193/D (2) point c) of the 1992 Labour Code.

315 Gyulaváry, Tamás: Speciális foglalkoztatási formák. In: *A munkajog nagy kézikönyve*. Budapest, CompLex, 2006. 257.

316 Article 277 (2) of the 2012 Labour Code.

317 Article 222 (1–2) of the 2012 Labour Code.

scope of the collective agreement concluded by their employer.[318] The agency worker has an employment relationship with the agency and not with the user company. Therefore, even if the collective agreement of the user company includes rules on temporary agency work which deviate from the Code, such provisions are irrelevant and do not affect agency workers.[319]

The employment contract may only deviate from statutory provisions to the benefit of the employee. The only exception – where the deviation to the detriment of the employee is possible – is that based on the parties' agreement the employee is not to be exempted from work for the notice period.[320]

As pointed out above, the three-way relationship of agency work raises special problems in relation to the different agreements. It is questionable whether it is allowed to deviate from the rules of the Labour Code in a civil law agreement concluded between the agency and the user company. In lack of rules to the contrary, the contract of the two 'employers' on temporary agency work can deviate from the Labour Code only where it is specifically allowed. Such authorisations may be found in the case of fringe benefits, the sharing of expenses concerning employment, the deadline for transferring data for payroll and the liability for damages.[321] In all other cases, deviating from the rules of the Code is prohibited.

7. The employment contract for temporary agency work

The employment relationship for temporary agency work is established by a written employment contract which must contain the significant data of the parties, the job profile and the basic wage of the employee. Furthermore, it must explicitly contain that the contract is aimed at agency working. It is not compulsory to indicate the workplace in the employment contract, however, the agency worker must be informed in writing about the place of work and other significant aspects of work prior to the beginning of the assignment.[322] This written information letter is not considered to form part of the employment contract, thus, it may be unilaterally amended by the employer.

318 Article 279 (3) of the 2012 Labour Code.

319 Berke, Gyula – Kiss, György: *Kommentár a munka törvénykönyvéhez. A munka törvénykönyve magyarázata*. Budapest, CompLex, 2012. 537.

320 Article 43 and 220 (3) of the 2012 Labour Code.

321 Article 217 (2), (4–5) and 221 (2–3) of the 2012 Labour Code.

322 Article 218 (1), (3) of the 2012 Labour Code.

According to the new Labour Code, the employment relationship for agency work may also be established by modifying an employment contract concluded for standard employment. The former law specifically prohibited such amendments.[323] Nevertheless, such a modification may only rarely take place in practice. Such a case would be when an agency decides to employ its own employee as an agency worker, or when an employer changes its profile and commences temporary agency work activity, employing its own former staff as agency workers for future.[324]

The employment relationship for temporary agency work can also be fixed term, part time and/or telework employment. In case of fixed term employment, the applicable restrictions must be observed. Thus, it cannot be applied in excess of five years (nor in case more assignments take place in the course of this period), while the same parties may only use consecutive fixed term contracts in line with the legal interest of the agency and without harming the legal interest of the employee.[325] The new Labour Code lifted the ban which prohibited the combination of temporary agency work with simplified employment. Simplified employment covers short term employment, when the employee works only for a couple of days or weeks. The aim of the regulation is to offer less stringent labour law rules for such short employment, moreover, in order to combat undeclared work a more favourable tax regime applies.[326] Agency workers employed in simplified employment have become popular for filling casual positions, however, the agency worker's situation in a simplified employment relationship is rather precarious. Such workers are not covered by all services of social security and are not entitled to annual leave or sick leave. Note that temporary agency work cannot be combined with on-call work, job-sharing or employment by more employers.[327]

Upon comparison of the new Labour Code with the former law, we may conclude that it approximates the status of agency workers to employees in ordinary employment on two important points. First, while the former regulation contained many special rules for scheduling annual leave, which were more

323 Article 193/E (4) of the 1992 Labour Code.

324 Kenderes, György – Bányai, Krisztina: A munkajogi és polgári jogi kérdések és ellentmondások a munkaerő-kölcsönzés szabályrendszerében. *Munkaügyi Szemle,* 2002/7–8. 86.

325 Article 192 of the 2012 Labour Code.

326 Article 201–203 of the 2012 Labour Code. See in details in the chapter on the atypical forms of employment.

327 Article 222 (3) of the 2012 Labour Code.

favourable to the employer,[328] these were not upheld by the new Code. As a result, the general rules must be applied. Second, by deleting the former prohibition, according to the new Labour Code, a non-compete agreement may be concluded with the agency worker. Such an agreement means that the employee shall not engage in any conduct for up to two years following the termination of the employment relationship by which it may infringe upon or jeopardize the rightful economic interests of the employer. In exchange for honouring such an obligation, the employer shall be liable to pay adequate compensation. In determining the amount of such compensation, the degree of impediment the agreement exerts on the employee's ability to find employment elsewhere – in light of his education and experience – shall be taken into consideration. Nonetheless, the amount of compensation for the term of the agreement may not be less than one-third of the basic wage due for the same period.[329] The contracting party in a non-compete agreement may only be the agency, since there is no specific rule stating that the user company could also be considered as an employer in this matter. However, based on the prohibition of unfair market behaviour, the agency worker shall not use the acquired business secrets of the user company, not even after the termination of the employment.[330]

8. Liability for damages

The regulation of liability for damages requires special rules due to the particularities resulting from the three-way legal relationship. The new Labour Code brings about favourable changes, solving many former practical problems.

The employee's liability for damages differs depending on whether the damage was caused to the agency, the user company or a third party. In the first case the liability for damages does not require deviating regulation, so the agency can demand compensation for damages from the employee according to the general rules.

In case the employee causes damage to the user company, the new Labour Code makes it possible for the user company to enforce its claim for damages directly against the employee. However, the user company may conclude an agreement with the agency, that in such a situation the rules of employee's liability

328 Article 193/N of the 1992 Labour Code.

329 Article 228 of the 2012 Labour Code.

330 Act 57 of 1996 Article 4.

for damages enshrined in the Civil Code will be applied. Accordingly, for the damages caused by the employee, the agency – as the employer – will be held responsible.[331] Such an agreement could be advantageous for the user company, because it does not have to directly recover the damages from the employee, but may demand compensation from the work agency, which is typically more able and willing to comply. Then it is the agency's task to demand the compensation paid by it from the employee, who actually caused the damage. According to the 1992 Labour Code the agency was liable for all damages caused to the user company in all cases.[332] Now, it depends on the agreement of the parties. The compensation for damages caused by the employee can only be demanded directly from the agency if it is specifically stipulated in the contract of the user and the agency. In other words, the agency may undertake direct responsibility for the damages caused by its agency worker as part of its service for the user company. Such contractual provisions would obviously raise the agency's service fees.

Another novelty is that in case the agency worker causes damage to a third party (for example provides false information at the helpdesk to the client of the user company), the rules of the employee's liability for damages according to the Civil Code must be applied, with the difference, that – unless otherwise agreed by the agency and the user company – the user company must be considered as employer.[333] Hence, it is not the temporary work agency (as the legal employer), but the user company who is liable for the damages caused to a third party. The reason for this solution is that during the assignment the worker is part of the user's organisation, the work is performed in its interest, thus, it must bear possible risks and select the leased personnel with due care.

This setting is more advantageous also to the damaged party, because in the opposite situation it would be more difficult to enforce its claim for damages. Since the injured party could not demand compensation from the actual employer of the worker (the user), she had to first find out the identity of the legal employer, the agency. Moreover, the user company might be allowed to carry out activities which fall under stricter liability rules (e.g. in nuclear energy industry or in aviation). If the agency worker causes damage in these activities to third parties, such stricter rules would not be applicable to its legal employer. All in all, it is a more reasonable choice to hold the user responsible for the

331 Article 221 (1–2) of the 2012 Labour Code.

332 1992 Article 193/O (1) of the 2012 Labour Code.

333 Article 221 (3) of the 2012 Labour Code.

damages caused to third parties. Nonetheless, the agency – making its service more appealing – may assume this liability in its contract with the user.

According to the new Labour Code, an inventory liability agreement may also be concluded with the agency worker. Upon such agreement the employee shall be liable for inventory shortages resulting from unknown reasons irrespective of any wrongdoing.[334] Without the safety provided by such strict liability, there would hardly be any employer hiring out agency workers in positions concerning inventories.

It is worth mentioning, that the 1992 Labour Code constrained the agency worker's liability for negligent damages to half of the employee's monthly average salary. Unlike in the case of the standard employment relationship, such a limit could be raised neither in the employment contract, nor in the collective agreement.[335] This undue, redundant advantage which does not compensate the employee for any disadvantages of agency work was eliminated by the new Labour Code. As a new maximum, the agency worker is liable for negligent damages for up to four months absentee pay, while the agency's collective agreement may raise the threshold up to eight months absentee pay.[336]

Finally, the temporary work agency and the user company are jointly and severally liable for possible damages caused to the employee during the assignment.[337] Hence, the employee can demand total compensation from either the temporary work agency or the user company.[338] The employee's claims for damages are also secured by the 2 million HUF deposit of the agency.[339] The deposit may namely also be used in case the damage occurred during the assignment and the employee demands compensation from the agency based on the joint and several liability.

334 Article 182 of the 2012 Labour Code.

335 Article 193/P (1) of the 1992 Labour Code.

336 Article 179 (3) and 191 (2) of the 2012 Labour Code.

337 Article 221 (4) of the 2012 Labour Code.

338 Radnay, József: A munkaerő-kölcsönzés egyes kérdései. In: Ünnepi *tanulmányok Bánrévy Gábor 75. születésnapjára*. Budapest, Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar, 2004. 244.

339 Government Decree No. 118/2001. Article 6–7.

9. Equal treatment: 'near conformity'

The new Labour Code regulates the agency worker's right for equal treatment based on directive 2008/104/EC. The main issue here is that even if the agency worker and the directly employed employee perform work of equal value, due to the difference in employer, they might be paid differently. Therefore it is essential that the law prescribe the application of the principle of equal treatment in relation to these employees as well. An undying merit of the new Labour Code is that it corrects the difficult and confusing former rules originally implementing the directive.[340] Nevertheless, some significant details are still solicitous from the aspect of legal harmonisation.

9.1. Wages in practice

According to the statistics of the National Employment Service, the agency workers' income level is significantly lower than the gross national average wage[341], though it is the double of the statutory minimal wage, rendering the regulation of equal treatment even more significant. Last years' data on wages are as follows:

Data on wages			
Year	**Minimal wage**	**Average monthly wage of agency workers**	**National monthly average wage**
2009	71,500 HUF	128,668 HUF	199,837 HUF
2010	73,500 HUF	123,412 HUF	202,525 HUF
2011	78,000 HUF	137,038 HUF	213,094 HUF

Agency workers earn significantly lower wages than the average employee, but if we consider that three-quarters of such workers are blue-collar workers – and half of them work in positions requiring no qualifications – wage levels do not seem particularly low. The difference is smaller if we compare their wages to the average wages in those sectors where the majority of leased employees work.

340 See Act 105 of 2011.

341 http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_qli012b.html

Sectors	Monthly gross average wages		
	2009	2010	2011
National economy	199,837 Ft	202,525 Ft	213,094 Ft
Processing industry	190,331 Ft	200,672 Ft	213,281 Ft
Commerce	175,207 Ft	185,812 Ft	196,942 Ft
Building industry	152,204 Ft	153,130 Ft	156,682 Ft
Administration and service supporting activities	149,131 Ft	145,576 Ft	149,675 Ft
Agency workers	128,668 Ft	123,412 Ft	137,038 Ft
Catering, hotel, tourism	122,561 Ft	122,699 Ft	125,757 Ft

9.2. The principle of equal treatment and its exemptions

An important change compared to the former regulation is that as a main rule, from the assignment's first day and concerning all components of wage the agency worker shall be paid equally as the user company's directly employed employee performing work of equal value. The new Labour Code stipulates that during the assignment the same basic working and employment conditions must be provided for the agency worker as for the directly employed employees. This specifically includes the regulations applicable to pregnant women and nursing mothers, the protection of young employees, protective rules on wages and other allowances and finally, the requirements of equal treatment.[342] Equal treatment must be respected, irrespective of whether the given working conditions are prescribed by law, a collective agreement or a unilateral statement of the employer.

There are four exceptions to the main rule, which call for serious attention in practice. On the one hand, in three cases the Labour Code allows the application of the principle of equal pay only from the 184th day (after the first half year) of the assignment. When calculating the time limit, repeated or prolonged assignments shall be counted together, irrespective of whether it was based on contracts concluded with the same or different agencies. On the other hand, parties can deviate from the principle of equal pay in a collective agreement.[343] Below we assess the possible exemptions in details.

342 Article 219 (1–2) of the 2012 Labour Code.

343 Article 219 (3–4) and 222 of the 2012 Labour Code.

9.3. Exemption of permanent employment

According to the first exemption, regulations on wage, other benefits and equal treatment shall be applied from the 184th day of the assignment in case of agency workers contracted for indefinite duration, who are also paid between assignments.[344] The directive considers the joint existence of these two terms as an advantage, compensating the agency worker for not being entitled to equal pay.[345] Both terms basically depend on the employment contract concluded by the employee and the agency. If the contract is open-ended and the agency obliges itself to pay wage for the breaks between assignments, the principle of equal pay can be sidestepped for the first half year of the assignment. This also means that the employee can be hired out for a lower price to the user company for short term scenarios. Note that the law sets no minimum for the wage to be paid between the assignments, leaving this up to the parties' agreement.[346]

It's clear that the comparative advantage of indefinite employment and the pay between assignments can easily be lost. Such a situation occurs when the employee is dismissed during the first months despite an open-ended employment relationship, or if the employee receives only a symbolic pay for the idle time or in the case of consecutive assignments without breaks. Unfortunately, the new Labour Code does not provide any compensation to the employee in such cases, although it is specifically foreseen in the directive. It prescribes that the member states shall take proper measures in order to prevent misuses concerning exemptions from the equal treatment principle.[347] It must be added, that the exclusion of certain agency workers from equal pay without proper compensation also raises the question of discrimination since there is no objective justification for such a distinction between agency workers.[348]

Should the agency worker receive lower pay than his directly employed colleague performing work of equal value merely because the agency worker has the promise of permanent employment and a small amount of pay for the break periods between assignments which might never occur, such practice may also be objected based on the prohibition on abuse of rights.[349] In our view, the

344 Article 219 (3) point a) of the 2012 Labour Code.

345 Directive 2008/104/EC Article 5 (2).

346 Kártyás, Gábor: Csorba kiegyenlítés: a kölcsönzött munkavállalók egyenlő bánásmódhoz való joga az új munka törvénykönyve után. *Esély,* 2013/3. 41–42.

347 Directive 2008/104/EC Article 5 (5).

348 Constitution Article XV.

349 Article 7 of the 2012 Labour Code.

agency shall not stipulate terms in the employment contract only to escape the principle of equal pay. However, in a labour dispute it is the agency worker who shall prove that the agency abused the exemption of permanent employment.

9.4. Exemptions in regard to the employee and the user company

According to the second exemption, the agency is exempted from the principle of equal pay during the first 183 days, in case the employee is considered to be permanently absent from the labour market. This status is defined by a separate law.[350] Different exemptions from common charges are provided for these employees in order to enhance their employability. Their exemption from under the equal pay principle is based on the scope of the directive, since it does not apply to employment under a specific public or publicly supported vocational training, integration or retraining programme.[351]

The third exemption applies if the user company is a business association in the majority ownership of a local municipality or a non-profit company. Supposedly, the legislator's intention was to provide benefits for the non-profit user company. However, the directive only excludes from its scope organisations without business activity which is not equivalent to the non-profit status. The directive specifically stipulates that its scope covers all enterprises whether or not they are operating for financial gain. Moreover, it cannot be claimed, that a business association in the majority ownership of a local municipality is necessarily a non-profit association. Finally, there are no state-funded labour market programs connected to these user companies, which could otherwise be the basis for the exemption from the principal of equal pay.[352] Thus, this later exemption is contrary to the directive.

9.5. A possibility to deviate in a collective agreement

Finally, the collective agreement may deviate from the principal of equal pay to the detriment of the employee.[353] Thus, the parties concluding the collective

350 Act 123 of 2004 Article 1 (2) point 1.

351 Directive 2008/104/EC Article 1 (3).

352 Directive 2008/104/EC Article 1 (1) and (3).

353 Article 222 of the 2012 Labour Code.

agreement are free to restrict the application of the principle of equal pay even for a longer period than 183 days. Nevertheless, according to the directive, such deviating regulations must 'respect the overall protection' of agency workers.[354] Therefore, the principle of equal pay may only be set aside in case of proper compensation. At this point Hungarian law is not in full conformity with the directive, as this guarantee is missing from the Labour Code. As described above, the collective agreement of the agency is applicable to the agency worker, thus, the deviating rules shall be stipulated in the agency's collective agreement.

9.6. Are exemptions stronger than the main rule?

In summary, due to the wide range of exemptions, certain agency workers can still be excluded from the effect of the equal pay principle.[355] This is especially true for employees performing short term assignments not exceeding a half year. Unfortunately, statistics show that such short term assignments dominate the domestic practice, since the average length of assignments is around a few months.

On the other hand, the current rules on equal treatment raise questions related to proper legal harmonisation as well as the constitutional prohibition of discrimination, therefore, their application also entails inherent legal risks for the employers – agencies and users alike.

10. Special rules on the termination of the employment relationship

The 1992 Labour Code contained radically different rules on the cessation and termination of the employment relationship of agency workers than in the case of ordinary employees. Many problems ensued from the application of these provisions, for the special prescriptions were unfounded and inconsistent in many cases. One of the merits of the new Labour Code is that it eliminated these redundant, unfounded discrepancies, unjustified by the specialties of temporary agency work.

354 Directive 2008/104/EC Article 5 (3).

355 Gyulavári (2012) op. cit. 433.

To give an example, the new Labour Code applies the general legal consequences of unfair termination of the employment relationship and does not contain any specific provisions on this matter for agency workers. However, in the 1992 Labour Code the agency's liability for unfair termination was slighter than the liability of a typical employer.[356] This distinction was unreasonable, for there is nothing in the special structure of agency work that would justify agencies falling under a more favourable regime than other employers in cases of unfair termination.

The original text of the new Labour Code would have contained more flexible rules on the termination of the employment relationship of agency workers but would also have properly compensated employees (for example by introducing a longer notice period and severance pay). This balanced approach was not upheld in the final text, including changes to the sole advantage of employers.

10.1. Dismissal due to the termination of the assignment

The consequences of the assignment's termination changed dramatically. The 1992 Labour Code prescribed that the employer may dismiss the employee based on the lack of assignments only in case its attempts to hire out the worker remained unsuccessful for a consecutive 30 days.[357] This rule was in fact a very important guarantee for the employee. Accordingly, the agency was not allowed to dismiss the employee based on the mere fact that he had not been assigned to any users for 30 days calculated from the end of the last assignment. These 30 days had to be covered with basic wage.

This rule clearly demonstrates the speciality of agency work: the employment relationship may embrace more assignments spent in various user companies. The agency worker is obliged to work for the user company selected (contracted) by the agency, but from the agency's aspect this right is also an obligation. During the employment relationship the agency shall ensure that the employee is employed by user companies. This way, agency work provides a wide range of opportunities for the employee to gain experience in different organisations. The '30 days rule' ensured that agency work covered more assignments – at least the agency was motivated to manage further assignments –, thus the worker could fully exploit these advantages.

356 Article 193/M of the 1992 Labour Code.

357 Article 193/J (3) of the 1992 Labour Code.

Nonetheless, despite the theoretical reasonability of the 30 days rule, it also raised many practical problems. This is due to the fact that the regulation was very laconic, failing to provide for the necessary details. For example, it was not clear what sort of assignments had to be offered to the agency worker (e.g. as regards pay, place of work) and the calculation of the 30 days was also blurry (e.g. whether periods when the employee cannot be obliged to work – such as sick-leave, paid holiday – needed to be taken into account or not).

In our view the 30 das rule was – despite the lack of details – an exemplary provision of temporary agency work in Hungary. By lengthening the period of employment by 30 days following the end of the last assignment, it significantly raised the chances of a new assignment, ensuring that the possible advantages of agency work may also be realized on the employee's side. This is why it is unfortunate that the new regulation eliminates this prescription replacing it by a solution which serves the sole interest of the employer and may be objected also from a constitutional perspective.

According to the new Labour Code, the termination of the assignment is to be considered as a reason related to the operation of the agency and as such a valid reason for the dismissal.[358] Hence, turning the former regulation the other way round, the agency can immediately dismiss the employee after the assignment ends by simply referring to this fact. Therefore, in practice the end of the assignment also means the end of the employment relationship, which is very unfavourable for agency workers.

It must be pointed out that in such a situation the reason for the dismissal will be that the hiring out of the employee has ended. The dismissal itself does not have to include the reason why the assignment came to an end (for example, the user company needed fewer employees or the employee performed badly or violated its obligations, etc.). This way, the employee will not be able to question the legality of the dismissal, as the termination of the assignment by law is a valid reason in itself for the termination of the employment relationship and it is not required that the reasoning include why the assignment ended. Moreover, the termination of the assignment is a circumstance which may be caused by the agency itself (for example, by calling back the employee and replacing him by another worker or through the termination of the contract concluded with the user company).

As for an example for the first scenario, in a recent case the labour court rejected the agency worker's claim of unlawful dismissal. The employee's

[358] Article 220 (1) of the 2012 Labour Code.

assignment was terminated because his supervisor found a protective glove in his bag when he was about to leave the user's premises at the end of his shift. The next day the agency dismissed him on the grounds that his assignment ended. The labour court ruled that the court could assess only whether the assignment was actually terminated but it was irrelevant why the employee was no longer welcome at the user.[359]

In our opinion, considering the termination of the assignment as a valid reason for the dismissal basically means termination without reasoning. By comparison, the former rules on the termination of civil servants' employment without reasoning were deemed unconstitutional by the Constitutional Court in 2011.[360] Among the reasons for unconstitutionality, the following deserve attention also with respect to agency workers.

The Constitutional Court declared that the legal rules on the obligation to give reasons in case of unilateral termination by the employer are guarantees of constitutional importance related to the right to work.[361] Hence, it is against the right to work, when the employment relationship concerning subordinated work may be terminated unilaterally by the employer without proper reasons. According to another argument of the Constitutional Court, there is no efficient legal protection against the employer's dismissal if the notice does not contain reasons. Even if the unreasoned dismissal can be contested in court, the failure to provide reasons restricts the worker's right for effective legal protection by court.[362] Finally, due to the lack of reasons, the mere subsistence of the worker and his family can be endangered in an unpredictable way, resulting in an absolute subordination to the employer. As the Constitutional Court ruled, considering employees as subordinated 'tools of task solving' is against human dignity.[363]

Since the termination of the assignment cannot be considered a proper reason to dismiss agency workers, the current regulation does not offer adequate protection for their right to work or human dignity and also leaves the workers without effective judicial protection. All in all, the new law replaced an exemplary rule by a solution which can be objected even on constitutional grounds.

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359 4.M.503/2013/9. For a detailed assessment, see: Kovács, Szabolcs: A kikölcsönzés megszűnése mint felmondási indok – egy bírósági ítélet tükrében. *HR&Munkajog,* 2014/5. 27–28.

360 Constitutional Court decisions No. 8/2011. (II. 18.) and 29/2011. (IV. 7.).

361 Constitution Article M and Article XII.

362 Constitution Article XXVIII.

363 Constitution Article II.

It is worth noting, that the proposed text of the new Labour Code would have prescribed the application of the rules on collective dismissals in the case of temporary agency work, but this was eventually left out from the final version. We cannot but agree with this correction. It is quite common in the practice of agencies that they lay off a large number of employees at the same time. For example, a user company terminates the assignment of 300 agency workers sending them back to the agency, which will probably dismiss most of them. These layoffs are not extraordinary but are much rather part of the ordinary course of agencies' business. Hence, applying the administrative obligations of collective dismissals would cause significant burdens. Moreover, since the user company can immediately send back a high number of employees, it would be impossible to inform the effected workers in advance about the planned dismissal.

10.2. The 'cropped' notice period

While the original draft of the new Labour Code failed to include the 30 days rule, it would have contained many rules concerning the termination of employment amounting to favourable changes benefiting the employees.

According to the 1992 Labour Code, the notice period in case of temporary agency work was 15 days, or 30 days in case of an employment lasting longer than one year. The proposed text of the new Code foresaw the application of the general rules on notice periods to agency workers, resulting in a significant increase in its length. By comparison, according to the final text, the length of the notice period applicable to agency work is uniformly 15 days in all cases.[364]

According to the 1992 Labour Code the length of the notice period (15 or 30 days) depended on the duration of the employment relationship and even if it was shorter than foreseen under the general rules, this was not objected by the Constitutional Court.[365] The Constitutional Court held that the specialities of temporary agency work justified the shorter notice period only in case of short term employment, but the more permanent the employment the less well-founded the shorter notice period is. From this aspect, the uniform 15 day notice period seems to be a step back, violating the constitutional prohibition of discrimination. There is hardly any reason to apply a shorter notice period to

364 Article 220 (2) of the 2012 Labour Code.

365 See decision no. 67/2009. (VI. 19.).

an agency worker than another employee in standard employment in case both employees share long term tenure. As assignments can last up to five years, even agency workers could acquire such long tenure.

10.3. Severance pay – is it due or not?

The proposed text of the new Labour Code would have changed the rules of severance pay in favour of the employees. The proposal originally prescribed that agency workers are entitled to severance pay according to the general rules, i.e. like all other employees. This would have been an important change, as the 1992 Labour Code never made severance pay compulsory for agency workers.[366] In our opinion, this amendment would have been reasonable. The role of severance pay is to support the employee in form of a special allowance in the transitional period when her employment ended after a longer time through no fault of the employee. The provision of such an allowance is also reasonable in case the employee worked as an agency worker. If the law excludes agency workers, it can be considered a peremptory distinction among different employees, since the role of the legal institution is justified also in case of temporary agency work. It is unfortunate that the legislator finally restricted the agency workers' right to severance pay. The rule finally adopted was obviously orientated by employers' interests. Accordingly, severance pay is due in agency work, however, its amount does not depend on the length of the employment relationship, but is calculated on the basis of the duration of the last assignment instead.[367] Temporary work agencies argue that this solution is reasonable as in the course of his employment with the agency the employee can work for more user companies and otherwise it would be questionable who should bear the expenses of severance pay.

This explanation is totally flawed. Severance pay shall obviously be paid by the employer and not by one of its clients, not even if it can be identified for which client the employee has performed tasks during the employment relationship. For example, severance pay of a logistics administrator must be paid by its employer, for whom the work of the employee generated profit and not by the three companies whose logistics tasks the employee handled. The reasoning is the same for agency work. According to the current rule, the duration of the

366 Article 193/P (1) of the 1992 Labour Code.

367 Article 222 (5) of the 2012 Labour Code.

employment relationship preceding the last assignment is irrelevant from the aspect of severance pay. For example, if the last assignment lasted four months at the end of a five year long employment relationship, the agency worker is not entitled to severance pay. It is clear that employers can easily avoid this allowance and hamper its original function. It is incomprehensible why agencies grudge severance pay from the employees working and generating profit for them for years.

11. Collective rights of agency workers

Adapting the rules of collective labour law which are based on a bilateral employment relationship to agency work is challenging given the three way structure of the latter. While legal regulation has many dead-ends, some practical hindrances also make it difficult for agency workers to organise themselves. The temporary nature of their employment, the changing working conditions in each assignment, the fact that agency workers are not each other`s colleagues in the traditional sense since they perform work in different user companies, results that they are less organised. Nonetheless, the atypical character of agency work is the shared employers' position, which in no way decreases the level of the employees' subordination. Hence, the protection provided for through collective rights is necessary for balancing out the unequal powers of the parties also in the case of agency work. As the mere function of collective rights is required, agency workers' collective rights must prevail despite of all technical hindrances and the legislator has to pay adequate attention to regulate them in a way that workers can in fact exercise these rights in practice.

Agency workers' collective rights are formally guaranteed under Hungarian labour law. However, the detailed analysis of the relevant rules show that the harmonisation between the general rules of the Labour Code and the particularities of agency work is missing, rendering collective rights unenforceable in many fields.

As regards union rights, the starting point is that the union can exercise its rights only against the entity considered to be the employer under the Labour Code. Hence, two questions arise: who is to be considered the employer (the agency or the user company) concerning the given right and what conditions are required by law to exercise that right? Problems arise in cases where the user company shall be considered the employer but the law requires terms to exercise the given right which cannot be fulfilled by the user company.

Such compliance is missing in case of the labour law protection of trade union officials. The basic aim of this institution is to prevent uprooting him from the community where he pursues his activity. Thus, the employer needs the prior consent of the union to dismiss or to assign the official to another workplace, employer or position.[368] In case of agency work the protective aim can only be achieved in case the user company is disallowed to unilaterally send back the union official to the agency, as a result, the termination of the assignment requires the prior consent of the union. The Labour Code does not particularly mention this case, however, without this protection any agency worker union official can easily be removed from the workplace where he performs his activities, restricting protection and leaving union officials in a precarious position. Thus it would be reasonable to extend union officials' labour law protection to the termination of the assignment.

Note that it is also questionable whether the union of agency workers may be a 'representative union' at the user company. This is important since union rights shall only be bestowed upon those unions which are representative at the employer. According to the Labour Code, a representative union at the employer shall mean a trade union which, according to its statutes, operates an organization authorized for representation or has an officer at the employer.[369] Since the user company is not the employer of agency workers, users might deny guaranteeing trade union rights to organisations representing agency workers.

The right to collective bargaining is guaranteed only at the agency.[370] Considering that the agency's employer's rights are shared with the user company, collective bargaining with the agency cannot be complete. For instance, the user company sets the rules on scheduling working time or wage supplements and guarantees workplace health and safety. In these areas, bargaining with the agency is futile.

It is both theoretically and practically unreasonable that the rules of the collective contract concluded at the user company do not apply to agency workers. Hungarian labour law does not determine any terms – except for the existence of the employment relationship – for the application of the collective contract of the employer to the employee, thus, this legal situation cannot be justified simply by considering the agency workers as 'outsiders'. This is particularly true for long term assignments. In our view, a situation where the

368 Article 273 of the 2012 Labour Code.

369 Article 270 of the 2012 Labour Code.

370 Article 279 (3) of the 2012 Labour Code.

collective contract applies to an employee recruited for two weeks, at the same time excluding an agency worker who is on a two years long assignment, clearly amounts to unequal treatment.

Finally, if the collective contract of the user company cannot be applied to the agency worker, this will also limit the user company's rights. The user company will lose the rights that can be exercised only under the collective contract (such as annual reference periods for calculating working time or higher overtime limits).

Nevertheless, the problems mentioned are partially solved by the principle of equal treatment. If the agency worker has to be offered the same basic working and employment conditions as the user company's directly employed employee performing work of equal value, then the relevant provisions of the user's collective agreement shall also be applied. However, as mentioned above, in Hungarian practice most agency workers can be exempted from the principle of equal treatment.

12. Similar scenarios: cases including multiple employers

There are a couple of institutions which are similar to temporary agency work. The differentiation between the different forms of leasing labour force emerged in many debates. These appeared typically in the practice of the labour inspection, while it is rare that the employee questions the legal construction of his employment. Below we review the new institutions similar, yet separate from temporary agency work as regulated in the new Labour Code.

12.1. Temporary assignment

Temporary assignment is similar to temporary agency work, however it entails only a temporary and not commercial transfer of labour force. Temporary assignment is not an atypical form of employment, but a special order of the employer, which requires the employee to temporarily work for a different employer.

The aim of temporary assignment is to temporarily direct the employee to another employer, if the former is unable or unwilling to employ the worker itself. The two employers (the assigner and the receiver) conclude a contract on the temporary assignment. Similarly to agency work, the employee works not in the organisation and by the orders of the company he has an employment relationship with, but under the control of a third party. Such assignments are

of temporary duration, as according to the Labour Code, such employment deviating from the employment contract cannot exceed 44 days or 352 hours within one year. However, this limit can be increased by collective agreement.[371]

The rules of the new Labour Code on how rights and obligations are shared between the assigner and the receiving employer are meagre. It sets forth merely that during the temporary assignment the work schedule of the receiver shall be applied and the employers are jointly and severally liable for the damages incurred by the employee.[372] All other questions are left up to the parties' agreement (for example, scheduling annual leave, paying salary and expenses), but the employment contract can be modified or terminated only by the assigner, as the employment relationship continues to exist between it and the employee.

The former regulation foresaw that – unlike in the case of temporary agency work – the assigner could not demand remuneration from the receiver for the employee's assignment and the two employers had to be connected by ownership.[373] These two restrictions are no longer included in the new Labour Code. Therefore, temporary assignment means not only a transfer within the same company-group, since the assigner and the receiver can be totally independent from each other. In theory, the new law does not prohibit remuneration between the parties for temporary assignments. In our view, however, it should be considered illegal. If temporary assignment could be used to transfer labour force as a business activity (for profit), all compulsory requirements for operating a temporary work agency would be circumvented.[374] In light of the fact that in practice agency work was often disguised as temporary assignment,[375] it would have been justified to uphold the explicit restraint on remuneration.

12.2. Employment relationship with multiple employers (employee sharing)

The new Labour Code introduced that multiple employers can jointly employ the same employee for a given position in a single employment contract.[376] Here, the

371 Article 53 and 57 of the 2012 Labour Code.

372 Article 96 (4) and Article 166 (3) of the 2012 Labour Code.

373 Article 106 of the 1992 Labour Code.

374 Varga M. Péter: A munkaerő-kölcsönzés és a kirendelés. *HR&Munkajog,* 2013/10. 17–18.

375 See among others the following court decisions: Mfv.I.10.349/2008/2.; BH2008. 99; Mfv.I.10.401/2009/3.

376 Article 195 of the 2012 Labour Code.

employee performs his tasks for multiple employers, but within the framework of one employment relationship. This might be realised through sharing the working time among the employers and the employee performs for each at a separate time (for example two companies jointly employ one administrator), but such a case can also occur when the employee works for different employers at the same time (for example, four companies rent an office building together and jointly employ a receptionist).

Unlike agency work, employee sharing is not about transferring employer's rights to an outside party for profit but involves multiple employers right from the very beginning of the employment relationship. Any employer may give orders to shared employees, but cannot dispose over all of the working time. The employers shall conclude an agreement among themselves specifying their respective rights and obligations with regard to the shared employees.[377] Some authors argued that employee sharing should not be understood as a legal umbrella composed of several employment relationships but rather a single employment relationship that parties have with each other. By contrast, job sharing, when several employees share the same job for a single employer, could much rather be described as based on contracts between individual employees and the employer.[378] Moreover, while agency workers do not necessarily know the next company they will be working for, shared employees know all their employers right from the start of the employment.

The new law laid down only the most important elements of the new institution of employee sharing, leaving it up to the parties concerned to negotiate and agree on all the remaining details. The lack of detailed regulation has both advantages and disadvantages. On the one hand, the parties can design the legal relationship according to their own needs. The more employers are involved, the more relevant this advantage may become. On the other hand, designing a workable employee sharing employment relationship requires time, expertise and – if external advice is needed – money. Since the statutory rules alone are useless, employee sharing requires the creativity of the parties.

Employee sharing requires the participating employers to share common goals. This presupposes a personal connection among them, which is more likely in the case of SMEs. Mutual trust is the cornerstone of employee sharing,

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377 Cséffán, József: *A Munka Törvénykönyve* és *magyarázata.* Szeged, Szegedi Rendezvényszervező Kft., 2012. 523.; Kozma, Anna: A több munkáltatóval fennálló munkaviszony. In: Kardkovács, Kolos (szerk.): *A Munka Törvénykönyvének magyarázata*. Budapest, HVG-Orac, 2012. 321.

378 Berke–Kiss (2012) op. cit. 490., 493.

which is also reflected in the joint and several liability of the employers. While it sounds reasonable for the tenant companies in an office building to employ a receptionist together, no company would enter into a contract entailing joint and several liability without knowing well the other employers with whom the responsibility would be shared.

12.3. Dividing employers' rights and obligations in employee sharing

According to the Labour Code, the employment contract should indicate clearly which employer would be responsible for wages.[379] For example, all employers shall pay the same rate proportionally for the time the employee works for them. They may also agree that one employer will pay the whole wage and shall be reimbursed by the others on the basis of a civil law contract. The flexibility concerning the wage scheme is one of the most attractive elements of employee sharing for employers. It is often used to allocate costs within a group of companies. For example, organisations may jointly employ a part of the workforce with one organisation bearing all the wage costs. This is usually the organisation which has the necessary resources or the one falling under the most favourable tax and social security regime. However, this solution comes with an inherent risk as there are no clear rules governing the internal accounting among employers for the costs of the shared employees. Tax law experts agree that such transactions need no invoicing and do not fall under the scope of value added tax.

Employers may also select which one of them will be paying the taxes and social security contributions. Tax regulations stipulate that employers shall inform the tax authority on the designated employer in charge of paying tax and social security contributions. In case they fail to report who is the designated employer, the authorities may select any of them as responsible for fulfilling the obligations. Besides, employers may be fined up to HUF 500,000 (approximately € 1,600) each.[380]

The designated employer may be replaced by the parties whenever they decide to do so. However, such changes may give rise to problems with regard to the social security benefits of the employee such as sickness or maternity

379 Article 195 (2) of the 2012 Labour Code.

380 Act 92 of 2003 Article 16 and 172; Act 80 of 1997 Article 4.

allowances. The social security benefits are primarily calculated on the basis of the contributions paid during the actual employment relationship. From the perspective of social security regulation, the change of the designated employer shall be considered as the start of a new employment relationship, often negatively affecting the level of employee's benefits. This is a clear example for a contradiction between labour and social security law which can be overcome by means of legislation.

Besides the selection of the employer responsible for wages and the one for social security and tax law obligations, there is also a third question that needs to be considered by all parties before signing an employment contract. The Labour Code stipulates that the shared employee will be subject to the collective agreement that is in operation in the company paying the wages, unless agreed otherwise.[381] Again, employers have a lot of discretion. The employers may choose to apply the collective agreement of the company that offers the least generous benefits. However, such a deviation from the statutory rule needs the agreement of all employers as well as the employee. Therefore, unlike the two options discussed in the previous paragraphs, this decision cannot be taken by the employers alone.

To sum up, there are three aspects allowing for a great deal of flexibility in terms of remuneration, since employers may decide: which employer is responsible for paying wages; which employer is responsible for paying taxes and fulfilling social security obligations; which collective agreement should apply (this decision needs to involve the employee).

It is worth mentioning that in all three cases the parties involved may select different employers. For example, if three companies sign a contract with an employee, one company may be responsible for paying the net wage, another acts as the designated employer with regard to the tax and social security authorities, and the parties may decide to apply the collective agreement operating in the third company. Separating the net wage and tax and social security obligations would not make much sense; nevertheless, the parties may decide to do so.

An important guarantee is that the employers' liability does not depend on their respective agreement on paying wages. The Labour Code stipulates that the liability of employers in respect of the employee's labour-related claims shall be joint and several.[382] This covers a broad scale of possible claims such as unpaid wages, other benefits or damages. Thus, the employee may enforce his

381 Article 279 (4) of the 2012 Labour Code.

382 Article 195 (3) of the 2012 Labour Code.

claim against any one of the employers, irrespective of whether that company was responsible for the given obligation.

An interesting question is how the principle of equal pay shall be applied in the employee sharing scenario. Article 12 of the Labour Code stipulates that in connection with employment relationships the remuneration of work and the principle of equal treatment must be strictly observed. For the purposes of the Article, wage shall mean any remuneration provided directly or indirectly in cash or in kind, based on the employment relationship. No guidance is given in legislation as to which employee can be a comparator to apply the principle of equal pay in a situation where the employers apply different wage levels for the shared employee's position.

12.4. The termination of the employment relationship in employee sharing

The termination of the employment relationship is a rather complex issue considering the multiplicity of employers. The Labour Code stipulates that the employment relationship is no longer valid when the number of employers is reduced to one. The rule is cogent (imperative), hence the remaining parties cannot decide to continue their relationship under the same contract.[383] This situation is deemed similar to the dissolution of the employer without succession as in both cases the employment ceases automatically because of the employer's circumstances. Thus, as a guarantee, the employee shall be entitled to an absentee pay due for the notice period of at least 30 days when exempted from work duty, as well as severance pay.

It is obvious that an employment relationship involving more employers cannot be maintained where only one employer remains since this changes the essence of the employment relationship. The problem is that employers might artificially create circumstances that lead to such cases. For instance, an employer establishes a subsidiary with the lowest possible registered capital. In case there is a need for additional workforce the new personnel is contracted by both companies under the employee sharing contract. As soon as the new employees are no longer needed, the employer terminates the activity of the subsidiary and ends it without succession. This approach may help sidestep a lot of obligations and duties, such as protection against dismissal or the requirement

[383] Article 195 (5) and Article 213 point b) of the 2012 Labour Code.

to give adequate reasons in case of dismissal. Similarly, the employer may use an existing but almost insolvent company as the other employer.

However, labour regulation does not leave the employees without protection in the situations outlined above. Such conduct of the employer clearly violates the prohibition of the wrongful exercise of rights as it is intended for the injury of the legitimate interests of the employee.[384] Hence, the employee might claim wrongful termination of the employment contract. In this case, however, the burden of proof would be on the employee and proving that the employers' conduct was in fact abusive is rather complicated. In addition, the employee is entitled to all the benefits he would receive in the case of dismissal by the employer. Thus, there is no real financial motivation for employers to circumvent the ordinary procedure for dismissal.

Termination of an employee sharing contract needs careful planning. There are two key questions. Firstly, in some instances the employment relationship does not end since only one employer leaves. Secondly, the employers should decide which one of them is entitled to terminate the relationship.

As for the first question, in most cases ceasing the employment relationship[385] affects all the employers, terminating the employment in respect to all the parties. However, if one employer ceases to exist without succession, the employment relationship remains intact provided that there remain at least two employers. Another example could be the termination of the employment relationship based on the mutual agreement of the parties. Parties may agree that only one employer leaves the employment relationship while at least two other employers agree to continue it along with the employee.

Turning to the other issue, according to the Labour Code the employment relationship may be terminated by either one of the employers, unless agreed otherwise.[386] Thus, as a general rule, employee sharing may be terminated by any one of the employers and the termination statement affects all the other parties. Nevertheless, parties are free to agree, for example, that only the employer who pays the wages shall terminate the employment relationship or termination needs the prior consent of the other employers, or at least the others shall be informed of the plan of termination in due time. It is also possible to explicitly deny this right from certain employers. If it is the employee who terminates the employment, this affects all the employers and thus, it is not possible to exclude

384 Article 7 of the 2012 Labour Code.

385 Article 63 of the 2012 Labour Code.

386 Article 195 (4) of the 2012 Labour Code.

only one employer while continuing to work for the others. If the employee initiates the termination by mutual agreement, he must to obtain the consent of all the employers.

Labour lawyers disagree on whether a simple amendment of the employment contract is enough to introduce employee sharing in place of typical employment and vice versa. In our view, theoretically, nothing in the Labour Code prohibits such amendments and according to Hungarian private law, parties may freely add or release an additional party from the legal relationship. Future court practice may settle this debate.

Employee sharing is not about the transfer of labour force, but aims at joint employment. Regulation allows the parties to agree on most rights and obligations, so it is not impossible that parties would imitate agency work through this institution, where the 'central employer' provides the labour force for a hidden offset to the other employing partners.

12.5. Employment relationship of school associations

Employment relationship of school associations is very similar to temporary agency work. The special characteristic of school associations' is that they operate in order to ensure work conditions for their members who are full time secondary school or university students.[387] Hence, in social associations members are obliged to work as a personal contribution, this may be performed in an employment relationship or in other legal relationships.

The member of the school association has a legal relationship with the association, but work usually occurs in the organization of a third party, with whom the association concludes a civil law contract for the completion of an agreed task. For instance, a third party mandates the association to complete packaging tasks through its members. The work is performed in the premises and with the equipment of the mandator, the association only organises the work and provides the necessary workforce.

According to the former regulation, school associations were not legally authorized to transfer the employer's rights over their members to third parties. Thus, if the labour authority detected that the mandator directly ordered the members, scheduled their working time etc., the inspectors fined the employers for disguised agency work. Such practice of the authority was also confirmed by

[387] Act 10 of 2006 on associations, Article 8.

the Supreme Court.[388] Nonetheless it was unrealistic to assume that in scenarios like the one mentioned above, the work was only controlled by the association and not the third party. Finally, starting with the summer of 2011 the law entitled school associations to transfer the employer's rights to their clients.[389] This solution is upheld by the new Labour Code, which makes the difference between agency work and the school association employment relationship blurred.

Although the employment relationship of school associations exhibits many differences to temporary agency work, the essence of the institution – the transfer of subordinated labour for a fee – is the same. In our view the employment relationship of school associations can be considered an institution analogous to temporary agency work.[390]

According to the legal definition, the employment relationship of school associations is a fixed-term employment relationship established between the student and the school association based on which the employee is obliged to perform work for a third party.[391] This definition exhibits three important differences as compared to agency work. First, the school association employment relationship may only be established with a full time student. Therefore, the contents of the legal relationship must be formed with due consideration to the employee's obligations related to his ongoing studies. For example, most students are not available for a permanent full time position requiring eight hours of work a day. Generally, they only work for a short time or part time (at weekends, during the summer holiday or a couple of days a week). Second, the employer may only be a school association. Finally, the legal relationship is established for a fixed term, while an agency worker might have an open-ended employment contract. As an exception from the general rule, the duration of the employment may exceed five years and consecutive fixed term contracts may be applied between identical parties without restrictions.[392]

388 See e.g. Mfv.II.10.156/2007/2.

389 See the former Labour Code, Articles 194–194/F, which came into effect on the 1st of August 2011 by Act 105 of 2011. Interestingly, the former regulation allowed the transfer of the right of instruction only in case of *force majeure* for persons under the age 18. As sharing the employer's rights is not conditional on the age of the employee, we agree with the decision of the legislator not to uphold this distinction in the new Labour Code.

390 For a similar opinion, see: Horváth, István: Fényárnyék. Húsz percben az új Munka Törvénykönyvéről. In: Kun, Attila (editor): *Az* új *Munka Törvénykönyve dilemmái*. [Acta Caroliensia Conventorum Scientiarum Iuridico-Politicarum V.] Budapest, 2013. 87.

391 Article 223 (1) of the 2012 Labour Code.

392 Article 227 (3) of the 2012 Labour Code.

The establishment of the school association employment relationship falls under special rules. As a first step, parties conclude a framework employment contract, which fixes only the type of tasks the student will perform and the probable amount of the wages. The agreement which complies with the ordinary employment contract is concluded only when actual work is to be done. Then, based on the framework agreement, another contract is concluded, in which the accurate amount of the basic wage, the tasks to be carried out, the location and time of the work is fixed.[393] The framework contract – lasting longer than five years – may cover the entire period of studies and – as an umbrella – may include further separate works (specific agreements).[394] For example, a university student stipulates a contract with a school association for five years. During the winter break, the association offers him a position of translator for one month. Next summer he works as a waiter for three weeks. Later on, he takes a part time job as an assistant in a legal office. All assignments are detailed in a separate contract concluded within the framework of the agreement the parties signed at the very beginning of their cooperation. The regulation however lacks the rules concerning the termination and modification of the contract stipulated for a given assignment. As a result, the employee can terminate the contract only by mutual agreement with the employer or may cancel an assignment only if he terminates the entire employment relationship (the framework contract).[395]

12.6. No annual leave?

An important feature compared to the general rules is that in the school association employment annual leave, sick-leave, maternity-leave and other unpaid leaves are exempted. Nevertheless, the employee is entitled to an unpaid rest period no shorter than the annual leave days would that have been due based on the employee's age.[396] Theoretically, the reason for this provision is that studying youngsters are generally employed only for a short time, so they can manage their rest and vacations even without annual leave granted by law. In our opinion, such reasoning is unacceptable. An employee may work for a

393 Article 223 (2–3) of the 2012 Labour Code.

394 Czeglédy, Csaba: A munkaerő-kölcsönzés és az iskolaszövetkezetek. *HR&Munkajog,* 2013/10. 19.

395 Kártyás, Gábor: Az iskolaszövetkezeti munkaviszony helye a foglalkoztatási formák között. *Pécsi Munkajogi Közlemények*, 2013. II. 82.

396 Article 225 (2) of the 2012 Labour Code.

longer period of time – even years – in school association employment, albeit short assignments are more common. In case the employment relationship lasts for at least 15-18 days, Hungarian labour law guarantees one day of annual leave in all employment relationships, except school association employment. We do not see any reason why student employees are denied the right to annual leave which all other employees enjoy.

It must be added that the exclusion of annual leave is most certainly against the law of the European Union. According to article 7 of directive 2003/88/EC[397], all employees are entitled to four weeks of paid vacation per year. The European Court of Justice interprets this rule very strictly. The Court found that 'according to settled case-law, the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by [the directive] itself.' The Court added that the directive 'must be interpreted as precluding Member States from unilaterally limiting the entitlement to paid annual leave conferred on all workers by applying a precondition for such entitlement which has the effect of preventing certain workers from benefiting from it'. The BECTU case deserves particular attention, where the Court refused to exclude paid annual leave in short term employment.[398] As pointed out by the Court, the assumption that the employee who has a short-term employment may rest before establishing a new employment relationship is false. The employees who continually conclude short-term employment contracts are in a more precarious situation compared to those who are permanently employed, so 'it is all the more important to ensure that their health and safety are protected in a manner consonant with the purpose of the Directive'.[399]

12.7. Concerns of legal harmonisation

The similarity of school association employment and agency work also raises questions of proper legal harmonisation. As the service provided by the school associations complies with the concept of agency work regulated in directive

397 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

398 C-282/10. para. 16–19.

399 C-173/99. para 63.

2008/104/EC (see articles 1 and 3), the provisions of the directive shall also be applied to school association employment relationships. The legislator seems to deny that school associations would fall under the scope of the agency work directive as the new Labour Code transposed its rules with regard to agency work but only partially in the case of school association employment. In our view, this legal relationship cannot be excluded from the scope of the directive. School association employment can hardly be considered as subsidized vocational training or an employment program for integration or retraining, which would in fact fall outside the directive's scope.[400]

As regards the basic employment and working conditions, equal treatment is granted both for the member of the school association and the agency worker. For the adherence of the principle of equality, both the association and the client are jointly and severally liable.[401] Moreover – unlike in the case of agency work – there are no exceptions to equal treatment in school association employment. Thus, if the student worker performs work of equal value compared to the directly employed employee of the client, they shall not be paid distinctly. As such, regulation of the Hungarian school employment relationship is in full conformity with the agency work directive in respect of the right to equal treatment.

However, school association employment does not conform to the agency work directive in other aspects. There is no guarantee that the employment at the third party will be temporary (it can last as long as the employee remains a student), and rules for assisting the employee in getting permanent employment and obligations concerning information about collective rights are also missing.[402]

12.8. The positions of the third party

The third party contracting with the school association may give orders to the employee. Hence, it is reasonable to deploy some employer's obligations to it. The employer's obligations are distributed among the two parties just

400 Directive 2008/104/EC Article 1 (3).

401 Article 224 (4–5) of the 2012 Labour Code.

402 Directive 2008/104/EC Article 3, 6 (1–4) and 8. As for the latter, although the 2012 Labour Code prescribes that the employer is obliged to inform the works council semi-annually about the number of employees and the designation of their scope of activities, employees of a school association – in lack of an employment relationship with the third party – cannot be included in this circle [Article 262 (3) c) of the 2012 Labour Code].

like in the case of agency work.[403] From the third party's point of view, school association employment is equivalent with temporary agency work. Apart from the differences that derive from the characteristics of the employee – lack of profession and experience, school obligations, etc. – there is one more important difference worth considering: common charges after school association employment are much more favourable. School associations are not obliged to pay social security contributions and social contribution tax for employing students studying in full-time education.[404] As a result, employing a student through an association is way cheaper than hiring out a temporary agency worker for the same position.

Seeing the similarities between school association employment and temporary agency work, the question arises: is it reasonable to uphold the former? Agency work offers the advantages of employing foreign workforce, so another atypical form of employment for the same functions seems redundant. Although the more favourable common charges explain employers' demand for student workers, the question is why the school association is the only employer falling under the favourable common charges for employing a full time student? There is no legal obligation for school associations to provide extra services to student workers (such as work opportunity matching their studies or enhanced HR support). On the contrary, if the student chooses to work for a school association, the applicable labour law rules are less protective than in any other form of employment: there is no annual leave, sick-leave – and it being a fixed-term legal relationship – no notice period or severance pay. Why were the favourable common charges not linked to the person to be supported – the student –, but much rather to the only possible employer, the school association?[405] In our opinion, the privileged situation of school associations under labour law and tax law should only be upheld in case the legislator demands extra obligations matching the needs of the students employed. Yet, school associations' role in enhancing the labour market situation of young people remains rather blurred in spite of favourable rules.[406]

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403 See below, Article 224 of the 2012 Labour Code.

404 Act 80 of 1997 Article 5 (1) point b); Act 156 of 2011 Article 455 (3) point b).

405 Kártyás (2013c) op. cit. 89.

406 Kártyás, Gábor – Répáczki, Rita – Takács, Gábor: *A munkaerő-kölcsönzés* és *az iskolaszövetkezeti munka szerepe a fiatalok foglalkoztatásában. Kutatási zárótanulmány.* Budapest, 2012. 105., 121., 130. http://pazmanymunkajog.com/images/files/kutatas/ZRTANULMNY.pdf

13. Summary

Temporary agency work already had history of a decade in Hungary when the new Labour Code was drafted. However, the main concern about the institution still seems to be unanswered. That is the function of agency work compared to the traditional employment relationship. The new rules are still contradictory in many questions and leave agency workers in lack of adequate legal protection without acceptable reasons.

First of all, the regulation still permits long term assignments (up to five years), which questions the temporary nature of agency working. The regulation does not prevent effectively the substitution of the permanent, traditional employment relationship with agency work. Second, the harmonisation of the agency work directive guaranteed agency workers' right for equal pay only in principle. Even though the Hungarian legislator acknowledged that the employment's different legal construction alone cannot constitute differences in pay, the Labour Code made use of all possible exemptions offered by the directive. As a result only a minority of agency workers fall under the scope of equality. Third, the new legislation allowing the termination of the employment relationship upon the end of the assignment practically means that agencies need to give no reasons to dismiss an agency worker. In our view there is nothing in the special structure of temporary agency work that would underpin such rule.

The assessment of similar institutions involving more employers shows that the boundaries between these scenarios became blurry. In our opinion school associations operating as agencies need no separate regulation, but should be regulated as a form of agency work. It would also be the interest of the agencies to clearly distinct agency work from temporary assignments, as the latter fall outside of the scope of the legal guarantees set for agency working (including licencing of agencies).

V.
EMPLOYMENT DISCRIMINATION: DOWN BY LAW?

Hungarian anti-discrimination law traditionally applied to all disadvantaged fields and groups in a uniform manner. Nevertheless, labour law is the central field of anti-discrimination measures, since most of the complaints originate from workplace conflicts.[407] In view of the above, this chapter explains the functioning of the general anti-discrimination law framework, putting a special emphasis on the particularities of discrimination in the labour market.

Inserting anti-discrimination provisions in the main pieces of legislation was a tradition of the socialist legal system, however, these provisions were no more than empty words, without effective enforcement measures, forums or procedures. Unfortunately this flawed legal pattern long survived after the political changes of 1990 and led to the fruitless formal harmonisation of EU sex discrimination law in 2001. However, legal practitioners urged the deep reform of anti-discrimination provisions, and this professional demand was reinforced by the exigencies of the equality directives preceding EU accession.

Finally, following a series of long debates, reform was brought about in the form of Act No. 125 of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA). The present chapter provides an overview of the provisions, legal institutions of the ETA with the aim of assessing its practical effect on the labour market. In our view the ETA marks a significant step forward, however, it is not unprecedented, since its genesis also includes preliminary developments such as the practice of the Constitutional Court, the acquis communautaire, former labour and civil law provisions.

The ambitious reform aspires to thoroughly regulate and also generate legal procedures against widely existing discriminative practices. The fight

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407 *Beszámoló az Egyenlő Bánásmód Hatóság 2012.* évi *tevékenységéről, valamint Az egyenlő bánásmódról* és *az esélyegyenlőség előmozdításáról szóló 2003.* évi *CXXV. törvény alkalmazásának tapasztalatairól.* Budapest,Egyenlő Bánásmód Hatóság, 2013. www.egyenlobanasmod.hu, 28.

against employment discrimination is but one, albeit prominent target of the anti-discrimination mechanism, since the ETA prohibits discrimination in all other fields (health care, housing, goods and services etc.). In the following, the provisions of the ETA on scope, definitions, exemptions and procedural rules will be analysed in order to provide a thorough, comprehensive evaluation of the Hungarian reform, as well as the efficiency of the ensuing legal framework.

1. Employment discrimination law before ETA

1.1. Socialist heritage: empty declarations

The principle of equal treatment was a constant element of the Labour Code in the socialist period preceding 1990. While the first Labour Code (1951) merely contained the requirement of equal working conditions for men and women[408], the second Labour Code (1967) also prohibited discrimination against employees based on sex, age, nationality, race and origin.[409] As such, the second Labour Code contained a closed list of discrimination grounds. It is worth pointing out however, that the provisions described above were meaningless political declarations instead of functioning legal (material and procedural) provisions, since discrimination was considered as non-existent in the socialist society and labour market, where the just and equitable state was the main employer.[410]

1.2. The legal-branch model lives on after 1990

Interestingly, the socialist legal tradition described above survived remarkably long after the political change in 1990. As a result of the legal-branch model inherited in this tradition, anti-discrimination rules were to be located in the Labour Code, Civil Code and procedural laws etc. Only one piece of legislation broke through this clear legal-branch model, namely Act No. 26 of 1998 on

408 Article 4 (1) of 1951/7. Decree Law on the Labour Code.

409 Article 18 (3) of Act 2 of 1967 on the Labour Code.

410 Andor Weltner: *A szocialista munkaszerződés (The socialist employment contract).* Budapest, Közgazdasági és Jogi Kiadó, 1965. 95.

equal opportunities of disabled persons (FOT)[411], however, the implementation of the equal treatment principle was not the focus of this law.

As for labour law, the third Labour Code (1992) contained a detailed article on the prohibition of discrimination[412] with an extensive and even open list of discrimination grounds (sex, age, political belief, any other characteristics, etc.). Furthermore, an embryonic version of reversing the burden of proof and the possibility of positive actions was also included in this article dedicated to anti-discrimination. Thus, the 1992 Labour Code contained the most elaborate and detailed anti-discrimination provisions within the legal branch model at this time.[413]

Nevertheless, even these relatively detailed labour law provisions failed to ensure the efficient implementation of the anti-discrimination principle in legal practice. This shortcoming was not remedied even by harmonisation efforts in 2001, which affected exclusively the area of labour law before Hungary's accession to the EU.[414] Although the labour law harmonisation package passed by the Parliament in 2001[415] supplemented the anti-discrimination clause with some details, the text of article 5 of the Labour Code was not remarkably improved by this measure of formal harmonisation.

As a result, it was merely the Labour Code (article 5) and the Civil Code (article 76)[416] that contained general clauses prohibiting discrimination, including discrimination among others in the field of employment. Consequently, the protection of employees against discrimination was rather weak and this insufficient legislative framework was widely criticised by human rights lawyers, academics, and also experts of the European Commission during bilateral EU accession talks (see the criticism in detail below).

411 Act 26 of 1998 contained a few, diffuse equal treatment provisions, in particular on accessibility (article 5, 27, 29). However, this Act is more about promoting equal opportunities of disabled persons, than providing equal treatment provisions, as suggested by its title.

412 Article 5 (1)-(4) of the 1992 Labour Code.

413 The English version of the 1992 Labour Code: http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex4.pdf

414 Hungary joined the EU in 2004.

415 Act 16 of 2001 on the amendment of the Labour Code.

416 Article 76 of Act 4 of 1959 on the Civil Code: „Any breach of the principle of equal treatment, freedom of conscience, unlawful deprivation of personal freedom, injury to body or health, contempt for or insult to the honor, integrity, or human dignity of private persons, shall be deemed as violations of inherent rights."

1.3. Lack of case-law

The alarmingly low number of discrimination cases (meaning only one or two court cases per year) was the tangible outcome of the legal barriers prevailing in the 1990's, shedding light on the unsuitability of the legal-branch model, the lack of detailed material as well as procedural provisions.

For example there was only one court decision on age and sex discrimination in this period. In the test case of *Kádár v. Profi Ltd.*[417] a discriminatory advertisement was contested, which excluded women and persons over 35 from applying for the position of manager assistant at a large commercial company. The court refused to apply the Labour Code (article 5), because its scope did not cover the application procedure preceding the employment relationship[418]. The court stated that the advertisement violated the anti-discrimination clause of the Constitution[419] and the Civil Code provision on personality rights.[420] However, the reimbursement of the cost of the proceedings (7100 forints, approximately 30 euros) was the only sanction imposed by the judgement[421]. The novelty of the case was that it gave horizontal effect to the anti-discrimination provisions enshrined in the Constitution.

2. Practice of the Constitutional Court

The case-law of the Constitutional Court was the first pillar of Hungarian anti-discrimination law reform. Therefore, we will briefly describe the relevant provisions and certain noteworthy elements of the case-law of the Constitutional Court.

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417 Zoltán Peszlen: Próbaper a diszkrimináció ellen. In: Gyulavári, Tamás – Kiss, Róbert – Lévai, Katalin (szerk.): *Vegyesváltó, Pillanatképek nőkről, férfiakról.* Budapest, Egyenlő Esélyek Alapítvány, 1999. 138–149.

418 The scope of the Labour Code was extended to the application procedure in 1999.

419 Article 70/A of the Constitution in force at that time.

420 Article 74 of Act 4 of 1959 on the Civil Code.

421 The plaintiff did not require compensation for immaterial damages.

2.1. Constitutional provisions regarding discrimination

The former Constitution[422] contained several provisions regarding discrimination. The most prominent provision was the so-called general anti-discrimination clause, Article 70/A of the Constitution, which stipulates the principle of equal treatment through the general prohibition of discrimination based on any human characteristic.[423] Thus, in terms of the provision, civil and political rights must be secured to everyone without distinction.[424] In order to ensure such rights, the law rigorously sanctions any form of discrimination.[425] Moreover, the state shall endeavour to guarantee equal rights for everyone through measures that create fair opportunities for all.[426]

Article 70/A contained the list of the possible grounds of discrimination, however, this list contained only examples[427] and made it possible to prohibit discrimination based on any other ground, such as for example age (open taxation). In addition, the equal pay for equal work principle was also expressly declared.[428]

The new constitution entitled the Basic Law (in force as of 1 January 2012), decreased the number and downgraded the substance of former anti-discrimination provisions.[429] According to the only relevant clause, Hungary shall ensure fundamental rights to every person without any discrimination

422 Act 20 of 1949 on the former Consitution is not in force from 1 January 2012, as it has been replaced by the Basic Law of Hungary (the new constitution).

423 Article 70/A Subsection (1): "The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever."

424 According to Article 70/A Subsection 1, the Republic of Hungary ensures human rights, and citizens' rights without distinction to all persons within its territory. Article 66 par 1 guarantees equal rights for men and women, respectively par (2) contains the principle of equal pay for equal work. However, article 66 must be interpreted in connection with article 70/A, thus the latter is the general anti-discrimination rule, and the basis of the Constitutional Court's interpretation.

425 Article 70/A Subsection 2.

426 Article 70/A Subsection 3.

427 The exhaustive list of examples in article 70/A par. 1: race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth.

428 Article 70/B Subsection 2: "Everyone has the right to equal pay for equal work, without any discrimination whatsoever."

429 See Article XV. of the Basic Law of Hungary: http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf

on the grounds of race, colour, sex, disability, language, religion, political or other views, national or social origin, financial, birth or other circumstances whatsoever. Thus, the former open list of discrimination grounds remained unchanged. The most obvious, inexplicable and painful change was the deletion of the equal pay principle from the constitution, as it is missing from the Labour Code as well.[430]

2.2. The anti-discrimination test of the Constitutional Court

The Constitutional Court has interpreted the constitutional provisions in numerous decisions, devising its consistent discrimination-test over the last 24 years. In these interpretations, the Constitutional Court has given a wider context to the anti-discrimination clause. The practice of the Constitutional Court has been of fundamental significance, since it elaborated the constitutional anti-discrimination test, which served as a basis for judicial practice and the ETA as well.

In accordance with the practice of the Constitutional Court, the anti-discrimination clause equally applies to natural and legal persons.[431] Furthermore, the prohibition extends to the entire legal system.[432] The Constitutional Court applies two different discrimination tests for fundamental, and non-fundamental rights. Firstly, a rigorous test applies to fundamental rights, based on the principles of "necessity" and "proportionality". Secondly, a softer test is used for non-fundamental rights, previously based on arbitrariness, while recent practice centred on the requirement of reasonableness.[433]

Discrimination is not unconstitutional, if a legitimate social objective or a constitutional right can only be achieved through the contested measure. Essentially, this interpretation is the basis of the concept of positive actions.

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430 The reference of article 12 of the 2012 Labour Code to the equal pay principle will ba analysed alter.

431 It is contrary to the text of the Constitution, which refers expressly to *natural* persons: Dec. 59/1992. (XI. 6.) AB (not translated into English).

432 Dec. 61/1992. (XI. 20.) AB.

433 László Sólyom: Introduction to the Decisions of the Constitutional Court of the Republic of Hungary. In: László Sólyom – Georg Brunner (eds.): *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court.* University of Michigan Press, 2000. 1.

However, the limit of positive action is the prohibition to restrict the core regulations of human dignity and basic individual rights[434].

3. Effects of EU law[435]

European Union law was the second pillar of Hungarian anti-discrimination law reform. A significant question surrounding the relevant debate was whether the ETA should merely comply with EU law or rather provide EU-conform, efficient solutions for the specific problems of the Hungarian labour market and employment law.

3.1. First wave of harmonisation: polishing up the 1992 Labour Code (2001)

Hungarian anti-discrimination law complied with six out of the eight sex equality directives examined in the course of the acquis screening in 1998.[436] The two missing directives, 75/117/EEC on equal pay and 97/80/EC on the burden of proof, were implemented by inserting two new paragraphs in the Labour Code as part of the harmonisation amendment passed in 2001.[437] The said two articles of the Labour Code on the general prohibition of discrimination (article 5) and the equal pay principle (article 142/A)[438] did not bring about a substantial change. Therefore, legal harmonisation, similarly to the experiences of many other countries in the region, practically failed to deliver the expected outcome, namely to elaborate a truly effective legal framework.

This first wave of harmonisation introduced merely two novelties, at the same time, it did not extend to other fields, but was limited to labour law (more precisely, the Labour Code). The first veritably new rule was the labour

434 See the Constitutional Court's decision: Dec. 21/1990. (IV. 25.) AB. In: Sólyom–Brunner op. cit. 105.

435 Botond Bitskey – Tamás Gyulavári: Hungary. In: Malcolm Sargeant (ed.): *The Law on Age Discrimination.* The Netherlands, Kluwer Law International, 2008. 138–140.

436 The acquis screening of Hungarian anti-discrimination legislation took place in November 1998, as part of the 13th chapter of the negotiations on Social affairs and employment.

437 Act 16 of 2001.

438 See the amended text (Act 16 of 2001) of article 5 and article 142/A of the 1992 Labour Code.

law definition of indirect discrimination[439], while the second was a detailed provision on certain aspects of the equal pay principle.[440] The very first equal pay provision of the Labour Code contained the definition of "pay" and "equal work", in compliance with Article 141 of the Treaty,[441] the Equal Pay Directive and the case-law of the European Court of Justice (ECJ).[442] This equal pay provision was to be applied in the case of all discrimination grounds, including sex, age, race, etc.

3.2. Second wave of harmonisation: birth of a new legal branch (2003)

The passing of Act No. 125 of 2003 on equal treatment (ETA) brought about the second wave of legal harmonisation in this field, which was necessary to comply with the new requirements of the Race Directive[443] and the Employment Equality Directive[444], in particular, the obligation to establish a body promoting equality. According to Article 13 of the Race Directive: "Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin." Since such a specialized institution was missing under Hungarian law, this EU law requirement prompted a legislative pressure for the Parliament. Fortunately, this pressure was reinforced by human rights lawyers and met with the political will of the government in 2003. As a result, legal harmonisation finally led to the adoption of a general anti-discrimination Act (ETA), notwithstanding the fact that it is (still) not an obligation under EU law.

Besides the emerging new challenges, the long-standing expectation of achieving a more effective, EU-conform legislative framework remained. Summarising the implementation of EU law requirements, special emphasis was

439 Article 5 section (2) of the Labour Code was repealed and substituted by article 9 of the Equal Treatment Act, with a general scope.

440 Article 142/A of the 1992 Labour Code.

441 Treaty on Establishing the European Community.

442 The main difference between article 142/A and EC law is that the former entitles all groups of workers to base their claims on the equal pay principle. At first sight, this generous concept is more favourable to workers, in effect it raises serious interpretation problems.

443 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

444 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

put on the following issues: definitions, sanctions and institutional framework. The ETA brought about a significant change in harmonisation strategy: contrary to the first amendment of 2001, it ambitiously regulated the main issues of EU equality law in detail. For instance, the 2001 amendment of the Labour Code merely introduced the definition of indirect discrimination, but neglected the issue of other definitions, sanctions and institutions. By contrast, the ETA includes the definitions of direct and indirect discrimination, harassment and victimisation etc., with a general scope (reaching far beyond employment).

In accordance with EU Directives and ECJ case-law, sanctions must be effective, proportionate and dissuasive. This requirement caused some head-ache for the legislator, and was finally solved in combination with the institutional question. The institutional provision of the Race Directive required the establishment of a national equality body assisting victims, conducting independent surveys and publishing independent reports. It may be an interesting innovation of the ETA that it tried to comply with both requirements by establishing the Equal Treatment Authority, with a competence to fine wrongdoers in the framework of public administrative proceedings.

3.3. Effects of EU law: form and contents

EU law has had a noteworthy effect on Hungarian anti-discrimination law in two respects. Firstly, it compelled the reform of the former legal-branch provisions. It is not an overstatement, that the reform would not have been feasible without the imperative influence of the equality directives, especially the Race Directive and the Employment Equality Directive[445]. Secondly, the contents of the ETA were also significantly affected by EU equality laws, as well as best practices (legal institutions) of the old Member States[446].

[445] Several Members of Parliament supported in 2003 the idea of postponing the passing of the Equal Treatment Act. However, the government could always refer to the obligatory requirements and also the deadlines of these directives.

[446] It is worth mentioning in particular the legal solutions of the equal treatment legislation of The Netherlands (form of the legislation), United Kingdom (definitions) and Finland (equality body).

4. Debate surrounding the form of the legislation

4.1. Do we need a general anti-discrimination law?

Unreasonably, the professional debate on legal reform boiled down to a single issue around 2001: is there a need for a comprehensive, general anti-discrimination Act, or does the amendment of branch level regulations deliver the required outcome? Like any oversimplified question, this divided lawyers and politicians working on the subject, failing to come any closer to the eventual solution.

Several arguments spoke for a new, general anti-discrimination Act: to achieve a consistent, uniform approach, and create a set of regulations, institutions, and sanctions that stand the test of practice. Existing branch level regulations were criticised, because the general anti-discrimination clauses of the Labour Code and the Civil Code were bare declarations and did not provide a solid basis for the slowly evolving court practice. The deficiencies of the branch level model were clearly demonstrated by the alarmingly low number of discrimination cases.

4.2. The Constitutional Court's conservative approach to formal issues

The formal aspects of legislation were even examined by the Constitutional Court in 2000, inspired by numerous complaints against the inadequate branch level provisions. These constitutional complaints argued that the branch-level provisions do not comply with Community law and other international human rights obligations, thus, they urged the adoption of a separate act on equal treatment. According to the decision of the Constitutional Court[447] however, the Parliament did not violate the Constitution by failing to pass such an anti-discrimination act.

The Constitutional Court made the following statements on the conceptual issues of anti-discrimination legislation. There had been a multi-tier anti-discrimination law prohibiting discrimination in the Hungarian legal system, and by passing that particular piece of legislation in that particular way, the Parliament complied with its legislative obligation. Although the legislator did

[447] Constitutional Court Decision 45/2000. (XII. 8.) AB.

not exhaust the necessary legislative possibilities by that respective type of legislation, it is exclusively for the legislator to decide, what further regulation would be desirable, since there are no constitutional requirements in that regard. On this basis, the Constitutional Court rejected the arguments grounded on the Constitution and raised in favour of the obligatory uniform regulation.

4.3. One general Act or several Equal Treatment Acts?

The Ministry of Justice prepared the White Paper (legal concept)[448] of the Equal Treatment Act in the autumn of 2002, which was disseminated to several governmental and non-governmental organisations, making it available also on the Internet. The Ministry argued for an Equal Treatment Act with a general scope, covering all discrimination grounds. This proposal led yet again to a heated debate on the form of legislation: should one general Equal Treatment Act or several Equal Treatment Acts (on various discrimination grounds and/or fields of discrimination) be drafted?

The government's White Paper elicited numerous written comments, initiating heated debates between governmental and civil experts in 2003.[449] Above all it was the feminist organisations[450] criticised the proposal for a general act and suggested that separate acts be elaborated on the equal treatment of the various groups. The main argument against the "general prohibition concept" was, that separate anti-discrimination acts would be more effective against the special forms of discrimination based on sex, race etc. However, they only proposed three Acts: gender equality, disability rights and racial discrimination acts. These alternative proposals did not take into account the other discrimination grounds, such as age, sexual orientation, religious or ideological conviction etc.

The general consensus of the parties in the debate was that there are strong arguments for and against both concepts. On the one hand, a general anti-discrimination act would better guarantee legal coherence, on the other hand, separate anti-discrimination acts may include rules tailor-made for the

448 Concept of the Act on Equal Treatment and the Promotion of Equal Opportunities. First version published in October, 2003.

449 For example, the Ministry of Justice organised a conference on the concept of the Equal Treatment Act on June 5th, 2003. We should also mention the round-table discussions organised by Human Rights information and Documentation Centre (INDOK) in the spring of 2003.

450 See the opinion of the Hungarian Women's Lobby on the Act at http://habeascorpus.hu/allaspont/kritika/antidiszkr.2003.11.28.pdf (in Hungarian).

specific disadvantaged groups. Evidently, there are examples for both solutions in the EU Member States, which was also an important topic of the debate. The main argument against the framework of several acts was that a general act may guarantee the most consistent, uniform legal practice with an effective institutional framework. This model may also better serve the social objective of raising awareness.

Finally, the legislator gave preference to the act with a general scope (ETA), referring to the strong will for a coherent, uniform legislation. Nevertheless, the preceding debate yielded an important conceptual insight for the Act. It became clear, that special regard must be paid to the different situations of the various groups. The Ministry of Justice started the codification of a general Equal Treatment Act in the spring of 2003, and the Parliament passed Act No. 125 of 2003 on Equal Treatment and the Promotion of Equal Opportunities on December 27 of 2003.

5. Scope of the ETA in employment

The scope of the ETA was a fervently debated issue, since the legislator had to meet the following (sometimes contradictory) requirements: efficiency, applicability, coherence of antidiscrimination provisions within the entire legal system, compliance with constitutional and legal harmonisation requirements, and last but not least, respect for the private sphere.

Accordingly, the ETA determines a set of limitations concerning its scope. Firstly, it provides a list of the public organisations and institutions bound by it (article 4). Secondly, this list of organisations is supplemented by provisions (article 5) which identify certain "private" legal relationships, including employment relationships, where the requirement of equal treatment must prevail. Thirdly, these rules are supplemented by exceptions (article 6) and exemption clauses (article 7 and 22). The following chapter explains the scope of the ETA in employment relationships, as well as the exceptions. The exemption clauses will be described in the subsequent chapter.

5.1. Discrimination grounds and their limits

5.1.1. The open-ended list of discrimination grounds

The ETA has a general scope in respect of the groups and legal relationships covered by it. The scope of the ETA extends to all persons and groups of persons, in case of discrimination, based on any of their characteristics listed in article 8 on direct discrimination. As such, the definition of direct discrimination plays a central role within the ETA, as it defines the list of discrimination grounds.[451] This list of 19 protected discrimination grounds is significantly longer and much more detailed than either the former Hungarian clauses or the similar provisions stipulated in international instruments.[452]

The ETA follows the concept of the former anti-discrimination clause[453] set forth in the constitution, albeit the list enshrined in the ETA is much more detailed and supplemented by new elements, such as age or sexual orientation. At the same time it is worth pointing out that some of these new elements are in fact not absolutely new, since Article 70/A of the Constitution also contained the expression "other status or characteristic". Therefore, some of the new grounds, such as for example age, were already covered by the Constitution and respective decisions of the Constitutional Court[454] long before the Act.

An important consequence of locating this extremely broad personal scope of the ETA within the definition of direct discrimination is the absolute dominance of direct discrimination in legal practice. It is possible to use the relatively easily applicable and widely known definition of direct discrimination based on the express protection of all possible discrimination grounds, for example part-time work, trade union membership etc. As a result, lawyers and employees prefer to use the legal definition of direct discrimination instead of the more complicated

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451 The following 19 characteristics are protected by the ETA (in the order set forth in the law): sex; racial origin; colour; nationality; national or ethnic origin; mother tongue; disability; state of health; religious or ideological conviction; political or other opinion; family status; motherhood (pregnancy) or fatherhood; sexual orientation; sexual identity; age; social origin; financial status; the part-time nature or definite term of the employment relationship or other relationship related to employment; the membership of an organisation representing employees' interests; other status, attribute or characteristic.

452 See for instance: European Convention on Human Rights, Article 14; International Covenant on Civil and Political Rights, Article 2 (1); International Covenant on Economic, Social and Cultural Rights, Article 2 (2)

453 Article 70/A.

454 Dec.'s 14/1995. (III. 13.) AB, 20/1999. (VI. 25.) AB.

and unexplored notions of indirect discrimination or harassment (eg. in case of part-time work).

Consequently, Hungarian legal practice hardly knows cases beyond direct discrimination[455] (see the respective case-law later). We do not consider this development as a shortcoming of the ETA, but as a rational solution, which simplifies legal practice through the method of providing very detailed rules on direct discrimination. In this sense, the lack of indirect discrimination cases is not the symptom of a lack of remedy in such cases, but rather the uniform classification of all cases, including indirect discrimination based on part-time work or any other characteristic.

5.1.2. The narrow interpretation of "other characteristics"

It is worth mentioning that the open list of discrimination grounds has already caused serious interpretation problems regarding the meaning of "other characteristics", since its precise meaning remained obscure for a long period of time. The main source of uncertainty regarding its interpretation is that this discrimination ground opens the list to all possible personal attributes, which are not present in the list of discrimination grounds.

Right at the start of the application of the ETA, both the Equal Treatment Authority and the courts gave this rather flexible discrimination ground an extremely and unduly wide interpretation.[456] This remarkably wide interpretation may be illustrated by the fact, that a former workplace conflict (labour law litigation) between the superior and the employee was accepted as a discrimination ground in case of a disadvantageous decision made by the superior.[457] Nonetheless the Equal Treatment Authority stated discrimination based on a long list of considerably diverse "other characteristics", such as a professional debate between the superior and the employee[458], critical

455 *Beszámoló az Egyenlő Bánásmód Hatóság 2012.* évi *tevékenységéről...*

456 Gyulaváři, Tamás – Kádár, András Kristóf: *A magyar antidiszkriminációs jog vázlata.* Egyetemi jegyzet. Miskolc, Bíbor, 2009. 32–37.

457 EBH Dec. 22/2006.

458 EBH Dec. 1/2008.

professional opinion[459], old-age pension[460], domicile[461], slim stature[462] or even the level of degree.[463]

In our opinion, only a few of the above characteristics may be considered a genuine discrimination ground, depending of course on the circumstances of the case. At the same time, many circumstances featured in the above list are clearly not genuine discrimination grounds (eg. professional debate, opinion, old-age pension), but this kind of differentiation is rather the wrongful exercise of rights (abuse of rights), prohibited under the Labour Code. Wrongful exercise of rights means, in particular, any act that is intended for or leads to the injury of the legitimate interests of others, restricts the enforcement of their interests, constitutes harassment or the suppression of their opinion.

The main difference in law between basing the claim on discrimination or wrongful exercise of rights is that the burden of proof is reversed only in discrimination cases.[464] Since the protection provided under anti-discrimination law is designed and provided solely for those persons and groups of persons who are at a disadvantage due to some characteristic closely connected to their personality (substantive feature of human character), the Equal Treatment Advisory Board[465] recommended a restricted interpretation of the notion of "any other characteristic" in order to ensure that the preferential rules on reversing the burden of proof are applied only to those who truly need it.

Accordingly, the Equal Treatment Authority and the courts started to follow this restricted understanding of other characteristics as a discrimination ground. This narrow notion is based on the substantive feature of human personality. Although the concept of other characteristic is constantly changing, its hard core derives from social prejudice, thus it is capable of forming a disadvantaged social group. Even in such cases the person possessing this characteristic is discriminated against primarily as a consequence of belonging to such a group of persons and not due to his/her individual behaviour.

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459 EBH Dec. 166/2009.

460 EBH Dec. 234/2009.

461 EBH Dec. 1/2007.; EBH Dec. 819/2008.

462 EBH Dec. 310/2007.

463 EBH Dec. 395/2007.

464 Article 19 of ETA.

465 Az Egyenlő Bánásmód Tanácsadó Testület 288/2/2010. (IV. 9.) TT. sz. állásfoglalása az egyéb helyzet meghatározásával kapcsolatban, http://www.egyenlobanasmod.hu/data/TTaf_201004.pdf (in Hungarian).

In accordance with this test, the Equal Treatment Advisory Board recommended the following examples of discrimination grounds on this legal basis: multiple discrimination, discrimination through association, nationality, level of education (as an aspect of social origin), physical appearance (slim or fat body), kinship with a person who is discriminated against, place of residence and geographical distance.[466] However, even in these cases the decision, whether the alleged discrimination is stated by the Equal Treatment Authority or the court, may be made by taking into account all relevant circumstances of the case. Therefore, it is a very complicated task to provide clear and generally applicable guidance on this matter to forego a simple automatic application of a list of accepted characteristics.

5.2. Employment relationships: the unrestricted scope of the ETA

5.2.1. The covered legal relationships aimed at employment

Article 5.d extends the scope of the ETA to all kinds of employment relationships: "employers in respect of employment relationships and persons entitled to give instructions in respect of other relationships aimed at employment and relationships directly related thereto". Consequently, the obligation to ensure equal treatment shall be applied not only in all sorts of employment relationships (public and private spheres), but generally in all kinds of contractual relationships aimed at work.

Hungarian labour law distinguishes between four clusters of employment relationships: private employment relationships[467], public employees' employment relationships, civil servants' employment relationships and service relationships. Although the different laws use various designations for these legal relationships, all of them cover subordinated work exhibiting all the essential features of an employment relationship, even if under a different label, such as public employee (employment) relationship or civil servant (employment) relationship. Thus, the ETA covers all such working

[466] Az Egyenlő Bánásmód Tanácsadó Testület 288/2/2010. (IV.9.) TT. sz. állásfoglalása az egyéb helyzet meghatározásával kapcsolatban, http://www.egyenlobanasmod.hu/data/TTaf_201004.pdf, 7–9.

[467] The plural sense is explained by the existence of several forms of atypical employment relationships.

(employment) relationships[468]: employment relationships[469], public employee relationship[470], civil servant relationship[471], judicial service relationship[472], legal service relationship[473], prosecution service relationship[474], military service relationship[475], armed forces service relationship[476] and professional foster parent relationship[477]. As a result, the equal treatment principle shall be applied to employment relationships of all public and private employees, with no exception.

Beyond employment relationships, there are several contractual relationships aimed at employment*:* civil law contracts for work[478], membership in a professional group, co-operative membership[479] and partnership activities under economic and civil law involving personal contribution and aimed at work.

5.2.2. Civil law contracts: debated coverage

There has been considerable academic debate surrounding the limitless scope of the equal treatment principle, since it also includes all civil law contracts aimed at work (independent contractors). Some academics argued[480], that such a wide scope of equal treatment provisions covering civil law contracts aimed at work is not essential and indeed, it violates the basic doctrines of private law (contractual freedom). In their view, the application of the equal treatment laws in case of employment relationships, as an exception under private law, may be explained by the weaker market position of the employee.[481] Therefore, such a

468 Article 3(a) of ETA.

469 Act 1 of 2012 on the Labour Code.

470 Act 33 of 1992 on Legal Relationship of Public Employees.

471 Act 199 of 2011 on Legal Relationship of Civil Servants.

472 Act 157 of 2011 on Judicial Service Relationship.

473 Act 68 of 1997 on Legal Service Relationship.

474 Act 174 of 2011 on Prosecution Service Relationship.

475 Act 95 of 2001 on Military Service Relationship.

476 Act 43 of 1996 on Armed Forces Service Relationship.

477 Act 31 of 1997 on Rights of Children.

478 Act 5 of 2013 on the Civil Code.

479 Act 10 of 2006 on Co-operatives.

480 Vékás, Lajos: Egyenlő bánásmód polgári jogi jogviszonyokban? *Jogtudományi Közlöny,* 2006/10. 355–364.; Kiss, György: Az egyenlőségi jogok érvényesülése a munkajogban. *Jura*, 2002/1. 48–61.

481 Vékás op. cit. 359.

protection is neither reasonable, nor justified in the case of civil law contracts aimed at work, since independent contractors do not possess such a weak position in a civil law relationship, commonly characterized by the balance of the two contracting parties.

By contrast, we contend that independent contractors often also find themselves in a weak labour market position and may be deemed as economically dependent workers[482], which may justify their inclusion under the scope of the ETA. Furthermore, the Race Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC) are applicable to conditions for access to employment, self-employment and occupation.[483] In this reading, the disputed rule on the broad scope of the equality provisions simply implements the EU Equality Directives in Hungarian law. National legislation does not have a room for manoeuvre in this respect, since the notion of self-employment unequivocally implies civil law contracts. Moreover, the application of equal treatment rules regarding civil law contracts aimed at work is a dormant rule, for there has been no litigation or even administrative procedure concerning an allegedly discriminatory civil law contract.[484]

5.3. Exceptions

Article 6 of the ETA lists the cogent exceptions from the scope of the ETA, which accordingly does not extend to: family law relationships, legal relationships between relatives, relationships directly connected with the activities of the religious life of the churches, issues related to membership of civil organisations[485], legal entities and organisations. In consequence, the employment relationships and contractual relationships aimed at employment between relatives[486] are not covered by the ETA. This is an interesting

[482] See for example: Samuel Engblom: Equal treatment of employees and self-employed workers. In: Ann Numhauser-Henning (ed.): *Legal Perspectives on Equal Treatment and Non-Discrimination*. Kluwer Law International, 2001.; Guy Davidov: Who is a worker? *Industrial Law Journal*, 35., 2005/1. 57–71.; Nicola Countouris: *The Changing Law of the Employment Relationship.* Aldershot, Ashgate, 2007.

[483] Article 3 of Directive 2000/43/EC and 2000/78/EC.

[484] Tamás Gyulaváry: A bridge too far? The Hungarian regulation of economically dependent work. *Hungarian Labour Law E-Journal,* 2014/1, www.hllj.hu.

[485] With the exception of political parties (section 6, subsection (2) point b).

[486] Relative is the person defined as such under Paragraph b) of article 685 of the Civil Code, with the exception of fiancées (article 3.f).

limitation, since the scope of the Labour Code covers employment relationships between family members as well. Furthermore, this provision does not comply with Directive 2000/78/EC, at the same time, it has no real relevance in legal practice. This provision was not included by mistake, instead, it was a conscious decision of the legislator not wanting to interfere with the relationships of the family members.

An immense number of questions have been raised regarding the relationship between the principle of equal treatment and the autonomy of the churches, since the issue partly affects employment affairs as well. In accordance with article 4 of the ETA, the personal scope of the Act, as a general rule, does not cover the "relationships directly related to the religious activities" of churches or their legal entities.[487] It would be demanding to come up with an abstract definition of the legal relationship directly related to the religious-life activities of the churches, therefore, one must consider all elements of the particular legal case. However, the decisions of the Constitutional Court[488] and the courts may serve as a guideline in this respect.

Employment relationships and other contractual relationships aimed at employment are evidently not such relationships that would be directly related to the religious-life activities of the churches. This category merely includes the relationship of priests and other persons involved in the religious activities of the church. In case a church legal entity has employees in its schools, hospitals or social service providers, then the employment or other legal relationship of these employees fall under the scope of the ETA.[489] However, there is a special exemption in this respect: the principle of equal treatment is not violated if the distinction arises directly from a religious or other ideological conviction fundamentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit.[490]

487 Article 6 (1)c of ETA.

488 Especially the following decisions of the Consitutional Court: Dec.'s 4/1993. (II. 12.). AB; 8/1993. (II. 27.) AB; 22/1997. (IV. 25.) AB; 32/2003. (VI. 4.) AB.

489 Published decisions of the Supreme Court on this issue: BH 2006/14., EBH 2005/1216.

490 Article 22.b of ETA.

5.4. Scope of the Labour Code in discrimination proceedings

The employment relationship is still the central legal institution of Hungarian labour law, regulated predominantly by the Labour Code for the last half century.[491] At the same time, several other acts, such as the ETA, have always played a significant role in employment regulation.[492] Therefore, the legal connection between the Labour Code and the ETA is a central issue of employment discrimination law.

According to Article 2 of the ETA: "other provisions pertaining to the principle of equal treatment, set out in separate legal acts, among others the Labour Code, shall be applied in harmony with the provisions of the Act". In parallel, Article 12 of the Labour Code also confirms the harmony between these two Acts: "in connection with employment relationships, such as the remuneration of work,[493] the principle of equal treatment must be strictly observed". Since the equal treatment principle is regulated by the ETA, this sentence refers to the parallel application of the Labour Code and the ETA.

As a result, the detailed anti-discrimination provisions of the ETA and the special labour law rules of the Labour Code must be applied in harmony. For instance, the legal dispute regarding the termination of the employment of a pregnant employee must be solved by the joint application of the Labour Code provisions on unfair dismissal[494] and the ETA provisions on direct discrimination,[495] burden of proof[496] etc.

According to the decision of the Supreme Court, the labour provisions on the termination of employment shall be applied together with the ETA rules on harassment, if the employer terminates the employment relationship in revenge for the refusal of sexual harassment by the employee.[497] The only field of discrimination which is still detailed in the Labour Code[498] is equal pay for equal work, but even in this case, many ETA provisions must be applied as

491 The very first Labour Code was passed in 1951 (1951/7. Decree Law on the Labour Code).

492 There are several other relevant Acts on specific labour law matters, such as the Acts on labour safety, strike or the promotion of employment.

493 In our opinion this strange reference to pay was destined to replace the equal pay for equal work principle, as it is not present in any law (Labour Code, ETA etc.) and it was even deleted from the Constitution (Basic Law) in 2012.

494 Article 82–83 of the 2012 Labour Code.

495 Article 8 of ETA.

496 Article 19 of ETA.

497 Supreme Court BH 2011/347.

498 Article 12 of the 2012 Labour Code.

well (e.g. burden of proof). Moreover, the FOT also contains several rules on the equal treatment of persons with disabilities, in particular, the law contains accessibility provisions. Therefore, these rules must also be applied together with the ETA on accessibility matters.

6. Seven definitions: violation of the equal treatment principle

It was a crucial task of the ETA to determine precise legal definitions of unlawful practices, measures and behaviours, in compliance with EU Directives. It was obviously difficult to adjudicate an anti-discrimination case before the ETA came into effect due to the lack of such definitions. The case-law of the Constitutional Court provided some guidance for the courts, however, these decisions failed to fill out the respective gap in the legal system. Prior to the ETA, Article 5(2) of the Labour Code on indirect discrimination was the only anti-discrimination definition in Hungarian law. This lack of definitions provided for an uncertain legal situation, making major reform indispensable. For this reason, the detailed definitions provided by the ETA meant a great step forward in this field.

6.1. The principle of equal treatment: a conceptual change

The ETA meant a conceptual change concerning definitions. Formerly, no definition of the principle of equal treatment existed and the relevant clauses merely referred to the prohibition of discrimination, without, however, providing any definition for the same. Article 5(1) of the former Labour Code repealed by the ETA, duly illustrates the former vague anti-discrimination clauses.[499] Unfortunately, this definition in no way described the prohibited measure or behaviour.

According to the statutory definition[500] the equal treatment principle means that all natural persons, groups, legal entities and organisations without legal personality, shall be treated with "the same respect and deliberation and their

[499] "It is prohibited to discriminate against an employee in connection with the employment relationship, based on his/her sex, age, family status, disability, race and ethnic origin, religion, political conviction, trade union membership of activity, or any other characteristic irrespective of the employment relationship."

[500] Article 1 of ETA.

special considerations shall be equally respected". The decisive influence of the Constitutional Court is demonstrated by the fact, that this definition of the equal treatment principle was simply copied from the Constitutional Court's fundamental decision on discrimination dating back to 1990.[501] This conceptual change means that discrimination is a violation of the equal treatment principle. This new concept also required the amendment of many other acts (Labour Code, Public Education Act, etc.) in order to refer to the equal treatment obligation instead of simply prohibiting discrimination.

The ETA itself lists five ways in which the principle of equal treatment may be violated: direct discrimination (article 8), indirect discrimination (article 9), harassment (article 10.1), segregation (10.2)[502] and victimization (10.3). Article 7 emphasizes that an instruction to discriminate also violates the principle of equal treatment.[503] In this chapter we explain the definitions of violating the equal treatment principle, except segregation, since it does not have any relevance in labour law.

At the same time, it should be pointed out that the regulatory framework is even more complex, for not only the ETA contains anti-discrimination definitions, but two other laws as well. Firstly, the accessibility obligation is contained in the FOT in a certain level of detail (e.g. exceptions).[504] Secondly some rules in relation to the equal pay for equal work principle are enshrined in Article 12 of the Labour Code. Therefore, a total of seven anti-discrimination definitions (five plus two) may be found in the entire legal system and the detailed provisions of the ETA shall be applied to all of them.

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501 Dec. 9/1990. (IV. 25.) AB.

502 Segregation is a widely existing discriminatory practice against roma children in education. Therefore, the Act prohibits segregation, which is defined as a conduct separating individuals or groups of individuals from others on the basis of their characteristics as defined in article 8, without a reasonable explanation resulting from objective consideration. This is an innovative concept, not to be found in EC law or former Hungarian anti-discrimination law. Segregation is a special form of direct discrimination, which has relevance predominantly for discrimination cases in education, thus it is not relevant in relation to employment discrimination.

503 This is an important provision, as earlier it was ambiguous in legal disputes, whether the same provisions and sanctions shall be applied to instructions to discriminate as discrimination per se.

504 English translation of Fot: http://mek.oszk.hu/09700/09751/09751.pdf

6.2. Direct discrimination: the key definition

The ETA was the first law that provided a comprehensive definition of direct discrimination, in accordance with EU Directives. According to this statutory definition, measures are considered to be direct discrimination, as a result of which a person or a group is treated less favourably than another person or group was treated, is treated, or would be treated in a comparable situation, because of his/her real or presumed protected characteristic. The hypothetical comparison, although only in the case of persons in a comparable situation, was made possible by the first amendment to the ETA in 2006[505], in compliance with the EU law definition of direct discrimination.[506]

In general, this is the very first definition of direct discrimination in the Hungarian legal system, providing a remarkably detailed list of discrimination grounds, at the same time describing the prohibited measures with precision, in compliance with EU law and the Constitutional Court's decisions. It has great significance for legal practice, since this is the definition used by the courts and the Equal Treatment Authority in the majority of the cases.[507]

6.3. Indirect discrimination: written for the desk?

Both EU law and the experience gathered from national legal practice[508] made the definition of indirect discrimination necessary, since it is an existing form of discrimination. According to the statutory definition in force, measures are to be deemed indirect discrimination which are not considered direct discrimination and apparently comply with the principle of equal treatment (neutral), but put any person or group possessing protected characteristics as defined in Article 8 (discrimination ground) at a considerably greater disadvantage than those other

505 Act 104 of 2006.

506 Article 2 (2a) of Directive 2000/78/EC: "direct discrimination shall be taken to occur where one person is treated less favourably than *another is, has been or would be treated in a comparable situation*, on any of the grounds referred to in Article 1".

507 Compendium of case-law of the Equal Treatment Authority: http://www.egyenlobanasmod.hu/jogesetek/jogesetek (in English)

508 The White Papers of the Legal Defence Bureau for National and Ethnic Minorities give a detailed analysis of case-law and practical difficulties (http://www.neki.hu). See also on this topic: Lilla Farkas – András Kádár: *Report on measures to combat discrimination in Hungary.* Migration Policy Group, 2003. (www.migpolgroup.com/infopages/2206.html).

persons or groups who are in a comparable situation.[509] This provision hardly differs from the former definition of indirect discrimination in the Labour Code,[510] however it has a general scope covering all branches of law, not only labour law.[511]

Unfortunately, the definition of indirect discrimination has considerably less significance in present legal procedures, than direct discrimination. In our opinion, indirect discrimination disputes are prevented by the strict data protection laws, procedural problems and the lack of knowledge amongst legal practitioners. At the same time, the detailed list of discrimination grounds covered by the direct discrimination definition also restricts the potential scope of the indirect discrimination clause. Consequently, there are still hardly any cases on indirect discrimination before the courts and the Equal Treatment Authority.

6.4. Employment specific provisions on direct and indirect discrimination

Former court practice had shown that detailed provisions were rather useful in answering at least the most common legal questions, furthermore, the special problems of the different fields of implementation also had to be taken into account. Therefore, the ETA includes separate chapters on the most important and most common fields of discrimination, such as employment[512], social security and health care[513], housing[514], education and training[515], as well as the provision of goods and services[516].

509 Article 9 of ETA.

510 This definition was in force as of 2001: „Article 5(2) For purposes of this Act indirect discrimination shall exist where – on the basis of the characteristics defined in Subsection (1) – an employment-related provision, criterion, condition or practice that is apparently neutral or that affords the same rights to all disadvantages a substantially higher proportion of the members of a particular group of employees, unless that provision, criterion, condition or practice is appropriate and necessary and can be justified by objective factors."

511 The former definition of indirect discrimination, which was inserted in the Labour Code in 2001 in the course of labour law harmonisation, had to be applied exclusively to the legal relastionships falling within the scope of the Labour Code.

512 Articles 21–23 of ETA.

513 Articles 24–25 of ETA.

514 Articles 26 of ETA.

515 Articles 27–29 of ETA.

516 Articles 30–30/A of ETA.

The outstanding significance of employment provisions is substantiated by the fact that the articles on employment are the first in the chapter on the "enforcement of the equal treatment principle in various situations". Furthermore, the employment provisions contain the most elaborate and the longest list of prohibitions, such as access to and termination of employment, job advertisements, promotion, pay, where both direct or indirect discrimination may arise.[517]

This specific, detailed list of the prohibition of direct or indirect discriminations is not exclusive, since the employer may discriminate against a person or group in any other way as well. This provision is therefore intended to serve as a guideline for the courts and the Equal Treatment Authority: although this list of particular violations shall be applied exclusively in the cases of direct and indirect discrimination, but it may be a guideline regarding harassment, segregation and victimization as well. Thus, the scope of Article 21 is not limited to special forms of discrimination, but is of a more general scope.

6.5. Harassment and sexual harassment

Harassment is another newly stipulated violation of the equal treatment principle and it was also discussed, whether the ETA should include a specific provision on sexual harassment as well.[518] Finally, Article 10 (2) of the ETA implemented only the definition of the race and the framework directives by introducing a single, general definition of harassment. Accordingly, harassment is a conduct violating human dignity[519] related to the relevant person's characteristic, defined by Article 8 on the discrimination grounds, with the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment around a particular person.[520]

As a result of the detailed regulation, the Equal Treatment Authority has already elaborated an extensive case-law on harassment, especially regarding

517 Article 21 of ETA.

518 The definition of sexual harassment was introduced to EU law for the first time by the amendment (article 2 (2) of Directive 2002/73/EC) of the equal treatment directive (Directive 76/207/EEC).

519 Although the definitions in the Race Directive and the Framework Directive use the term "purpose or effect of violating the dignity of a person", the ETA speaks of "violating human dignity", thus, the reference to the purpose of violation is still missing from Hungarian law.

520 Article 10 (1) of ETA.

employment complaints.[521] Flowing from the provisions on the scope of the ETA, in case of workplace harassment, it is only the employer who may be party to such a discrimination proceeding conducted by the Equal Treatment Authority under the ETA, even if harassment was committed by a workmate or the superior of an employee. Furthermore, the victim of harassment may launch a case before a labour court and his/her claim on damages may be based on the Civil Code provisions on personality rights. In this case, not only the employer but also the boss or the workmate may be sued.

6.6. Victimization

Prior to the ETA, Hungarian labour law did not contain an explicit prohibition of victimization. In such cases the provision prohibiting the wrongful exercise of rights[522] were available against employers, therefore, the employee could refer to this legal basis before the labour court against victimization. Unfortunately, however, this labour law principle was only exceptionally used by victimized employees. The only positive example is Resolution No. 95[523] of the Supreme Court, stating that the dismissal of the employee is unlawful, if it is intended for or leads to the injury of the rightful interests of the employee, harassment, or the suppression of his/her opinion[524]. Thus, the dismissal must be null and void, if the employee makes a complaint or a critical opinion against the employer, and this is then the actual cause (motive) behind the termination of his/her employment.

Victimisation, albeit only a satellite definition of direct discrimination, was a brand new definition at the time the ETA was adopted in 2003. The reason behind the introduction of this semi-independent definition was to promote legal procedures against an existing and extremely harmful discriminatory practice. Accordingly, victimisation is a conduct, which causes, aims at or threatens retaliation against the person making a complaint or initiating procedures

521 See English summaries of decisions stating harassment: http://www.egyenlobanasmod.hu/jogesetek/jogesetek

522 The former provision on 'appropriate exercise of law': Article 4 of the 1992 Labour Code "The rights and duties prescribed in the Labour Code shall be exercised and fulfilled in accordance with the purpose for which they are intended". The present provision on the prohibition of abuse of law is found in article 7 of the 2012 Labour Code.

523 Although the resolutions of the former Supreme Court (now the Curia – www.lb.hu/en) do not bind the courts, they nevertheless have a remarkable effect on the practice of the lower courts.

524 Resolution No. 95. is quoting and interpreting the text of article 4 of the former Labour Code.

because of a breach of the principle of equal treatment, or against a person assisting in such a procedure, as a consequence of his/her behaviour.[525]

This definition is relevant exclusively for employment discrimination cases, however, with respect to all discrimination grounds. Fortunately, there have already been a few victimization cases at the Equal Treatment Authority based on the above described statutory prohibition, which were analysed by the Opinion of the Equal Treatment Advisory Board in 2008.[526] According to the Advisory Board Opinion, the basis for discrimination in case of victimization is launching a complaint or participating in an equal treatment procedure. Thus, victimization may be established even if the discrimination complaint or lawsuit is rejected by the court or the Equal Treatment Authority,[527] since the legal basis is not the discriminatory measure, but much rather the participation in a related procedure. Since victimization reflects upon the retaliation against commencing legal proceedings against discriminatory practices, it is the most reprehensible form of discrimination, to be severely sanctioned.

6.7. Equal pay for work of equal value

Although ILO Convention No. 100 on equal remuneration came into force in Hungary in 1957,[528] this principle was only declared by the Constitution 32 years later in 1989. According to the implementing constitutional provision: "everyone has the right to equal pay for equal work, without any discrimination whatsoever".[529] Therefore, the scope of the constitutional principle was framed as wide as possible, including all discrimination grounds, moving far beyond sex discrimination. Unfortunately, the new Constitution (Basic Law of 2012) no longer contains the equal pay principle, therefore, beyond the statutory provisions, only the general anti-discrimination clause of the Basic Law may be relied on in cases of wage discrimination.

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525 Article 10 (1) of the Act contains the Hungarian translation of the Community law definition found in article 2 section (3) of the Race Directive, and article 2 section (3) of the Framework Directive.

526 Az Egyenlõ Bánásmód Tanácsadó Testület 384/3/2008. (II. 27.) TT. sz. állásfoglalása a megtorlás fogalmáról, http://www.egyenlobanasmod.hu/tt/TTaf_200803 (in Hungarian).

527 Or any other forum possessing competence concerning equal treatment disputes (e.g. ombudsman).

528 However the Convention was enacted only by Act 57 of 2000.

529 Act 20 of 1949 on the Constitution of the Hungarian Republic, Article 70/B (2).

As for statutory provisions, the very first detailed article on the equal pay principle was inserted in the Labour Code as late as 2001[530] as a result of labour law harmonisation.[531]These detailed provisions finally provided a solid legal basis, with clear definitions of pay and work of equal value, which was very useful in the courtrooms. Since the ETA was passed two years after the harmonisation amendment of the Labour Code, it was debated, whether the detailed equal pay provisions should remain in the Labour Code or rather be relocated in the framework of the ETA.

In the end, the 2001 equal pay provisions remained in Article 142/A of the Labour Code, which had to be applied in harmony with the general anti-discrimination rules set forth under the ETA. In our opinion this was an overly complicated solution; instead, all equal treatment provisions, including the equal pay principle should have been simply placed in the ETA, just as the definition of direct, indirect discrimination, harassment etc. The dogmatic basis for this solution would have been the fact, that the violation of the equal pay principle is merely a special form of direct discrimination.

However, the new Labour Code of 2012[532] retained most of the detailed rules of the former Labour Code passed in 2001. According to Article 12 of the new Labour Code on equal treatment: "in connection with employment relationships, such as the remuneration of work, the principle of equal treatment must be strictly observed".[533] As a result, the stipulation of the principle of equal pay for equal work is now absolutely missing from the Hungarian legal system, since it was deleted from the Basic Law and it was not inserted into the Labour Code either. This principled rule is not fully compensated for by the soft reference to the pay gap in Article 12 of the Labour Code. This sends an

530 Act 16 of 2001.

531 Article 142/A: (1) In respect of the remuneration of employees for the same work or for work to which equal value is attributed no discrimination shall be allowed on any grounds (principle of equal pay).
(2) The principle of equal treatment shall be based on the nature of work, its quality and quantity, working conditions, vocational training, physical and intellectual efforts, experience and responsibilities.
(3) For the purposes of Subsection (1) ‚wage' shall mean any remuneration provided to the employee directly or indirectly in cash or kind based on his/her employment.
(4) The wages of employees – whether based on the nature or category of the work or on performance – shall be determined without any discrimination among the employees (Section 5).

532 Act No. 1 of 2012 on the Labour Code.

533 Remedying the consequences of any breach of this requirement may not result in any violation of, or harm to, the rights of other workers (article 12 of the 2012 Labour Code).

unfortunate message from the side of legislation clearly demonstrating the (lack of) significance afforded to this issue.

As regards the detailed provisions, the present Labour Code kept the former definition of wage, which „shall mean any remuneration provided directly or indirectly in cash or in kind, based on the employment relationship". In ouropinion, this definition is fully compliant with the equality Directives and the case-law of the Court of Justice of the European Union.[534]

Moreover, the new Labour Code also kept the former definition of equal work (work of equal value), which shall be determined „based on the nature of the work performed, its quality and quantity, working conditions, the required vocational training, physical or intellectual efforts expended, experience, responsibilities and labour market conditions".[535] 'Labour market condition' is the only new element in this list, explicitly meant to restrict the scope of comparison. The notion reflects upon the problem rooted in the above described wide interpretation of discrimination grounds, particularly the wide concept of „other characteristics". The objective of the legislator was to prevent employees from suing their employers based on regional pay differences, since the Supreme Court and the Equal Treatment Authority equally accepted comparison on the basis of a regional pay difference.[536]

Even though we agree with this narrow understanding of the equal pay principle excluding claims based on regionality place of work, the chosen method is flawed, since it only provides an opportunity of exemption through a restricted comparison of employees. In this case, the alleged pay gap must be investigated (the procedure must be commenced), but the employer may be exempted by stating that the two compared employees do not perform work of equal value, as the labour market conditions are rather different for instance in the two outmost regions of the country, where the two different workplaces of the same employer are situated. The real solution for this existing legal problem would have been the narrow regulation and/or interpretation of „other characteristics", clarifying that regionality cannot be a discrimination ground in equal pay disputes. According to this alternative solution, procedures would not

534 This definition of pay coincides with the provision of the former Labour Code, which was passed in 2001 as a result of the EU accession negotiations (bilateral acquis screening). The author was the member of the Hungarian delegation and the key speaker on equal treatment.

535 Article 12 (2)-(3) of the 2012 Labour Code.

536 Supreme Court BH 2010/2155.; Equal Treatment Authority Dec. No. 161/25/2012. (http://www.egyenlobanasmod.hu/data/161-2012.pdf)

be initiated for lack of a legitimate discrimination ground. At the same time, it is still unclear, how this new provision will work in the courtroom.[537]

6.8. Reasonable accommodation

The provision on reasonable accommodation has formed part of the FOT since 1998: "the employer providing employment must ensure the workplace environment to the extent required to perform the work, in particular ensuring the suitable modification of tools and equipment. Applications can be made to the central budget for support to cover the costs of such modifications."[538] This provision may be relied on by an employee or a refused job applicant as well. Since the disability equality law does not define its scope with respect to legal relationships aimed at employment, it shall be applied in accordance with the wide scope of the ETA (see above).[539] Therefore, the general provisions of the ETA shall be applied regarding both sanctions and procedure.

Moreover, the new Labour Code actually contains a corresponding obligation, without however, going into much detail: "in the employment of persons with disabilities appropriate steps shall be taken to ensure that reasonable accommodation is provided."[540] The obligation of the employer therefore remains somewhat vague, just as the applicable exemptions and sanctions. Consequently, as a new field of prohibited discrimination, legal practice will play a special role in elaborating its specifities in the coming years. The lack of detailed provisions may be made up for by referring to the fundamental rules of conduct stipulated among the introductory provisions of the Labour Code, such as the duty of cooperation[541] and the prohibition of wrongful exercise of rights.[542]

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537 The existing case-law of the Equal Treatment Authority focuses on the pay gap based on sex. See for example: Equal Treatment Authority Dec. No. 242/2006. (http://www.egyenlobanasmod.hu/jogesetek/hu/242-2006.pdf).

538 Article 15 (2) of FOT.

539 Az Egyenlő Bánásmód Tanácsadó Testület 309/1/2011. (II.11.) TT. sz. állásfoglalása az akadálymentesítési kötelezettségről, http://www.egyenlobanasmod.hu/data/TTaf_20110211-1.pdf (in Hungarian).

540 Article 51 (5) of the 2012 Labour Code.

541 Article 6 (2) of the 2012 Labour Code.

542 Szilvia Halmos: Requirement of reasonable accommodation under Hungarian employment law. *Hungarian Labour Law E-Journal* (www.hllj.hu), 2014/1. 97.

7. Exemptions

The obligated party may be exempted from an otherwise valid obligation, and may, therefore, lawfully treat a person or a group less favourably than another person or group in a comparable situation. Hence, where exemptions apply, the ETA and the requirement of equal treatment are still valid, however, due to certain conditions, the particular measure does not constitute discrimination.

Presently, the ETA enshrines two general exemptions and also specific exemption clauses, including a specific employment exemption clause in Article 22. Furthermore, the Act also contains the definition of preferential treatment (positive actions), as an exception from the equal treatment principle. Although the exemptions have been significantly amended and supplemented in 2006, the exemption system remains overly complicated and does not fully comply with EU law. In this chapter, we analyse the general and specific exemptions applicable in labour law, as well as the definition of preferential treatment.

7.1. Two general exemption clauses

The ETA contains two general exemption clauses,[543] which were inserted into the Act in this form in 2006 as a consequence of problems arising in court practice.[544] As a result, the two clauses contain different exemption tests for fundamental rights and non-fundamental rights. First, let us examine the exemption clause for non-fundamental rights: a discriminatory measure does not violate the principle of equal treatment, if, according to objective consideration, it has a "reasonable cause directly related to the particular legal relationship". Second, let us turn to the test for fundamental rights: differences in treatment are justified, if the fundamental right of the person put at a disadvantage is restricted in an imperative, unavoidable way to ensure the fundamental right of another person, assuming that this restriction is appropriate and proportionate to achieve that aim.

The aforementioned two clauses shall be applied both in direct, indirect and all other discrimination cases. This framework is not fully consistent with EU Directives, since direct discrimination may only exceptionally be justified

543 Article 7 (2) of ETA.

544 Supreme Court Dec. EBH 2005/1216., analyzed in: Kárpáti, József: Az utolsó próbatétel. Ítélet a Háttér Társaság kontra Károli Egyetem ügyben. *Fundamentum*, 2005/3.

under EU law. The 2006 amendment of the ETA constricted the justification possibilities remarkably, providing that direct discrimination and segregation based on racial origin, colour, nationality, national or ethnic origin cannot be exempted.[545] In our view, the two general exemption clauses (article 7) are still wider than foreseen by the EU Directives.

7.2. Specific exemption clause in employment disputes

The Labour Code incorporated the concept of "genuine occupational requirements" (GOR) in 1992. According to Article 5 of the 1992 Labour Code, repealed by the ETA, the distinction between employees shall not be considered discrimination, in case "it unambiguously ensues from the nature and requirements of the work". According to the published judgment of the Supreme Court, the distinction between the employees does not violate Article 5 of the Labour Code on the prohibition of discrimination, if it is necessary and objectively justified by the employer.[546]

The ETA replaced the above mentioned exemption clause with a similar, but more elaborate and sophisticated exemption system in employment matters. In addition to the general exemption clauses, Article 22 of the ETA contains special exemptions for employment disputes.[547] Accordingly, the principle of equal treatment is not violated in employment relationships, provided that the distinction is proportionate, justified by the characteristic or nature of the work and is based on relevant and legitimate terms and conditions.[548] Moreover, the principle of equal treatment is not violated in case the distinction arises directly from a religious or other ideological conviction, respectively national or ethnic origin, fundamentally determining the nature of the organisation, being at the same time proportional and justified by the nature of the employment activity or the conditions of its pursuit.[549]

The exemption system seeks to promote effective and smooth enforcement, raising at the same time serious doubts as well. The present system of one general and two special exemption clauses (employment, education) is rather

545 Article 7 (3) of ETA.

546 Supreme Court BH 2003/86.

547 There is an exemption clause for education as well (article 28).

548 Article 22.a of ETA.

549 Article 22.b of ETA.

complicated and the relationship between them is not clarified by the ETA. In practice, in employment cases exclusively the specific, employment clause is relied upon (*lex specialis*, Article 22), thus, the general clause is set aside (*lex generalis*, Article 7).

Nevertheless, the 2006 amendment of the ETA restricted the specific employment exemption clause as well, as the violation of the equal pay principle based on sex, racial origin, colour, nationality, national or ethnic origin may not be exempted in any case. However, even this restricted provision allows for a wider range of exemptions than is foreseen by EU law. Furthermore, it is worth mentioning that the special exemption clause for age discrimination, required by Article 6 of the Employment Equality Directive, is missing from the ETA. Although Article 22 shall be applied to such cases, its scope is remarkably different.

7.3. Preferential treatment (positive actions)

"Positive discrimination" was the generally accepted term for positive actions preceding 2003; the expression was regularly employed even by the Constitutional Court itself.[550] At the same time, this expression was widely criticised, since it does not properly express the meaning of such measures and has a rather disturbing connotation. Marking a symbolic change, the ETA introduced a new term in its stead: preferential treatment. The detailed regulation of the possibility and also the limits of preferential treatment measures was a substantial and also symbolic innovation in the legal framework.

As for the definition and limitation of preferential treatment, a slightly more differentiated approach proved to be necessary, as compared to the equal treatment definitions. Safeguarding equal opportunities is all the more the obligation of the state, to be ensured through positive actions and legislation. Thus, the scope of measures concerning equal opportunities basically includes the state itself including local governments, as well as the bodies and institutions of the same. Legislation may, however, stipulate obligations for private individuals and non-state organs for embracing positive actions, and may also ensure their legal enforceability.

[550] The Constitutional Court used the term 'positive discrimination' for the first time in Dec. 9/1990. (IV. 25.) AB, and later also in various other decisions.

Preferential treatment assumes a unique position amongst the above mentioned definitions, since Article 11 of the ETA exclusively deals with the limits of such practices. The preferential treatment provision is primarily based on the Constitutional Court's practice: "the prohibition of discrimination does not exclude any distinction aiming at increasing social equality"[551]. Accordingly, a measure or behaviour is not unconstitutional, if a constitutional right or objective can only be achieved by applying such a "preferential treatment measure", violating the rules of formal equality. However, the limits of these measures are to be found in the principle of equal treatment itself, as well as the prohibition of restricting the substance of fundamental rights[552] set forth by the Constitution. Although social equality as a general objective of society as a whole may come before personal interests, it cannot however, override the constitutional rights of the individual.[553] Beyond Constitutional Court decisions, EU law[554] and the case-law of the European Court of Justice[555] must also be observed in this regard.

Taking into consideration the foregoing requirements, preferential treatment measures shall not violate any fundamental rights, provide unconditional advantage or exclude the consideration of individual circumstances. The ETA allows for two kinds of positive actions, aiming at the elimination of the inequality of opportunities based on an "objective assessment of an expressly identified social group". Firstly, the preferential treatment measure may be based on an act, government decree or a collective agreement, though it can be effective only for a definite term or until a specific condition is met. Secondly, preferential treatment may be used at the election of a political party's executive and representative body or selecting candidates for the elections. Both provisions allow for the application of quota, albeit with the above mentioned legal restrictions.

The deficiency of this definition of preferential treatment stems from the fact that other Acts and government decrees are not equipped to enforce it. However, the discriminatory provisions of collective agreements are null and void, in

551 Dec. 9/1990. (IV. 25.) AB.

552 See Article 8 par. 2 of the Constitution.

553 Dec. 9/1990. (IV. 25.) AB.

554 See article 5 of the Race Directive, respectively article 7 of the Employment Equality Directive.

555 See particularly: C-450/93. Kalanke v. Freie Hansestadt Bremen [1995] ECR I-3051; C-409/95. Marschall v. Land Nordrhein-Westfalen [1997] ECR I-6363; C-158/97 Badeck and others [2002] ECR I-1875; C-407 Abrahamsson and Anderson [2000] ECR I-5539.

case they violate the provisions of an Act, such as the definition of preferential treatment in the ETA.[556] For example, the preference given by the collective agreement to the relatives of the employees at the selection of new employees must be null and void.

8. Procedural provisions: burden of proof and class action

Procedural provisions are a key element of an effective anti-discrimination law. The ETA considerably improved procedural rules to provide for an efficient legal framework by introducing a highly relaxed burden of proof clause and the innovative concept of class action.

8.1. Burden of proof: radical shift of risk

As of 1997, the burden of proof Directive obliged the Member States to reverse the burden of proof in discrimination cases[557], but the Hungarian Labour Code had introduced this rule as early as 1992. According to the former Article 5 of the 1992 Labour Code, the defendant must prove all, if there is a legal dispute concerning discrimination.[558] Since the Labour Code reversed the burden of proof only in case of labour disputes, this rule had to be extended to other fields of discrimination as well, since EU law contained this obligation for a wide scope.

Moreover, the application of this provision raised serious problems in legal practice. It was not obvious, what facts or evidence the plaintiff was bound to establish before the court to push the obligation to prove to the respondent's side. In the *Farkas case*, the first instance court stated that the plaintiff must prove that she visited the office of the defendant for a job interview. Since Ms Farkas, the roma applicant could not prove her visit at the hotel with direct

[556] An agreement, which violates any legal regulation pertaining to labour relations or any other statutory provision, shall be null and void. If invalidity of an agreement cannot be remedied within a reasonable period of time without causing injury to the parties and to public interest, it shall be recognized ex officio (article 27 of the 2012 Labour Code).

[557] See article 4 (1) of Directive 97/80/EC.

[558] See former article 5 (8) of the 1992 Labour Code, repealed by ETA from 28 January 2004: "In the event of any dispute in connection with the employer's actions, the employer shall be required to prove that his/her actions did not violate the provisions for the prohibition of discrimination."

pieces evidence (witnesses, documents etc.), only through a chain of indirect evidence, the court rejected her lawsuit against the potential employer, for lack of proof.

Finally, the Supreme Court overturned this flawed decision on appeal in its fundamental burden of proof judgment.[559] According to the reasoning of the Supreme Court, it was a misinterpretation of Article 5 of the Labour Code to "divide" the burden of proof and to require the plaintiff to prove that she took part in the negotiations at the defendant's office. Although it is not enough to allege discrimination, it however suffices to prove the detriment by the plaintiff. If the plaintiff proves the detriment, then it is for the defendant to prove that he/she observed the principle of equal treatment.

The ETA amended – at first sight restricted – the above mentioned vague wording of Article 5 of the Labour Code by sharing the burden of proof between the plaintiff and the respondent.[560] In the procedures initiated because of the violation of the principle of equal treatment, the plaintiff must show the probability, that he/she suffered a disadvantage, and exhibits at least one of the protected characteristics (see Article 8 of ETA).

According to the original text of the ETA, the plaintiff had to prove the disadvantage and the discrimination ground, however, the 2006 amendment all eviated the plaintiffs' obligations. If the plaintiff simply "shows the probability" of the disadvantage and the existence of a discrimination ground (protected characteristic), then it is for the respondent to prove, that a) he/she has observed the principle of equal treatment, or b) in respect of the relevant legal relationship, was not obliged to observe such principle. However, Article 19 shall not apply to criminal procedures and to procedures of minor offences.[561]

The new burden of proof provision contained in the ETA (in its present form since 2006) plays a highly important role in litigation and also in the procedures of the Equal Treatment Authority. Therefore, the Advisory Board of the Equal Treatment Authority issued an opinion[562] on the new rule, in order to promote the appropriate interpretation of the same. Formerly, it was the general understanding of judges[563] that the plaintiff should also prove causality between

559 Supreme Court BH 2004/255.

560 Article 19 of ETA.

561 Minor offences cover special procedures governed by Act 69 of 1999 on Minor Offences.

562 The text of the opinion on the burden of proof provisions is accessible in Hungarian on the website of the Equal Treatment Authority (www.egyenlobanasmod.hu).

563 The Members of the Advisory Board took part in several consultations and trainings for labour judges in 2006.

his/her protected characteristic and the detriment. This interpretation would be dangerous, however, since it entails proving the violation of the equal treatment principle as well. The opinion emphasizes, that the defendant must prove the above mentioned causality. At the same time, the published decision of the Supreme Court required the complainant to show (prove) the probability of the causality between the discrimination ground and the detriment.[564]

This new division of the burden of proof is unproblematic on the surface, yet in harassment cases the equal treatment principle may be violated even in lack of a detriment. At the same time it is worth noting that the amended burden of proof provision is still much more beneficial for claimants than the interpretation of EU provisions[565] rendered by the European Court of Justice in the Accept[566], Kelly[567] and Meister decisions.[568] It must be pointed out however, that the interpretation of the burden of proof provision of the ETA by the Supreme Court may yield some surprises in the near future concerning the causality problem.

8.2. Class action and representation

Before 2004 the institution of class action was missing from Hungarian law. The legislative freedom of the Hungarian National Assembly was restricted in this respect by a 1994 decision of the Constitutional Court[569], which found unconstitutional and thus repealed the general right of the public prosecutor to initiate or participate in a court procedure to pursue an "important state or social interest". According to the reasoning of this decision of the Constitutional Court, the right of action includes the right of the client not to initiate a legal (court) procedure, derived from the constitutional right of human dignity and self-determination. Therefore, provisions which detract or substitute the right

564 Supreme Court BH 2010/2272.

565 See for example article 10 (1) of the Employment Equality Directive: "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

566 Case C-81/12 Asociaţia *ACCEPT.* v. Consiliul Naţionalpentru Combaterea Discriminării [2013] ECR n.y.r.

567 C-104/10 *Kelly* [2011] ECR n.y.r.

568 C-514/10 *Meister [2012]* ECR n.y.r.

569 Decision 1/1994. (I. 7.) AB.

of the client to turn to the court are unconstitutional, even if they pursue an important state or social interest. This decision had to be observed and followed in respect of the class action provision of the ETA.

The objective of the class action rule is to facilitate launching a case before the court or the Equal Treatment Authority. A serious procedural obstacle in the former rules was that only those persons could initiate a legal procedure, who suffered a disadvantage from a measure, excluding groups of persons or NGOs.[570] The Hungarian class action provision[571] authorizes the public prosecutor, the Equal Treatment Authority, human rights NGOs and trade unions[572] to launch a case before the civil and labour courts for violations of the equal treatment principle.[573] The only condition being that the violation was based on a characteristic (listed in Article 8), which is an essential feature of the individual and affects a larger group of persons that cannot be determined accurately.[574] The existing class action provision was obviously not very popular, since only a few NGOs initiated such a procedure[575] and the Equal Treatment Authority has yet to launch a case based on this provision.

In the original version of the ETA, class action was confined to labour and civil court procedures. It was up to the second step in the 2006 amendment of the ETA to add the possibility of launching class actions before the Equal Treatment Authority by NGOs and trade unions. Class actions before the Authority, which may result in the Authority imposing a discrimination fine, constitute an effective way of combating discrimination, particularly regarding public advertisements, which exclude applicants based on age or sex.[576]

Beyond the means of launching class actions, NGOs, trade unions and the Equal Treatment Authority may act as a representative authorised by the injured

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570 This was an important issue in the Kádár v. Profi Ltd. case on sex and age discrimination (Peszlen op. cit. 138–149.).

571 Article 20 of ETA.

572 Social and interest representation organisation: social organisation or foundation the objectives of which set out in its articles of association or statutes include the promotion of the equal social opportunities of disadvantaged groups or the protection of human or personal rights; and, in respect of a particular national and ethnic minority, the minority government; furthermore the trade union in respect of matters related to employees' material, social and cultural situation and living and working conditions (article 3.e of ETA).

573 The only difference between regular court proceedings and class action cases is that the compensation and fines of public interest imposed in the latter case are due to the central budget (article 20 (2) of ETA).

574 Supreme Court BH 2012. M5.

575 For example, the above mentioned case on the burden of proof (Supreme Court BH 2004/255).

576 See the problems in the Kádár v. Profi Ltd. case.

party in procedures initiated because of a violation of the principle of equal treatment. In a public administrative procedure, the trade union or the human rights NGO is entitled to the rights of the client.[577]

9. Enforcement body: the Equal Treatment Authority

9.1. Debates on the institutional framework

The establishment of an institution combating discrimination was by far the most fervently debated issue during the drafting of the ETA. The legislator had to provide a clear answer to the institutional question, since the existing institutional framework did not comply with the requirements of Article 13 of the Race Directive.[578] Moreover, experience from legal practice had shown, that an effective institutional framework is an indispensable prerequisite of an efficient anti-discrimination law mechanism.

Two key questions were identified in the course of the analysis of the legislative options. Firstly, whether there was a need for establishing a new institution, or an existing body could be amended to perform this role. The second question concerned the possible jurisdiction and sanctions available to the designated institution.

9.1.1. New institution or existing body?

Two existing bodies, the Parliamentary Commissioner for Civil Rights and the Parliamentary Commissioner for National and Ethnic Minorities' Rights[579], seemed appropriate for the role prescribed by Article 13 of the Race Directive.

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577 Article 18 of ETA.

578 „Article 13 1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights. 2. Member States shall ensure that the competences of these bodies include: without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7 (2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination; conducting independent surveys concerning discrimination; publishing independent reports and making recommendations on any issue relating to such discrimination."

579 In the meantime the position of the Parliamentary Commissioner for National and Ethnic Minorities Rights was terminated as of 2012. More information on the history

Nevertheless, the competences of the two Commissioners covered only public authorities and public services and failed to comply with the scope of the Equality Directives. Therefore, the Commissioners could only have complied with Article 13 of the Race Directive, if their constitutional competences had been radically extended with respect to discrimination cases. Since amending the Commissioners' competences would have required a qualified majority, which the government could not secure, the establishment of a new anti-discrimination institution seemed to be the only solution.

9.1.2. Targeting strong competences and effective sanctions

The debate on the competences of the new equality body was closely connected with the discussion on remedies. The most evident shortcoming of the former anti-discrimination provisions was the lack of effective, proportionate and dissuasive sanctions. In labour disputes the courts largely relied on the Civil Code provisions on immaterial damages for lack of applicable labour law sanctions.[580] Human rights lawyers thus proposed the establishment of a new equality body with strong competences and effective sanctions. Considering the special conditions of the Hungarian the labour market, as well as the experiences gained from former litigation, only a strong institution could play an active and successful role in the fight against employment discrimination. The labour fine of the Labour Inspectorate[581] seemed to be the model to follow.

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of these institutions is available at http://www.ajbh.hu/en/web/ajbh-en and http://www.kisebbsegiombudsman.hu/index.php?lang=en (in English).

580 Article 84 (1) of the former Civil Code: „A person whose inherent rights have been violated shall have the following options under civil law, depending on the circumstances of the case: a) demand a court declaration of the occurrence of the infringement, b) demand to have the infringement discontinued and the perpetrator restrained from further infringement; c) demand that the perpetrator provide for restitution in a statement or by some other suitable means and, if necessary, that the perpetrator, at his own expense, make an appropriate public disclosure for restitution; d) demand the termination of the injurious situation and the restoration of the previous state by and at the expense of the perpetrator and, furthermore, to have the effects of the infringement nullified or deprived of their injurious nature; e) file charges for punitive damages in accordance with the liability regulations under civil law."

581 Act 75 of 1996 on Labour Inspection.

9.2. Equal Treatment Authority: the legal status of the equality body

The difficulties related to extending the competences of the Parliamentary Commissioners, as well as the will of the legislator to introduce a public administration sanction (discrimination fine), supported the idea of establishing a new equality body. The Equal Treatment Authority established in the end formed part of the public administration structure,[582] as this was the only way to delegate competences to fine those breaching the equal treatment principle (administrative sanctions). The procedure of the Authority is governed by Act 140 of 2004 on the General Rules of Administrative Proceedings and Services.

9.2.1. Jeopardized independence

The independence and the independent control exercised by this specialised public authority is rather problematic, since the Equal Treatment Authority works under the supervision of a designated minister within the Government.[583] The legislator had no other choice, since all public authority must be part of the structure of public administration. In order to ensure at least a relative independence within the administrative institutional framework, the ETA stated that "the Authority cannot be directed in its exercise of duties".[584] However this provision was deleted from the ETA in 2011 and it remains to be seen whether the existing legal framework will be able to permanently guarantee independence from governmental interference.

582 The Equal Treatment Authority is presently regulated by Act 140 of 2004 on the General Rules of Administrative Proceedings and Services.

583 Kádár, András: Az Egyenlő Bánásmód Hatóság függetlenségéről. *Fundamentum* 2010/2. 98–101.

584 Article 13 (3) of ETA, repealed by Act 174 of 2011.

9.2.2. The role of the former Advisory Board

It was a source of independent expertise that the Equal Treatment Authority used to perform certain duties[585] in co-operation with an Advisory Board. Although the members of the Advisory Board were nominated by the Prime Minister, they had to demonstrate extensive experience in the protection of human rights and the application of anti-discrimination law.[586] The Advisory Board has issued several opinions on legal questions concerning the application of the Act[587] - several of these opinions have been cited above. Following the expiration of the six-year mandate[588] of the first Advisory Body, the relevant ETA provisions were repealed in 2011 and the Advisory Board ceased to exist.[589] No official explanation was offered for the termination of the Advisory Board and we find it a misguided decision, since this body played an important role in providing the theoretical background for legal practice.

9.3. Competences of the Equal Treatment Authority

9.3.1. Public administrative sanctions

The ETA contains ten tasks, the most important being that the Authority, based on an application submitted or in cases defined by ETA, conducts *ex officio* an investigation to establish whether the principle of equal treatment has been violated, following which it takes a public administrative decision.[590] If the

585 The following duties had to be performed in co-operation with the Advisory Board: c) review and comment on drafts concerning equal treatment; d) make proposals concerning governmental decisions and legislation pertaining to equal treatment; e) regularly inform the public and the Government about the situation concerning the enforcement of equal treatment; f) co-operate with NGOs; g) continually provide information to those concerned and offer assistance in acting against the violation of equal treatment; h) assist in the preparation of governmental reports to international organisations, especially the Council of Europe; i) assist in the preparation of the reports for the European Commission concerning harmonisation of the equal treatment directives [former article 14 (1)].

586 Article 14 (3) of ETA, repealed by Act 174 of 2011.

587 The Advisory Board issued the following opinions in 2006: burden of proof, accessibility and scope of the Equal Treatment Act regarding financial institutions (www.egyenlobanasmod.hu).

588 The mandate of the Advisory Board lasted between 2005-2011.

589 Articles 17/B-17/E were repealed by Act 174 of 2011 from 1 February 2012.

590 The Authority cannot investigate decisions and measures of public power authored by the Parliament, the President, the Constitutional Court, the State Audit Office, the Parliamentary

Authority has established, that the provisions ensuring the principle of equal treatment were violated, it may impose the following sanctions[591]: order that the situation constituting a violation of law be terminated; prohibit the further continuation of the violation; publish its decision establishing the violation of law; impose a discrimination fine or apply a legal consequence determined in another act.[592]

These simultaneously applicable sanctions shall be imposed after taking into consideration all circumstances of the case, with particular regard to the consequences and the duration of the violation, the repeated demonstration of conduct and the financial situation of the person or entity committing such a violation.[593] The amount of the discrimination fine ranges from fifty thousand to six million Forints (circa 170-20000 Euros), which used to be in line with the amount of the labour inspector's fine (proportionality), but is now lagging behind.[594] The maximum amount of the fine is quite high, thus, this sanction may have the required dissuasive effect. However, the effectiveness of the fine is mitigated by the fact, that it does not compensate the person discriminated against, since it is payable to the central budget.[595]

In practice, the discrimination fine and the publicity of decisions have been the most common and most effective sanctions imposed by the Equal Treatment Authority. However, the discrimination fine has been imposed in a rapidly decreasing number of cases in the last few years: 20 fines in 2010, 11 in 2011 and only 2 in 2012.[596] There is no reasonable explanation for eliminating the most important sanction available to this public administration body – basically the very reason for establishing this institution in its present form. The Equal Treatment Authority may rapidly become a toothless lion without imposing discrimination fine. Was this the underlying goal of its management all along, or just a misunderstanding?

Commissioners of civil rights, the courts and the public prosecution (article 14 (3) of ETA).

591 Article 17/A (1) of ETA.

592 It must be noted, that there were no such sanctions in other Acts, although the possibility remained open.

593 Article 17/A (3) of ETA.

594 This statement was true at the time of the adoption of the Equal Treatment Act, since the possible amount of the discrimination and the labour fine was the same. However, the amendment of Act 75 of 1996 on Labour Inspection (Act 155 of 2005) increased the amount of the labour fine (article 7), but the amount of the discrimination fine remained unchanged.

595 Article 34 (3) of ETA.

596 www.egyenlobanasmod.hu

9.3.2. Further competences

The above mentioned investigative power was the main reason the legislator insisted on establishing a new institution forming part of public administration. Nonetheless, the Authority shall also have the following competences:

- pursuant to the right of class action, initiate a lawsuit with a view to protecting the rights of persons and groups, whose rights have been violated;
- comment on drafts related to equal treatment;
- make proposals concerning governmental decisions and legislation pertaining to equal treatment;
- regularly inform the public and the Government about the equal treatment situation;
- co-operate with the social partners, NGOs and the relevant governmental institutions;
- provide information to those concerned and offer assistance to act against the violation of equal treatment;
- assist in the preparation of governmental reports to international organisations, especially to the Council of Europe concerning the principle of equal treatment;
- assist in the preparation of the reports for the European Commission concerning the equal treatment directives;
- prepare an annual report to the Government on the Authority and its experiences obtained in the course of the application of the Act.[597]

It may be clear from the above described list of competences, that the Equal Treatment Authority possesses a wide jurisdiction, covering all discrimination fields and discriminated groups, including discrimination against all kinds of persons and groups of persons in employment. As a general observation we may state that the Equal Treatment Authority has strong powers in an international comparison of similar equality bodies.

[597] Article 14 (19) of ETA.

10. Domestic case-law

10.1. Remedy system: the role of courts

There are two main forums in employment discrimination cases: the Equal Treatment Authority and the labour court.[598] The ETA clarifies the interaction of the public administration and court procedures. In accordance with judicial practice, the labour court may proceed in parallel to the procedure of the Equal Treatment Authority, if the litigation concerns the same employment relationship, but the lawsuit is not based on the same discriminatory measure of the employer.[599]

The main differences between turning to the civil or labour court and the Equal Treatment Authority are the possible sanctions and the speediness of procedure. The forums also have certain common sanctions at their disposal[600], however, there is a great difference between their procedures regarding compensation. The civil and labour court may oblige the employer to pay material and immaterial damages in accordance with the liability regulations under civil law.[601] Evidently, the Authority may impose such a sanction, yet it can impose a discrimination fine. Therefore, only the court procedure may provide indemnification for the person or group discriminated against. Apparently, the victims of discrimination are not attracted by this possibility, since there have been much less employment discrimination litigations heard before the labour courts than administrative procedures at the Equal Treatment Authority in the last ten years.

We may conclude that the Authority is more popular than the courts. The main reason for the lack of popularity of litigation is, that it is rather slow, expensive and requires legal expertise, unlike a public administrative porcedure. Thus the Equal Treatment Authority attracts the majority of the complaints, as its

598 The Commissioner for Fundamental Rights (http://www.ajbh.hu/en/web/ajbh-en) also plays a limited role in the remedy system.

599 Metropolitan Court Decision 8.K.32.975/2005/7, p. 6.

600 The ETA copied some of the sanctions of the Civil Code for the purposes of sanctions for violating personality rights (article 84), which may be applied by labour courts as well. Therefore, the labour and civil courts, respectively the Authority may equally order, that the situation constituting a violation of law be eliminated, prohibiting the further continuation of the violation.

601 According to article 339 (1) of the Civil Code: „A person who causes damage to another person in violation of the law shall be liable for such damage. He shall be relieved of liability if he is able to prove that he has acted in a manner that can generally be expected in the given situation."

procedure is much more simple, free of charge and must be completed within the short deadlines of public administrative proceedings.[602]

10.2. General comments on the case-law of the Equal Treatment Authority

The declared aim of the ETA was to substantially increase the volume of procedures against discrimination, however, the number of court procedures has only slightly increased following the adoption of the ETA.[603] According to our experience and the limited available information on court practice, in many lawsuits equal treatment provisions are usually referred to as secondary claims, however, the number of *prima facie* cases of employment discrimination is still low.

The establishment of the Equal Treatment Authority in February 2005 was a turning-point regarding the remedy system. The Authority received 491 complaints in 2005, which increased to 1153 in 2008, 1300 in 2010 and 1496 in 2013. This means that the number of complaints received had tripled between 2005 and 2013. Most of the complaints are in connection with discrimination in the labour market, predominantly submitted by women over 50, roma and disabled persons.[604] The low number of decisions establishing discrimination may be explained by the incomplete knowledge on discrimination law and the large proportion of unfounded complaints.[605]

10.3. Judicial review of the decisions of the Equal Treatment Authority

The decision of the Authority cannot be appealed against in the framework of a public administrative procedure. The administrative decision of the Authority

602 Act 140 of 2004 on the General Rules of Administrative Proceedings and Services.

603 There were altogether about 10-15 discrimination court procedures in progress in 2005, mostly initiated by human rights NGOs (Hungarian Helsinki Committee, Legal Defence Bureau for National and Ethnic Minorities etc.). Unfortunately there are no available reliable statistics on this issue, therefore, the author must rely on his own experience: the number of discrimination cases have slightly increased during the last decade.

604 http://www.egyenlobanasmod.hu/cikkek/beszamolok

605 The Constitutional Court and the Parliamentary Commissioners had the same experience in the first few years.

cannot be altered or annulled by supervisory bodies and only the court has the competence for review. In addition the lawsuit falls within the exclusive scope of authority and competence of the Metropolitan Public Administration and Labour Court, which shall proceed through a panel comprised of three judges.[606] This solution may guarantee that these few judges are specialized in equal treatment cases, which may improve the quality of court decisions.

11. Reform of Hungarian anti-discrimination law: subjective appraisal

Hungarian law has always contained a few sparse provisions on the prohibition of discrimination, however, these failed to constitute a coherent and efficient system. The comprehensive reform of the Hungarian anti-discrimination legislation was carried out in 2003 by passing the ETA. The Hungarian anti-discrimination law is uniform in the sense that it applies exactly the same rules for the different fields of discrimination and for the various discrimination grounds. In the course of the elaboration of the reform, the legislator had in mind a set of ambitious goals to achieve. The new legislation should comply with the relevant constitutional and EU law requirements, create a coherent and effective system, while respecting the private sphere. Altogether, the ETA is expected to promote the practical enforcement of the equal treatment principle.

Undoubtedly, the Equal Treatment Act was a significant step forward in this direction. Its success depends on how much the Equal Treatment Authority and the labour courts are able to fill the definitions of ETA with content, how efficient the sanctions and procedural provisions are, and to what degree the prohibitions of the Act become part of common knowledge. The first decade of applications have shown that the Equal Treatment Authority is very active in this field, but the court case-law is still lagging behind. Most of the complainants prefer the Authority to the court, since the public administrative procedure is faster, easier and cheaper than litigation. The balance shows that while damages may be claimed only from the court, the most effective sanction of the Equal Treatment Authority, the discrimination fine has hardly been imposed recently, reducing the efficiency of the Authority's efforts.

606 The lawsuit falls within the scope of authority and exclusive competence of the Metropolitan Public Administration and Labour Court. The Metropolitan Court shall proceed through a panel comprised of three professional judges (see article 17/B).

It was clear from the very beginning that the reform of anti-discrimination law cannot be finished in one single legislative step, but much rather requires continuous legal developments. In the present situation, this means the monitoring of the implementation and the refining of the Equal Treatment Act. Unfortunately, the number of detailed, at times unnecessary procedural provisions is increasing year by year, which seem to erode the consistency and transparency of the legal framework. Notwithstanding the above, the Hungarian reform has already brought several interesting innovations, resulting in the steady development of legal practice.

VI.
COLLECTIVE RIGHTS IN THE NEW LABOUR CODE

1. Employees' representation in Hungarian labour law

Hungarian labour law regulates four institutions of employees' representation:

- trade union: autonomous legal entity, typically a 'confrontational' organization of employee's representation.
- works council: assures the participation of employees in management, without a separate organisation or legal personality.
- representatives of employees on the supervisory board of a business organisation: as a special form of employee's participation, this possibility is only available in case the business organisation employs more than 200 employees. At such employers one third of the members of the supervisory board must be elected by the employees. Candidates are nominated by the works council after hearing the trade union's opinion.[529] This is much rather a civil law institution than a form of employee representation, as the supervisory board is in charge of monitoring whether the management's actions are in line with the legal provisions and the company contract, furthermore, it seeks to safeguard the members' (shareholders') interests. Employee members share the same rights and obligations as other board members.[530] Employee members are usually also elected trade union officials or members of the works council who use this mandate to acquire further information on the operation of the employer.
- representation in health and safety matters: a special organisation of employee's participation, its function is to facilitate employee participation in guaranteeing work safety, as prescribed in the

[529] Civil Code Article 3:125.

[530] Civil Code Article 3:120 (3), 3:126.

framework directive on occupational health and safety.[531] To this end, employees elect a representative for workplace health and safety in workplaces with over 50 employees. The representative takes part in the employer's decision making processes concerning health and safety matters and cooperates with the authority in case of inspection. This special form of employee representation requires that the elected representative is trained in occupational health and safety, although at most workplaces it is hard to find such a suitable candidate. Elected representatives have to take part in mandatory trainings.[532]

1.1. Unions and works councils: different but connected

The two main forms of employee representation are trade unions and works councils. Although the differences of the two institutions are apparent also in Hungarian labour law, due to reasons described below in the last two decades they operated in interconnection.

The trade union provides representation basically by confronting the employer with the legal authority necessary for such a role. By contrast, the works council cooperates with the employer and it does not possess the rights that would enable confrontation. A basic difference is that the trade union is an autonomous legal entity, a special form of civil organisation, which aims at protecting and facilitating the interests of employees. As a result, trade unions have their own organisational structure designed autonomously by the union, and independent from that of the employer. By contrast, the works council is not a legal entity, has no own organisational structure and operates as a special part of the employer's organisation.

The legal rights of the two organisations are designed in accordance with their respective attributes mentioned above. Trade unions, in accordance with their confrontative nature may take collective action (for example in demonstrations, strikes) and the working conditions they negotiate may be stipulated in a legally binding collective agreement. The bargaining power of the trade union primarily depends on how the workforce is organised, much rather than on the union rights prescribed by the Labour Code. By comparison, the works council is primarily

531 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, Article 11.

532 Act No. 93 of 1993 on workplace health and safety Article 70/A.

entrusted with information and consultation rights set out in the Labour Code. Its influence on the employer's operation is limited to participation, for although it may engage in the process of decision-making, it can only hinder certain decisions if at all. Works councils shall remain unbiased in relation to a strike organized against employers, and they may not organize, support or obstruct strikes.[533] The main differences between trade unions and works councils are presented in the following chart.[534]

Trade union	Works council
Outside body, legal personality	Part of the employer's organisation without legal personality
Confrontative representation	Cooperative representation
Voluntary membership with elected officials	Members are elected
Main legal instruments are strike and collective bargaining	Information and consultation rights. Shall not support or obstruct a strike.
Rights depend basically on its bargaining position.	The main source of its rights is the Labour Code.

1.2. Shift towards works council representation?

Although Hungarian labour law and academic literature treated trade unions and works councils as representative bodies with different functions, interestingly, former legislation connected the two types of employee representation. According to the 1992 Labour Code, the representativeness of trade unions was based on the results their candidates achieved at the works council elections.[535] Since the most important union rights were ensured only to representative trade unions (such as stipulating a collective agreement), it was in the best interest of the union to raise as many candidates for elections as possible and to facilitate their success by all means. The union's candidates were generally members or officials of the union. As a result, if such union candidates were elected as works council members, the members of the two different organisations practically merged and the employer was to consult the same persons in the works council and at the bargaining table over a new collective agreement. Due to the different attributes of the two organisations of employee representation, such a practice

533 Article 266 of the 2012 Labour Code.

534 Kiss (2005) op.cit. 443–451.; Lehoczkyné Kollonay, Csilla: *A magyar munkajog II.* Budapest, 2003. 154–157.

535 Article 33 of the 1992 Labour Code.

proved to be unbeneficial. In many cases the 'legally lightly armoured' works councils lost their autonomy and became a consultative body of the trade union.

According to the new Labour Code, exercising union rights is no longer based on the results achieved at the works council elections. As a result, there is a lower chance that trade unions and works councils will fuse together. However, since the works council has many important rights, it would still be useful for trade unions to get as many mandates in works councils as possible.

Although the new Labour Code considers neither of the two types of employee's representation to take precedence over the other, one may nevertheless experience a shift of emphasis in favour of the works councils:

- In the structure of the Code the rules concerning works councils are presented before the rules on trade unions, which was the other way round in the previous Code.
- According to the new law, monitoring the compliance with labour law became the general task of works councils, while this was formerly entrusted to the trade unions. It is worth noting however, that the necessary authority is not provided to works councils (for example the right to initiate proceedings before authorities).[536]
- EU law foresees consultation with the employees' representatives in cases of the restructuring the employer's organization (transfer, collective redundancy). The new Labour Code grants this authority specifically for works council and not the unions.[537]
- The new Labour Code allows the employer to conclude a works council agreement which is equivalent to a collective agreement, provided that there is no collective agreement at the employer or a trade union entitled to conclude one.
- Finally, the law defines the employees' representative as a member of the works council and the workers' representative sitting on the supervisory board of a business association.[538] Interestingly, union officials are not included in the definition. Thus, in applying the Labour Code, union officials – who would otherwise always be considered as such – shall not be deemed employees' representatives. As a practical consequence, the unlawfully dismissed union official may claim reinstatement only in limited cases, while works council members

536 Article 262 of the 2012 Labour Code.

537 Articles 72 and 265 of the 2012 Labour Code.

538 Article 294 (1) point e) of the 2012 Labour Code.

and other 'employees' representatives' will be entitled to such a claim in all cases of unlawful termination.[539] This weakens the labour law protection of union officials.

Considering the aspect of the protection of employees' interests, the significance of trade unions is obviously higher than that of works councils, as the latter can influence the decisions of the employer only through its 'soft rights' of consultation and information. Therefore, it seems odd that the new Labour Code gives works councils a role through which they almost substitute unions. In our opinion, whatever authority is granted to works councils by law, it cannot supplement the organizational power of trade unions.

Trade unions opposed the draft of the new Labour Code for it eliminated their veto right. According to the former regulation, the represented union could contest any unlawful action taken by the employer (or his failure to take action) by way of veto if such action directly affected the employees or the interest representation organisations of employees. However, the right of veto was excluded if the employee involved was entitled to file for legal action against the employer's action of his own motion. The employer could not execute the action in question until the negotiations between the employer and the trade union were finished, or, in case no agreement was reached, until the court decided the case.[540] For instance, if the employer wanted to change the travelling allowance regulations without prior consultations with the union, the union could contest such action since the employer infringed union rights. Until the parties conducted negotiations about the question or until the court decided, the employer could not amend the regulations. While the veto right was an important mechanism for unions to react to unlawful actions, it also gave rise to serious concerns.[541] For instance, unions often used this right to postpone unfavourable decisions. While the law set strict deadlines for the first instance procedure, if parties appealed, there was no deadline for the process any more. This way, employers were obliged to suspend their decisions for several months or even years. Finally, the legislator decided to eliminate this union right.

To sum it up, the new Labour Code brought a twofold, controversial change in the position of trade unions. On the one hand, some union rights disappeared from the Code, others were redefined as rights of the works council and the

539 Article 83 of the 2012 Labour Code.

540 Article 23 of the 1992 Labour Code.

541 Pál, Lajos: A szakszervezeti kifogás gyakorlásával kapcsolatos kérdések. In: *Emlékkönyv Román László születésének 80.* Évfordulójára. Pécs, 2008.

labour law protection of officials became significantly constrained. On the other hand, collective bargaining acquired greater significance than in the previous regulation. Trade unions often criticize this, since the legislator put them in a more important bargaining position armed with fewer statutory rights.

1.3. Statutory rights of trade unions

This chapter gives an overview of the statutory rights of unions enshrined in the Labour Code. We shall disregard the right to strike, which is regulated by a separate act[542] and assess collective bargaining only from the aspect of unions.

The rights afforded by the Labour Code to trade unions shall only pertain to the trade union which is 'represented at the employer'. This means a union which, according to its statutes, operates an organisation authorized for representation or has an official at the employer.[543] The rule aims at offering statutory rights only to those unions which have at least a minimal organisation at the employer. It is the statute that decides whether a union fulfils the conditions to become a represented union, since the inner structure and the officials are to be defined in the statute by autonomous decision of the union. Hence, any union may become a represented union at any employer by electing an employee to be its official or by modifying the statute to set up a new branch at the given employer. At the end of the day, the employer cannot hamper unions to be eligible to exercise union rights concerning its employees.

1.4. Right to (legal) representation

Trade unions shall have the right to represent their members before the employers or their interest groups in the ambit of workers' rights and obligations relating to financial, social, as well as living and working conditions. Moreover, unions are entitled to represent their members before the court, the relevant authority and other organs with a view to protecting their economic interests and social welfare, but only upon the prior authorisation of the member.[544] Thus, unions are not entitled to legally represent their members solely based on membership,

542 Act No. 7 of 1989 on the right to strike.

543 Article 270 of the 2012 Labour Code.

544 Article 272 (6–7) of the 2012 Labour Code.

but need authorisation from the member. Court practice also accepts general authorisations given to the union without stipulating a concrete representative.[545]

By contrast, during socialism labour law enabled unions to represent their members without authorisation in questions concerning employment.[546] Following the political change in 1989, one of the Constitutional Court's first labour law decisions found this provision to be unconstitutional. The Constitutional Court held that legal representation without authorisation breached the employee's autonomy which is an integral part of human dignity. In a later decision the Court ruled that parties to a legal debate shall have the right to bring such debate before the court. Such freedom also involves the right to skip this option and to decide not to go to court. Any regulation that enables others to initiate court proceedings without or against the will of the effected party breaches this right and is therefore unconstitutional.[547]

Hence, it is exceptional in Hungarian law that someone other than the directly affected party may start legal proceedings. Such an exception is the *actio popularis* provided for in anti-discrimination rules. Trade unions or other civil organizations may initiate proceedings before the Equal Treatment Authority or before courts in the interest of a large group possessing a protected characteristic (for example religious conviction, disability, sexual orientation, race, ethnic origin, etc.) the members of which may not be identified personally in the case of infringement or the imminent danger thereof.[548] However, in case the affected employee can be identified in person, only he may start legal proceedings.

1.5. Information rights and their limitations

The following provisions of the Labour Code guarantee that unions can access all relevant information necessary for representing employees' interests. Trade unions may request information from employers on all issues related to the economic interests and social welfare of employees in connection with their employment and shall be entitled to express their position and opinion to the

545 Curia, PK 147.; Gyulavári–Hős–Kártyás–Takács op.cit. 369.

546 Article 15 (2) of the 1967 Labour Code.

547 Constitutional Court decisions 150/B/1990 and 714/B/1992.

548 Act 125 of 2003 Article 20.

employer concerning any action (decision) of the employer or the draft of such decision, and to initiate consultations in connection with such actions.[549]

Due to the harmonisation of directive 2002/14/EC[550] the Labour Code contains detailed rules on information and consultation.[551] Such provisions aim to guarantee that the union's right to request information and express their opinion is not limited to formal interactions with the employer and that such rights may be actually exercised. The statutory rules below prescribe the provision of adequate information and real dialogue to take place between the parties.

The Labour Code – in line with the above mentioned directive – defines 'information' as the transmission of information specified by law related to industrial relations or employment relationships in order to enable the recipients to acquaint themselves with the subject matter and to examine it, and to formulate an opinion to prepare for consultations.[552] Hence, the law prohibits providing the union with only irrelevant, formal or redundant data. Employers' overindulgence is also unlawful, for example, when the employer dumps an unwanted load of data on the union which is impossible to review or properly process.

In the application of the Labour Code consultation shall mean the establishment of dialogue and exchange of views between the employer and the trade union. Thus, consultation does not necessary mean a conflict or debate between the parties, but encompasses also negotiations for efficient cooperation or common planning. Parties may initiate consultation at any time with respect to any issue. It is never compulsory to reach an agreement but the negotiations shall take place with a view to reaching an agreement. The parties shall be properly represented during the consultation and the direct exchange of views and substantive discussions shall be ensured.[553] These measures are quite vague and difficult to enforce, nevertheless, parties are free to stipulate more specific provisions in their collective agreement. Either party may bring an action within five days in the event of a violation of the provisions on information or

549 Article 272 (4–5) of the 2012 Labour Code.

550 Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

551 Czuglerné Iványi, Judit: Az információs és konzultációs jogok szabályozása Magyarországon. In: *Liber Amicorum – Studia Stephano Kertész dedicate.* Budapest, ELTE ÁJK Munkajogi és Szociális Jogi Tanszék, 2004.

552 Article 233 (1) point a) of the 2012 Labour Code.

553 Article 233 (1–2) of the 2012 Labour Code.

consultation. The law sets a very short, 15-day deadline for courts to such cases, however, labour courts can only establish the fact that the other party's rights were violated and no further sanctions can be applied.[554]

A further provision has great relevance in practice. The employer may not carry out the proposed action during the time of consultation, or for up to seven days from the first day of consultation, unless a longer time limit is agreed upon.[555] As a result, unions often initiate consultations to postpone the execution of the employer's decision. Employers are to inform the unions on their planned decisions in due time.[556] In case no agreement is reached, the employer terminates the consultation when the time limit expires.

Naturally, during its activities the union may acquire confidential data on the employer's operation. It is therefore important to set guarantees for the lawful handling of such sensitive information. According to the Labour Code, the employer is not obliged to communicate information or undertake consultation when it covers facts, information, know-how or data that, if disclosed, would harm the employer's legitimate economic interest or its functioning. The representatives acting in the name and on behalf of trade unions are not authorized to disclose any facts or data which were expressly provided to them in confidence or as information that are to be treated as business secrets and are authorized to use these only in connection with the objectives of employee representation.[557]

Such rules on data protection however, often contradict the essence of union rights. Unions in collective bargaining often struggle with employers who deny disclosing 'business information' which would be necessary to prepare for bargaining over wages. The Supreme Court highlighted the problem in a case concerning the information rights of works councils. In the given case the works council members disclosed to third parties a court decision which stated that the employer acted unlawfully. The Court noted that the employer could not prove how its rightful economic interests were violated by such action and ruled that it is essential to provide the works council with all relevant information as this guarantees its proper operation as a body of employee representation. Works councils and their members naturally fall under strict confidentiality

554 Article 289 of the 2012 Labour Code.

555 Article 233 (3) of the 2012 Labour Code.

556 Gyulavári–Hős–Kártyás–Takács op. cit. 338

557 Article 234 of the 2012 Labour Code.

rules, however, this shall not hamper their activities in representing employees' interests.[558]

1.6. Operational rights

The next group of union rights supports the union's every day operation by obliging the employer to ensure the necessary conditions. These are the following:

- 'Propaganda' right: trade unions shall have the right to provide information to workers relating to industrial relations or employment relationships. The employer – upon consulting the trade union – shall provide the means for the union to display information connected to its activities at the employer.[559] It is not regulated by law how such information may be disseminated, therefore, the parties shall agree upon its means in the collective agreement. Union information could be displayed in the employer's inner newspaper, in a closed part of the company's website accessible only to the staff or on notice boards in the locker room, etc. Unions often have access to the employer's staff mailing lists and may regularly send e-mails to staff (for example once a week).
- Right to use premises: Unions shall have the right to use the employer's premises after or during working hours, as agreed with the employer, for the purposes of interest representation activities.[560] Again, the legislator left the regulation of all details to the parties themselves. Collective agreements generally contain provisions on which room or office shall be used for the purposes of the union as well as the equipment offered by the employer (telephone, computer, internet access, photocopier, etc.). Note that if several unions are represented at the employer, each may demand the use of the employer's premises. In most cases unions share the same office and all unions sign a common agreement with the employer on the conditions of its use.
- Right to enter: as unions have legal personality and create an own organisational structure, some of their officials might not be the

[558] Supreme Court decision EBH2007/1633.; Gyulavári–Hős–Kártyás–Takács op. cit. 341.

[559] Article 272 (2–3) of the 2012 Labour Code.

[560] Article 272 (8) of the 2012 Labour Code.

employees of the employer where the union operates. Nevertheless, it is of crucial importance to enable such 'external officials' to enter the premises of the employer to consult with the members, to display information on notice boards or to negotiate with the management. To this end, the Labour Code foresees that a person acting on behalf of a trade union who is not employed by the employer shall be admitted onto the employer's premises if any member of the trade union in question is employed by the employer. The person admitted to the employer's premises shall abide by the provisions of the employer's internal policies.[561] Such 'internal policies' however shall not infringe the real functions related to the right to enter. For example, the employer may not limit its exercise to the parking slot with a sham reasoning that the company operates dangerous work processes.

– Collecting membership fees: the law makes collecting membership fees very convenient for unions by declaring that upon the written authorisation of the employee the employer shall deduct the fee from the wage and transfer it to the trade union's account. Employers shall not claim any compensation for withholding and transferring membership fees to the union, either from the union or the employee.[562] This way, the union can collect this important source of income free of charge. Note that by providing such authorisation the employee clearly reveals her union affiliation to the employer. Some unions experienced that members are reluctant to give the necessary authorisation to deduct membership fees because they didn't want the employer to discover their membership.[563]

1.7. Working time reduction

With a view to discharging the trade union functions of interest representation, the Labour Code guarantees two categories of working time reduction. The first one applies to union officials who are designated for labour law protection (see above). These officials are exempted from work for the entire duration of

561 Article 275 of the 2012 Labour Code.

562 Article 272 (9) of the 2012 Labour Code. The detailed rules are set out in Act No. 29 of 1991.

563 The Labour Code also stipulates that employers may not demand that employees disclose their trade union affiliation, see Article 271 (1) of the 2012 Labour Code.

consultations with the employer (for example the period of bargaining over a new collective agreement).[564] Such negotiations may be lengthy, yet this form of working time reduction has no upper limit, however long the consultations take the selected officials are exempted from work. This way, union officials are not under a time pressure to finish the bargaining process before their working time reduction is exhausted.

The second category of working time reduction may be distributed among the members of the union.[565] The total amount of working time reduction available in a given calendar year amounts to one hour monthly for every two trade union member employed by the employer. The amount of working time reduction available shall be determined based on the number of trade union members registered on the first of January of each calendar year. For instance, if the union has 100 members employed by the given employer on the first of January, it may use 50 hours of working time reduction every month. Working time reduction can be claimed until the end of the given year and might be scheduled unequally. Coming back to the previous example, the union's monthly 50 hours means 600 hours for the whole year and the union might use 200 hours in January, May and October. However, if the union does not exhaust all hours, the unused amount cannot be transferred to the next year.

Working time reduction shall be provided to the employee designated by the trade union. In our example, the union may select 100 members for each mentioned month who can participate in a two hour long training session. Otherwise, the 200 hours in January can be distributed among 10 members to transport them to an international union congress. The employer cannot object to the union's decision, neither to the selection of the employee enjoying working time reduction, nor its measure. Nonetheless – based on the parties' obligation to cooperate – the union shall notify the employer of its intention to claim working time reduction at least five days in advance, except in cases of unforeseen and overriding urgency, or other exceptional circumstances.

It is also not mandatory for the employer to financially compensate the unused hours. Note that the 1992 Labour Code obliged the employer to provide reimbursement for any unused portion of working time reduction upon the request of the union, but not exceeding half of the total amount. The amount of reimbursement was determined based on the average earnings during the previous calendar year of the trade union officials affected. The union had to use

564 Article 274 (1) of the 2012 Labour Code.

565 Article 274 (2–5) of the 2012 Labour Code.

such reimbursement solely for the purposes of employee interest representation activities.[566] This meant a significant income for unions, however – and that was the reason to eliminate the rule – it gave rise to doubts as to their independence from the employer.[567] Although the parties may still agree that the employer shall reimburse the union for unused working time reduction, it is not mandatory by law. In lack of such an agreement, it is in the union's best interest to use the whole amount for the purposes of its activities.

Absentee pay shall be provided for the duration of both kinds of working time reduction. The same pay is due for annual paid leave.

1.8. Right to initiate court proceedings

As a guarantee of all union rights mentioned above, unions may pursue their claims stemming from the Labour Code or the collective agreement through a judicial process.[568] Unions may also turn to the state labour inspection. The authority is not obliged to start inspections upon the union's petition, however, in case the employer and the alleged breach of law may be identified clearly from the complaint, inspectors usually investigate the case. It must be pointed out however, that the labour inspectorate has no authority to assess whether the employer respects union rights, for labour inspection is limited to examining the enforcement of individual employee rights.[569]

1.9. Right to conclude a collective agreement

While the new Labour Code restricted the exercise of certain union rights, it nevertheless afforded a huge importance to collective agreements. As a general rule, the collective agreement may deviate from the provisions of both Part Two (on the employment relationship) and Part Three (on collective labour rights) of the Labour Code.[570] This way, parties have much more influence on the legal framework of employment, for they may draw up their own Labour Code

566 Article 25 (5) of the 1992 Labour Code.

567 Bankó–Berke–Kajtár–Kiss–Kovács op. cit. 612.

568 Article 285 (1) of the 2012 Labour Code.

569 Act No. 75 of 1996 on the labour inspection Article 3.

570 Article 277 (2) of the 2012 Labour Code.

through collective bargaining. Below, we examine the conditions set by law on which trade union may conclude a collective agreement.

The former rules linked the unions' right to conclude a collective agreement to the number of votes their candidates received in the works council elections.[571] This solution had many shortcomings, for instance, no collective contract could be concluded in companies where no works councils were set up. This rule primarily excluded small and medium sized enterprises. Furthermore, labour lawyers pointed out that the results of the works council elections could not always represent the real power of the unions.[572] Authors argued that 'today it is totally unreasonable to subject trade unions' contracting rights to works council elections'.[573]

The new Labour Code changed the previous system and determined a new condition. A trade union shall be entitled to conclude a collective agreement if its membership at the employer reaches ten per cent of all workers employed by the employer.[574] This low threshold was set to enable parties to conclude the contract at small employing enterprises as well. It is also clear that there is no longer any connection between the unions' right to collective bargaining and the works council elections.

Yet the new law also gives rise to certain problems. Firstly, the Labour Code prescribes that if several unions are entitled to conclude the collective agreement, they shall do so collectively.[575] Such a coercion for coalition means that no agreement shall be signed until all unions above the ten per cent limit come to an agreement. This could easily have a blocking effect if, say, two unions each representing around 30 per cent of the employees would accept the agreement while one with 12 per cent opposes. Here, the two major unions cannot leave out the third organisation from the bargaining process. Interestingly, it may also occur that the employer and some of the unions would agree upon the proposal and the debate continues among the unions, not between labour and management.

Another problem is that Hungarian labour law considers the collective agreement a contract.[576] Consequently, an already concluded agreement cannot

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571 Article 33 of the 1992 Labour Code.

572 Kiss (2005) op. cit. 386.

573 Berke–Kiss–Pál–Pethő–Lőrincz–Horváth op. cit. 172.

574 Article 276 (2) of the 2012 Labour Code.

575 Article 276 (4) of the 2012 Labour Code.

576 Hágelmayer, Istvánné: *A kollektív szerződés alapkérdései*. Budapest, Akadémiai Kiadó, 1979. 341–342.; Kiss (2005) op. cit. 379–381.

be amended or terminated by others than the parties who originally signed it. If another newly organised union appears at the employer and meets the ten per cent requirement, it can participate in the negotiations related to the amendment of the already existing agreement solely in an advisory capacity.[577] This also applies to cases when the new union reaches a higher level of organisation than the original parties to the collective agreement. Hence, it may occur that a union representing the minority of the employees decides upon the amendments to the collective agreement, while the organisation representing the majority may only participate in the negotiations without any real influence.

1.10. Legal protection of union officials

The most important change concerning the legal status of trade unions is the protection of union officials. As the trade union official is a central actor in the collective life of the employer, she is granted special legal protection against unilateral measures of the employer, which could uproot her from among the workers whose interests she represents. Such protection has two elements: the general prohibition of discrimination and a special labour law protection.

1.11. The prohibition of discrimination

The act on equal treatment expressly prohibits discrimination based on the affiliation with any interest representation organisation.[578] Moreover, the Labour Code prescribes that:

- employers may not demand that employees disclose their trade union affiliation.
- employment of an employee may not be rendered contingent upon his membership in any trade union, on whether or not the employee terminates his previous trade union membership, or on whether or not he agrees to join a trade union of the employer's choice.
- the employment relationship of an employee shall not be terminated, and the employee shall not be discriminated against or mistreated by

577 Article 276 (8) of the 2012 Labour Code.

578 Act No. 125 of 2003 on Equal Treatment, Article 8 point s).

the employee in any other way on the grounds of trade union affiliation or trade union activity.
– any entitlement or benefit may not be rendered contingent upon affiliation or lack of affiliation to a trade union.[579]

The Equal Treatment Authority fined an employer because it paid double bonus to all its dispatcher employees except for the one who happened to be a union official. The employer could not prove that the affected employee's work was of significantly lower value than that of the others. The difference in treatment was presumably based on the fact that the union official turned to the authorities for the unlawful accounting practices of the employer.[580]

1.12. Labour law protection against dismissals and new limitations thereto

In brief, this special protection means that the employer is entitled to make unilateral decisions concerning the trade union official only in case it previously consulted with and received the consent of the trade union. According to the new Labour Code such measures are dismissal and employment deviating from the employment contract.[581] The protection against dismissal acquires the greatest significance in practice, for the employer may only terminate the employment relationship of a trade union official by dismissal with prior written consent of the union.

Whilst according to the 1992 Labour Code the labour law protection was granted for each person holding an office in the trade union, the new rules restrict the number of protected officials. This new approach became necessary as some unions abused labour law protection and elected officials in excess of what would have been necessary for their operation. This practice rendered the termination of the officials' employment relationship much more complicated. The labour courts continuously warned unions about the prohibition of the wrongful exercise of rights and held that consent regarding the officials' dismissal shall only be denied in case the termination of employment would

579 Article 271 of the 2012 Labour Code.

580 Equal Treatment Authority Case no. 177/2009.

581 Article 273 of the 2012 Labour Code.

otherwise hamper the operation of the union at the employer.[582] At the same time, the Supreme Court also ruled that it is the autonomous decision of the union to elect a higher number of officials.[583] According to the new Labour Code, the number of trade union officials protected by law at all autonomous establishments of the employer is based on the average number of employees employed in the previous calendar year, and shall be calculated as follows:

Number of employees at the establishment	**Number of protected officials**	
	At the given establishment	+ 1 person for the whole employer, chosen by the supreme body of the union
1-500 persons	1 person	
501-1000	2 persons	
1001-2000	3 persons	
2001-4000	4 persons	
4001-	5 persons	

Irrespective of the number of employees, all unions represented at the employer are entitled to protect one further official selected by the supreme body of the union. This 'plus one' person may be selected only for the entire structure of the employer. While unions are still allowed to unilaterally determine the number of officials elected, labour law protection may only be afforded to a maximum of persons as detailed in the chart above. As an element of cooperation, the trade union shall inform the employer in writing about its authorized representatives and officers.[584] The new law also limits the timeframe of protection. While the previous regulation offered one extra year of protection in case the official spent at least six months in office, the new Labour Code amended the numbers: if the union official was in office for at least a year, he remains protected for a further period of six months after his mandate expires.

As for the procedural rules, the trade union shall send its opinion on the employer's planned action within eight days of receipt of the employer's written notice. Should the trade union disagree with the proposed action, the statement shall include the reasons therefor. Failure by the trade union to convey its opinion within the eight days limit shall be construed as consent to the proposed action.

It is the union that decides which officials will enjoy protection, however, it may only alter its choice in case the protected official's employment relationship or union mandate is terminated. This may cause problems in case of protected

582 See court decisions BH2001/492., EBH2003/967., EBH2000/240.

583 See court decision EBH2004/1147.

584 Article 232 of the 2012 Labour Code.

officials who are absent from work for a longer period, for example in the case of a serious illness or maternity leave. In such situations the union cannot shift the protection of the absent official to somebody else, except when the mandate is also terminated or suspended.[585] It is also a problem that the number of protected officials depend on how many employees are employed in the given establishment, but not on the number of union members. For example, an establishment with 300 employees 90% of whom are organised may have only one protected official. By contrast, a newly launched union in a factory with over 5000 workers can select five officials enjoying labour law protection, even if it has only a handful of members.

A crucial issue of the new rules on the protection of union officials is the interpretation of the term 'establishment'. According to the new Labour Code, the same definition shall be applied as in the case of works councils, according to which establishment means a division with a leader entitled to employer's rights with respect to the participation rights of works councils.[586] This basically means that protected union officials shall be selected in those establishments where a works council can be set up. This applies even if the different premises are physically far from each other, but are under the supervision of the same leader and thus qualify as one establishment according to the rules on works councils. Such a centralization of the exercise of employer's rights can easily reduce the number of protected union officials, thereby obstructing the enforcement of the aim of the law. Once again, the operation of trade unions and works councils are connected here, despite the fact that the employees' need for a protected trade union official at the establishment is not conditional on whether the leader of such premise can exercise any employer's rights related to the works council. Parties often face serious debates on the interpretation of the establishment rule in the given employer's organisational structure, for it not only determines the number of eligible work councils, but also the number of protected union officials. As a result, apart from the employer, both the works council and the union are interested in this debate. A practical solution is to deviate from the statutory rules and to regulate the number of works councils in the works councils' agreement and the number of protected officials in the collective agreement.

It frequently occurs that an employee is a trade union official and also a member of the works council. In such situations, according to former court

585 Gyulavári–Hős–Kártyás–Takács op. cit. 371.

586 Article 236 (2) of the 2012 Labour Code.

practice, the legal protection applied to the person based on both titles, requiring a consent to dismissal from both the union and the works council.[587] This form of 'overprotection' is no longer upheld by the new regulation: in case the chair of the works council happens to be a protected trade union official as well, the labour law protection applies to him only on the basis of the latter title.[588]

While the new rules on trade union officials aimed at decreasing the number of protected employees, the transitional rules of the new Labour Code prescribed that all officials who were granted labour law protection before the new Code came into force (that is, the 30th of June 2012) would retain such protection until their employment relationship ends or they lose their union mandate.[589] Interestingly, the legislator took a step back at the last moment and left the previously guaranteed protection of union officials unscathed. As a final surprise, starting with the 1st of January 2013 the legislator deleted this 'grace period'. Thus, as of 2013 only those union officials enjoy labour law protection who are selected according to the rules of the new Code.

2. Works councils

The function of the works council is to facilitate the cooperation between employees and the employer and to take part in forming the employer's decisions.[590] The traditional role of the institution is to guarantee employees participation in the employer's decision making processes. The new Labour Code adds that works councils shall also 'monitor the employer's compliance with the provisions of employment regulations'.[591] Note that the works council has no right to intervene in case it detects labour law breaches on the side of the employer, thus 'monitoring' involves no real control. Such a supervisory role would suit the trade union better, which – as an independent legal person – can initiate court proceedings or turn to the relevant authorities.

587 See e.g. court decision BH2000/463.

588 Article 260 (5) of the 2012 Labour Code.

589 Act No. 86 of 2012 Article 14 (1).

590 Article 235 (1) of the 2012 Labour Code.

591 Article 262 (1) of the 2012 Labour Code.

2.1. The structure of workers' participation

Employees may elect a works council if the number of employees at the employer or at the employer's independent establishment or division is higher than 50. If more than 15 employees are employed at the given establishment, a single shop steward can be elected instead of a committee. Shop stewards may exercise the same rights as works councils and have the same obligations, however, shop stewards may not conclude a works council agreement substituting the collective agreement (see below).[592]

It is never compulsory to elect a works council (shop steward). The employer cannot force the employees to organise the election, to vote or to run for council membership. Similarly, the employees cannot be held responsible if they refrain from exercising their statutory rights to elect this interest representation body. There is no legal sanction if no works council operates at the employer.

The works council is not a legal person, thus, its organisation builds on the employer's structure. A council may be set up in all establishments (divisions) of the employer where the leader is vested with employer's rights in respect of the works council's rights of participation. For instance, the employer employs 200 workers in its seat and has a site in the countryside with additional 100 workers, and the leaders of both premises exercise the full range of employer's rights, in this case, two councils can be elected, one for each premises. However, as highlighted above in the discussion on the labour law protection of union officials, it is not clear which rights the executive shall exercise to form an 'establishment'. Works councils enjoy the right to express their opinion in a wide range of cases (see below), thus, according to the broad interpretation, in case the leader of the employer's site may decide on such cases, the site shall be considered an 'establishment' and its workers may elect their own works council. In the narrow sense, however, no works council can operate in a site where the leader does not exercise the whole range of employer's rights concerning all the rights of the works council. Since the debate cannot be settled on the basis of the text of the law, the parties should rather stipulate in the works council agreement how many councils shall be established and in which sites.

Works councils are elected for a term of five years, but if parties find this period to be too long or too short, they may deviate from this rule in the works council agreement. The number of works council members is 3-13 persons, calculated on the basis of the number of employees employed in the given

592 Article 236 (1), 269 (1) of the 2012 Labour Code.

establishment. Again, parties are free to define the number of the members otherwise by mutual agreement. If the number of employees and the number of works council members are not consistent with the Labour Code or the parties' agreement for at least six months due to an increase in the number of employees, a new works council member shall be elected.[593]

If more works councils operate at the employer, a central works council may be set up. Members to the central works council shall be delegated by the (establishment level) works councils from among their members. The central works council may not have more than fifteen members. Many employers operate as a group of companies and in such an organisational form the most important decisions are made not on the company level but by the group level management.[594] For that reason, central works councils or, for lack of such an entity, establishment level works councils may set up a corporate-level works council if the employer operates as a group of companies (holding). Members to such a works council shall be delegated by the central works councils or the works councils from among their members. The corporate level works council may not have more than fifteen members. Furthermore, the provisions on works councils shall apply to the central and corporate level works council as well (for example, the central works council can exercise the same rights of participation and its members enjoy the same working time reduction).[595]

There is no hierarchy or subordination between the works councils established on different levels. The rules of their cooperation shall be laid down by the councils themselves following the principle that each council shall exercise rights with respect to the decisions made on their relevant level. For instance, if the employer's decision affects all workers in the corporation, the corporate level works council shall take part in the process, while if another case relates to just one site, only the relevant establishment level council shall participate.

Finally, on the top of the structure of employee participation is the European Works Council. Directive 2009/38/EC[596] strives to guarantee the participation of employees in the employer's decision making process also in cases when the decision is made on the international level, therefore, the Member States'

593 Articles 236 (2–3), 237 of the 2012 Labour Code.

594 Bankó–Berke–Kajtár–Kiss–Kovács op. cit. 573.

595 Articles 250–251 of the 2012 Labour Code.

596 Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

relevant rules on participation shall not apply. The directive was implemented by a separate act[597] and in 2013 around a dozen Hungarian companies sent delegates to European Works Councils.

The institutions of employee participation are summarised in the following chart.

Level of participation	Conditions	Institution of employee participation
Establishment level	1-15 employees	none
	16-50 employees	shop steward
	51 or more employees	works council (3-13 members)
Company level	Several establishment level works councils operate	central works council
Corporate level	The employer is part of a group of companies	corporate level works council
International level	The employer is part of a Community level undertaking	European Works Council

2.2. The election of the works council

All workers employed by the employer and working at the given establishment shall be entitled to participate in the election of works council members.[598] However, only those employees shall run for membership in the election who have legal capacity and – except for newly formed employers – have been employed by the employer for at least six months. Certain rules on incompatibility must also be respected. Persons exercising employers' rights or relatives of the employer's executive officers may not be elected to serve as members of a works council.[599]

The employer shall not influence the election and must assume a neutral position. Therefore, the outgoing works council or the employees shall set up an election committee with a minimum of three members at least 60 days prior to the election. The election committee's responsibility is the preparation and execution of the elections and laying down the necessary detailed rules. Such details could be the date and place of voting, the means of voting (paper based or electronic), monitoring of the elections, rules on the election campaign, etc. All employee eligible to vote can become a member, except those who hold a seat in

597 Act No. 21 of 2003.

598 Article 239 of the 2012 Labour Code.

599 Article 238 of the 2012 Labour Code.

the works council. Members of the election committee shall be exempted from work for the duration of discharging their duties and shall be entitled to absentee pay for the period of such absence.[600] Note that in the case of large employers, arranging the works council elections can take several weeks, thus, the election committee members' exemption from work can last for a considerable time.

A candidate may be nominated by at least ten per cent of the employees eligible to vote or by at least 15 employees eligible to vote, or by any trade union represented at the employer. As we presented above, the unions' rights are no longer tied to the proportion of the votes their candidates get in the works council elections. Nonetheless, the more members the union holds, the greater influence it may have on the mechanism of employee participation. Besides, union officials elected as works council members enjoy additional reductions in working time. Thus, works council elections are still important for unions. The election committee registers the candidates and publishes their list at least five days prior to the election.

Works council members are elected by secret ballot and equal, popular vote. The persons receiving the highest number of votes, or at least thirty per cent of the valid votes will become members of the works council. In the event of a tie vote, the length of the employment relationship with the employer shall be taken into consideration. An election shall be declared valid in case more than half of those eligible to vote participated. In the event of an invalid ballot, the election shall be repeated within a period of 30-90 days.[601] In practice, employees are usually quite disinterested in elections and unions play an important role in mobilizing voters to achieve valid elections. Since the employer is responsible for covering all costs relating to the elections (see below), it is also in the employer's interest to reach the necessary number of votes already in the first round.

Employees, employers or represented trade unions may bring a court action within five days with respect to nominations, the procedure and the outcome of elections. The court shall hear such cases within fifteen days and shall annul the results of the election if it finds any material infringement of the relevant procedural regulations. An infringement shall be considered 'material' if it had an impact on the outcome of the elections.[602] Naturally, this is almost impossible to prove. For example, one nominating union places huge posters

600 Article 240 of the 2012 Labour Code.

601 Article 243–248 of the 2012 Labour Code.

602 Article 249 of the 2012 Labour Code.

in the workplace on the day of elections promoting its own candidates, while previously all actors had agreed that the campaign shall finish two days earlier. Even if it amounts to a serious breach of election rules, most probably no one could prove that this actually resulted in any additional votes cast in favour of these candidates. Moreover, even a slight deviation from the previously set election rules can cause one or two invalid or false votes resulting in a potentially different outcome. In these cases the material infringement of procedural rules is even harder to substantiate. Consequently, in case of election disputes, parties should rather find a way to settle the issue among themselves instead of turning to the labour court.[603]

2.3. Operation of the works council

The works council shall convene within fifteen days following its election and elect a chairman from among its members at its first session. The works council operates as a committee, meaning that the members shall attend the works council meetings in person and cannot be represented by substitute members. This also excludes the delegation of their rights to other council members or the president. The works council can only deliver a valid decision in a quorate session where members are present in person,[604] however, all other rules of operation may be regulated in its order of business. The order of business is adopted by the council itself, the employer's consent thereto is not necessary. This document can regulate among others the order of informing the members of the agenda, convening a session, the order of voting, or the questions of record, etc.

The Labour Code contains the following guarantees to facilitate the operation of works councils:

– Employers shall provide the opportunity to works councils to publish information related to their activities. The exact means shall be fixed in the works council agreement.[605] Such a propaganda right is necessary, since the Labour Code obliges the works council to inform the employees concerning its activities semi-annually.[606]

603 Gyulavári–Hős–Kártyás–Takács op. cit. 350.

604 Article 259 of the 2012 Labour Code.

605 Article 261 of the 2012 Labour Code.

606 Article 262 (4) of the 2012 Labour Code.

- Reduction in working time: the president of the works council shall be entitled to working time reduction amounting to ten per cent of his monthly working time, while the members shall be entitled to ten per cent. All working time reduction claims shall be notified at least five days in advance, except if claimed in situations of unforeseen and overriding reasons of urgency, or under exceptional circumstances. Absentee pay is provided for the duration of the working time reduction.[607]
- Covering costs: as works councils have no legal personality, they have no own resources or property. Thus, the justified expenses incurred in connection with the election and operation of the works council shall be borne by the employer.[608] If parties cannot agree on the amount of 'justified expenses', the Labour Code obliges them to decide the debate by arbitration. The decision of the arbitrator shall be binding upon the parties. In the absence of an agreement between the parties the arbitrator shall be chosen by random selection from among the persons nominated by the parties.[609] However, if the employer is reluctant to agree with the works council on the amount of necessary expenses, it will most probably be reluctant to abide by the decision of an arbitrator.
- Information rights: to the extent required for discharging their responsibilities, works councils may request information and initiate negotiations which the employer may not refuse.[610] The rules on information and consultation presented in the chapter on trade unions shall be applied also in the case of works councils.
- Labour law protection: the president of the works council enjoys the same labour law protection as the designated union officials: the employer needs the consent of the council to be able to dismiss the president. In the case of shop stewards, the employees shall vote on the matter. If the president of the works council is also a designated trade union official, the protection applies only on the basis of the latter title.[611] Consequently, those employee representatives who are members of both institutions are not covered by a twofold protection.

607 Article 260 (1–2) of the 2012 Labour Code.

608 Article 236 (4) of the 2012 Labour Code.

609 Article 293 (2–3) of the 2012 Labour Code.

610 Article 262 (2) of the 2012 Labour Code.

611 Articles 260 (3–5), 269 (2) of the 2012 Labour Code.

Note that the president's protection is weakened by the fact that the council members voting on the question do not enjoy any special protection other that the prohibition of discrimination.

– Right to launch court proceedings: works councils may pursue their claims based on the Labour Code or a works council agreement through judicial proceedings.[612] The Code of Civil Procedure prescribes that works councils may appear in labour disputes even if they have no legal personality.[613]

2.4. The works council agreement

The employer and the works council may conclude a works council agreement for a fixed term, but for no longer than the term of the works council's mandate. Unlike the collective agreement, it may not touch upon the issues of the individual employment relationship. Its aim is to implement the Labour Code's provisions on works councils and to promote the cooperation of the parties. However, exceptionally, the new Labour Code allows for works council agreements to substitute the collective agreement concluded by a trade union. The agreement may be cancelled with a three-month notice, while it automatically ceases with the outgoing works council.[614]

Based on the above, the basic function of the works council agreement is to facilitate the cooperation of the parties. The Labour Code left a lot of details unregulated with respect to the election or the operation of works councils, these questions may therefore be determined by the parties. For example, the works council agreement may regulate the competence of the works councils operating at different levels (establishment level, centre, corporate level), set the details of propaganda rights, the amount of justified expenses necessary for the councils' operation, the order of consultations with the employer, etc.

Moreover, the Labour Code allows the works council agreement to deviate from certain statutory rules. For instance:

– the conditions for setting up an establishment level, centre or corporate level council, the number of members, period of their mandate,
– members' dismissal from the works council,

612 Article 285 (1) of the 2012 Labour Code.

613 Act No. 3 of 1952 Article 351.

614 Article 267 of the 2012 Labour Code.

– the amount of working time reduction,
– the labour law protection of the president.

The works council agreement may not contain any restrictions on the statutory rights and functions of the council.[615]

Exceptionally, the works council agreement may also regulate the employment relationship, similarly to the collective agreement. Such agreements may be concluded on the condition that the employer is not covered by the collective agreement it has concluded itself, or there is no trade union at the employer authorized to conclude a collective agreement. Moreover, a works council agreement may never regulate the remuneration of work. The provisions on the works council agreement concerning the employment relationship shall be terminated upon the collective agreement concluded by the employer entering into force and also upon the trade union's notification to the employer of its entitlement to conclude a collective agreement.[616] It is clear from the provisions that the works council agreement may only play a subsidiary role to the collective agreement.

The centre and corporate level works council is also entitled to conclude a works council agreement. In case several works council agreements are in force at the same employer, the agreement of limited effect may derogate from the one with a broader scope – unless otherwise provided therein – insofar as it contains more favourable provisions for the employees.[617] For instance, in case the corporate level agreement contains an extra five days of annual leave, the establishment level works council's agreement cannot contain less, unless the corporate level agreement provides otherwise.

2.5. Rights of participation

Participation rights enable the works council to fulfil its basic function of parting in the decision making processes of the employer. These cover the works council's right to collective decision making, the right to express their opinion and information rights.

The strongest participation right is manifested in the common decisions, which means that the employer and the works council shall collectively make

615 Article 267 (5–6) of the 2012 Labour Code.

616 Article 268 of the 2012 Labour Code.

617 Article 268 (4), 277 (4) of the 2012 Labour Code.

the decision. This right is very limited in Hungarian labour law,[618] it can be exercised solely with respect to the appropriation of welfare funds.[619] Hence, the employer cannot decide on the use of such funds without the consent of the works council. If the parties cannot reach an agreement, the debate shall be settled by mandatory arbitration.[620]

The crucial question concerning this rule is the interpretation of 'welfare funds', for neither the Labour Code, nor any other law contains a definition. The term may cover allowances for employees' housing or for workers facing retirement, special aid, support for the workplace library, funds for the company family day, etc. Employers provide for a great variety of similar institutions and may spend a significant sum to promote such causes. Hence it is a sensitive issue where to draw the limits of the works council's right to form common decisions. Naturally, employers try to interpret the rule in the narrow sense and decide unilaterally. By contrast, works councils and trade unions argue that even fringe benefits shall be considered welfare funds as their function is not to remunerate work, but to support workers. The debate has not been settled yet and until court practice answers these questions, parties can regulate the matter in the works council agreement.

Employers shall request the works council's opinion prior to passing a decision in respect of planned for action and regulations affecting a large number of employees. The Labour Code does not define the term 'large number of employees', this may be clarified in the works council agreement. However, the law provides a list of examples on issues that could affect a large number of employees (for example, proposals for reorganization of the employer, introducing new technologies or upgrading existing ones, processing and protection of employees' personal data; plans relating to training and education, setting the principles for the remuneration of work; coordinating family life and work). Authors argue that the adoption or amendment of the collective agreement also affects a large number of employees – actually all of them –, therefore, the employer must obtain the opinion of the works council before signing such an agreement.[621] It is clear from the wording of the law that the employer must ask for the relevant opinion without the respective request of the works council. However, the council's opinion is not mandatory for the

618 Radnay, József: Az üzemi tanácsok tevékenységének továbbfejlesztése. In: *Emlékkönyv Román László Születésének 80.* Évfordulójára. Pécs, 2008. 385.

619 Article 263 of the 2012 Labour Code.

620 Article 293 (2) of the 2012 Labour Code.

621 Bankó–Berke–Kajtár–Kiss–Kovács op. cit. 590.

employer who may choose to disregard it. In case of disagreement, both parties may initiate consultations.

As we have seen above, the works council may request information from the employer to the extent required for discharging its responsibilities. Furthermore, the Labour Code obliges the employer to notify the works council semi-annually concerning the following:

a) issues affecting the employer's economic situation;
b) changes in wages, solvency related to the payment of wages, the characteristic features of employment, utilization of working time and the characteristics of working conditions;
c) number of workers employed and the description of the jobs they perform.[622]

Information shall be provided in a way as to enable the works council to acquaint itself with the subject matter and by examining it, to formulate an opinion to prepare for consultations.[623] Moreover, the works council shall be informed and consulted in case of transfers of undertakings and mass dismissals,[624] as laid down in the relevant EU directives.[625]

A widely debated problem concerning the participation rights enshrined in the new Labour Code is that the law contains no dissuasive sanction if the employer does not respect the works council's rights. The 1992 Labour Code stipulated that any action taken by the employer in violation of the rights of common decision making or consultation are deemed invalid. The works council could file for court action for the establishment of such invalidity.[626] This meant that the employer's decision was invalid if it decided without the prior consent or without consulting the council before taking the decision. This rule could potentially have far-reaching consequences. For example, in case the employer did not request the opinion of the works council before it sold the company's sports centre, the court ruled the whole sales contract to be invalid, entailing the obligation to restore the original situation. The new Labour Code contains no

622 Article 262 (3) of the 2012 Labour Code.

623 Article 233 (1) point b) of the 2012 Labour Code.

624 Article 265 and 72 of the 2012 Labour Code.

625 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses; Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

626 Article 67 of the 1992 Labour Code.

such severe sanction, the works council may only file for the mere declaration that its rights were infringed. Furthermore, it may initiate consultations to settle the issue or try to convince the employer to submit itself to mediation or voluntary arbitration. However, some authors argue that the employer's decision without the works council consent must still be considered invalid and no rights and obligations shall arise from or in connection with such a legal act.[627]

3. Summary

The new Labour Code faced trade unions with a twofold challenge. First, it opened a wide space for collective bargaining as never seen before in Hungarian labour law. Unions and management can alter from most statutory rules in their agreement thus they can draft their own Labour Code. Also, the requirements for a union to conclude a collective agreement became significantly simpler: it is not linked any more to the outcome of the works council's elections and the threshold (that is to represent 10 per cent of the employees) is set low enough to enable collective bargaining even in small and medium sized enterprises.

Second, the new law cut back on union rights. Some of their entitlements were deleted (like the right to veto) or restrained (like the labour law protection of officials), while others were passed to the works councils (for example, consultation in case of mass dismissals). Besides, the new Labour Code decreased the level of employees' protection. As a result, unions have to face the challenges of the new, more significant collective bargaining with less statutory protection and weakened bargaining position. In our opinion only well organised unions with firm support from the members could benefit from the new legal environment.

The new Labour Code preserved the dual system of employee representation and upheld the system of works councils. However, the law did not strengthen their positions, even if they inherited some union rights and now works councils are entitled to substitute the collective agreement by their own contract with the employer (the works council agreement). Contrarily, the most important participation rights became even more limited and are left without severe and dissuasive sanctions. One might be concerned that works councils will still operate in the shadow of the unions.

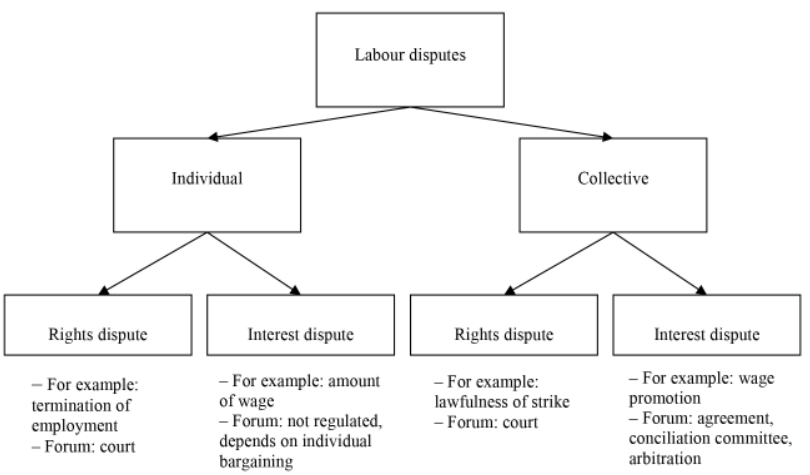
627 With reference to: Article 29 (4) of the 2012 Labour Code, see Bankó–Berke–Kajtár–Kiss–Kovács op. cit. 587.

VII.
ALTERNATIVEDISPUTERESOLUTION:CUIPRODEST?

1. Definitions of labour disputes

The Labour Code distinguishes between rights disputes and interest disputes, albeit the detailed definitions are missing from the law.[628] Labour rights disputes and interest disputes may equally be individual or collective. All such disputes are regulated by Part Four of the Labour Code, except for the individual interest disputes. Individual interest disputes are not regulated either by the Labour Code, or by any other law, since such disputes must be resolved by the parties, for example through a labour law or civil law agreement. Arbitration is the compulsory forum in certain cases of collective interest disputes, these are defined by Article 293 of the Labour Code (see later).

Types of labour disputes[629]



628 See Article 285-290 on rights disputes and Article 291–293 on interest disputes.

629 Kulisity, Mária: Munkaügyi viták. In: Gyulavári, Tamás (szerk.): *Munkajog.* Budapest, ELTE Eötvös Kiadó, 2013. 507.

1.1. The statutory definition of rights disputes

There is a legal definition of rights disputes in the Labour Code: "Workers and employers may pursue their claims arising from the employment relationship or out of this Act, and trade unions and works councils may pursue their claims arising out of this Act or a collective agreement or a works agreement by judicial process."[630] Therefore, rights disputes relate to claims arising from the employment relationship or the Labour Code (individual rights dispute), a collective agreement or a works council agreement (collective rights dispute).

The statutory definition provides the following list of potential subjects of rights disputes: employee, employer, trade union and works council. However, this list is by no means exhaustive, since there are further actors, who may also be a party to a labour rights dispute.[631] For example, the heir and the relatives of the employee may also become parties to the rights dispute.[632] Moreover, a group of employees may also be party to a rights dispute, for example, they may organize a strike, upon which the employer may launch a lawsuit against them based on the purported unlawfulness of the strike.[633]

Rights disputes may be initiated by both legal and natural persons, who have a legal interest deriving from or connected with the dispute. Consequently, public interest litigation (actio popularis) is not ensured in labour disputes, except for the cases of employment discrimination.[634]

1.2. The definition of interest disputes

The 1992 Labour Code contained the following definition of interest dispute (denominated 'collective labour dispute'): "Any dispute arising in connection with employment relationships (collective labour dispute) between the employer and the works council or between the employer (the employer's interest representation organization) and the trade union, which does not qualify as a

630 Article 285 (1) of the 2012 Labour Code.

631 Kulisity (2013) op. cit. 507–508.

632 Article 171 (1) of the 2012 Labour Code: „Employers shall also be liable for reimbursing the relatives of employees for any damages incurred in connection with the incidence of damage."

633 Act No. 7 of 1989 on Strike, Article 5.

634 Article 20 of Act No. 125 of 2003 on Equal Treatment contains the possibility of actio popularis.

legal dispute, shall be settled by negotiations between the parties concerned."[635] It is clear that the definition only covers collective interest disputes, since, as it was mentioned above, individual interest disputes are left unregulated.

The 2012 Labour Code no longer contains a definition of interest dispute, however, it mentions the parties to interest disputes: employer, works council and trade union. Here, we must make mention of the group of employees as well, who may also be the actors of an interest dispute. The definition of the former Labour Code continues to apply, thus, an interest dispute may not qualify as a rights dispute and it must be related to the employment of the employees.

2. Typology of labour disputes

2.1. Types of out-of-court rights disputes

Besides court disputes, the 2012 Labour Code and in the 2002 Mediation Act (Act No. 55 of 2002) provide for the following types of out-of-court rights dispute mechanisms:

a) Conciliation:

According to Article 288 of the Labour Code, conciliation may be stipulated in the collective agreement or in the parties' agreement. Therefore, conciliation requires the respective agreement of the parties or the social partners, and may be used both in individual and collective rights disputes. However, the Labour Code does not contain any further provisions on conciliation.

b) Mediation:

Mediation is regulated by the Mediation Act in detail. According to the Mediation Act, mediation is possible in both individual and collective rights disputes, in case conciliation is not stipulated in the collective agreement or in the parties' agreement.

Obligatory conciliation in the court procedure[636] is not an out-of-court settlement mechanism, but it is worth mentioning it at this point. At the first hearing, the court procedure starts with a conciliation led by the judge and aiming for an agreement. If the conciliation fails, the judge must commence the

635 Article 194 (1) of the 1992 Labour Code.

636 Article 355 of the Code of Civil Procedure.

court procedure. "It is not uncommon that the parties conclude an agreement at the first hearing, during the pause in proceedings or at a later stage. The parties and their lawyers are well aware of uncertainties, as well as the time-consuming and costly nature of disputes settled by court".[637]

2.2. Types of interest disputes

The following types of interest disputes (collective labour disputes) may be identified in the Labour Code:

a) Conciliation (Article 291 of the 2012 Labour Code):

The employer and the works council or the trade union may set up a conciliation committee to resolve their (collective labour) disputes.[638] The works council agreement or the collective agreement may contain provisions for establishing a standing committee as well. Therefore, choosing conciliation is voluntary, however, the works council agreement or the collective agreement may render conciliation compulsory by setting up a standing committee.

b) Arbitration (Article 293 of the Labour Code):

ba) Voluntary arbitration: the employer and the works council or the trade union may agree in writing in advance to abide by the decision of the committee, in which case the committee's decision shall be considered to be binding.

bb) Obligatory arbitration: the following two disputes must be decided by an arbitrator:

- The justified expenses incurred in connection with the election and operation of the works council shall be borne by the employer.[639]
- The employer and the works council shall collectively determine the appropriation of welfare funds.[640]

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637 *Individual disputes at the workplace: alternative disputes resolution*. Eurofound, Dublin, 2010. http://www.eurofound.europa.eu/eiro/studies/tn0910039s/tn0910039s.htm, p. 5.

638 Therefore this kind of conciliation is rather different from the conciliation mentioned above in relation to our of court rights disputes.

639 Article 236 (4) of the 2012 Labour Code.

640 Article 263 of the 2012 Labour Code.

The arbitrator shall be chosen by the parties, otherwise the arbitrator shall be chosen by random selection from among the persons nominated by the parties.[641] The decision of the arbitrator shall be binding upon the parties.

Types of labour disputes	Rights disputes	Interest disputes
Individual	Voluntary conciliation, if agreed. Voluntary mediation, if agreed.	–
Collective	Voluntary conciliation, if agreed. Voluntary mediation, if agreed.	Voluntary conciliation, if agreed. Voluntary arbitration, if agreed or works agreement/collective agreement render it compulsory. Compulsory arbitration on two topics specified by the Labour Code.

2.3. Rights disputes in the public sector

Act No. 199 of 2011 on Civil Servants contains all relevant provisions on the legal status of government officials (employees working in the central public administration). Government officials may not turn directly to the court in the majority of rights disputes, instead, they must submit their complaint first to the Arbitration Committee of Government Officials. The government official may launch a lawsuit at the labour court against the decision of the Arbitration Committee.[642]

3. Individual out-of-court rights disputes

3.1. Conciliation

Conciliation[643] may be stipulated in the parties' agreement for all or a restricted number of rights disputes and the parties may involve any independent person to settle the debate. Thus, conciliation is obligatory, when stipulated in the parties' agreement. It is not regulated by the Labour Code or any other law, its rules and

641 Article 293 of the 2012 Labour Code.

642 Article 190 of Act No. 199 of 2011.

643 Article 288 of the 2012 Labour Code.

characteristics are therefore somewhat vague. Based on the above, the recourse to out-of-court settlement mechanisms (conciliation) may be established in an individual employment contract. There are no pre-defined requirements, preliminary steps or excluded topics, for conciliation left totally unregulated and merely mentioned as a possibility in the Labour Code.

The written agreement or disagreement of the parties closes the procedure. Any of the parties may turn to court despite the agreement. If conciliation is stipulated in the collective agreement or in the parties' agreement, this shall have no effect on the time limits specified in the Labour Code (Article 287) for initiating the court procedure (deadline to submit the lawsuit). The court shall declare the agreement of the parties legally enforceable.[644]

3.2. Mediation

Mediation is possible in all kinds of individual rights disputes, if conciliation is not stipulated in the parties' agreement. In this case, any party may initiate the mediation procedure. Article 23 of the Mediation Act requires the parties to agree upon the involvement of a mediator and send a letter or an electronic document to the mediator chosen from the list of mediators published by the Ministry of Justice.[645]

The mediation process ends, in case

- the parties sign a written agreement;
- any party inform the other party and the mediator, that he/she terminates the mediation process;
- both parties inform the mediator, that they terminate the mediation process;
- after 4 months, unless the parties agree otherwise.[646]

Any party may turn to court despite the agreement.

644 Act No. 53 of 1994 on court enforcement, Article 23.

645 Article 23 of the Mediation Act.

646 Article 35–36 of the Mediation Act.

4. Collective disputes

Mediation and conciliation is also possible in case of collective rights disputes, however, the same provisions apply as for individual conciliation and mediation. Therefore, we shall not reiterate these provisions, will confine ourself to describing the two forms of interest disputes: conciliation and arbitration.

4.1. Conciliation

The employer and the works council or the trade union may set up a conciliation committee to resolve their disputes. The works council agreement or the collective agreement may also contain provisions for establishing a standing committee.[647] Therefore, conciliation is voluntary in collective labour dispute resolution, however, the works agreement or the collective agreement may make it compulsory by setting up a standing committee.

All interest disputes, which are not rights disputes, may be discussed in the conciliation committee. The works council agreement or the collective agreement may contain provisions for a standing committee and may also define the possible topics for conciliation. As regards trade unions, the range of interest debates may be vast. However, in case of works councils, only the consultation rights regulated by the Labour Code may form the basis of such interest debates.

The conciliation committee shall be composed of an equal number of members delegated by the employer and the works council or trade union, as well as an independent chairman.[648] The chairman shall consult the members delegated by both parties on an ongoing basis, drawing up an executive summary upon conclusion of the conciliation process which contains the arguments of the members and the outcome of the procedure.[649]

Both parties (employer, works council or trade union) have the capacity to initiate the procedure. Therefore, only these actors have (legal) standing to appear in mediation. Workers' representatives (staff delegates, individual workers) cannot initiate or participate in mediation, since they are not mentioned by article 291–293 of the Labour Code.

647 Article 291 of the 2012 Labour Code.

648 Article 291 of the 2012 Labour Code.

649 Article 292 of the 2012 Labour Code.

As for trade unions: "the rights afforded by this Act to trade unions shall be due to the local trade union branch represented at the employer. Local trade union branch represented at the employer shall mean a trade union which, according to its statutes, operates an organization authorized for representation or has an officer at the employer."[650] Therefore, only trade unions represented at the employer are entitled to exercise the right to conciliation (or mediation), while unions with no direct presence at the employer do not enjoy this right.

On the employers' side, the employer's representative may initiate or take part in conciliation (or mediation). The person exercising employer's rights shall be entitled to take legal acts on behalf of the employer. The rules for exercising employer's rights shall be laid down by the employer, within the framework provided for by the law. The employer may regulate representation in the company's founding document or in a by-law, or even in the collective agreement. If employer's rights are exercised by a person (body, organ) other than the one authorized thereto, his/her actions shall be deemed null and void, unless the person upon whom such rights were bestowed approved the legal act. Only single employers are mentioned by article 291 of the Labour Code, therefore, employers' organisations are not entitled to initiate or take part in conciliation or mediation.

The European Works Council Act[651] does not contain provisions on mediation or conciliation procedure. Since the provisions of the Labour Code on labour disputes (article 291–293) make no mention of either the European Works Council as a body or individual members of the European Works Council, they are not entitled to initiate or participate in conciliation or mediation.

The employer and the works council or the trade union may conclude a prior agreement in writing to abide by the decision of the committee. Upon such agreement, the committee's decision shall be considered binding.[652] Therefore, if the parties to the conciliation do not agree, their agreement shall not be binding. Although this is not regulated clearly by the Labour Code, this can be inferred from Article 293 of the Labour Code.

In the Hungarian Railway Company (MÁV) the conflict on the withdrawal of the free use of railways for employees was settled by a committee (2009).[653] At a regional Bus Company (Kapos Volán) the Labour Conciliation and

650 Article 270 of the 2012 Labour Code.

651 Act No. 21 of 2003.

652 Article 293 of the 2012 Labour Code.

653 http://www.vsz.hu/index.php?option=com_content&view=article&id=239:tajekoztato-a-vasuti-egyeztet-bizottsag-2009-aprilis-16-i-ueleserl&catid=56:veb&Itemid=114

Arbitration Service (MKDSZ)[654] assisted in concluding an agreement on wages in a conciliation committe. This agreement affected the wage increase of 1000 employees by concluding the collective agreement of 2011.[655] In the Hungarian Electricity Company (MVM) a similar agremement on wages was concluded in 2012, also with the assistance of MKDSZ.[656]

4.2. Arbitration

Arbitration is provided for and regulated only with respect to collective interest disputes.[657] According to the Act on Arbitral Tribunals, arbitration must not be applied in individual or collective labour rights disputes.[658]

As mentioned above, there are two kinds of arbitration in collective interest disputes:

a) Voluntary arbitration: the employer and the works council or the trade union may conclude a prior agreement in writing to abide by the decision of the committee, in which case the committee's decision shall be considered binding. The topic of arbitration is stipulated in the parties' written agreement, listing particular areas for arbitration. Both parties have the capacity to initiate the procedure. In case of a tie vote, the chairperson's vote shall be decisive.

   The decision of the committee is binding, as it is considered an 'employment regulation'. For the purposes of the Labour Code, 'employment regulations' shall mean legislation, collective agreements and works council agreements, and the binding decisions of the conciliation committee adopted according to Section 293.[659] Any agreement that infringes upon any employment regulation, or that is

654 In Hungarian: Munkaügyi Közvetítői és Döntőbírói Szolgálat, MKDSZ.

655 http://www.tpk.org.hu/engine.aspx?page=tpk_MKDSZ_Hirek_rolunk_irtak&switch-content=tpk_mkdsz_hirek_rolunk_szakmai&switch-zone=Zone1&switch-render-mode=full

656 http://www.tpk.org.hu/engine.aspx?page=tpk_MKDSZ_Hirek_rolunk_irtak

657 Article 293 of the 2012 Labour Code.

658 Act No. 71 of 1994, article 4.

659 Article 13 of the 2012 Labour Code: "For the purposes of this Act, 'employment regulations' shall mean legislation, collective agreements and works agreements, and the binding decisions of the conciliation committee adopted according to Section 293."

entered into by way of circumvention of any employment regulation shall be null and void.[660]

b) Obligatory arbitration: disputes arising in connection with Article 236 (4) and 263 of the Labour Code must be decided by an arbitrator. Both parties are entitled to initiate this procedure. In the absence of an agreement between the parties, the arbitrator shall be chosen by random selection from among the persons nominated by the parties. However, the parties may agree on choosing an arbitrator from the MKDSZ list of arbitrators (the detailed rules are contained in the MKDSZ Statute). During the proceedings of the committee or the arbitrator the parties shall not engage in any conduct aiming to frustrate the agreement or the implementation of the decision.

The decisions rendered (in the case of both voluntary and obligatory arbitration) are binding, thus, it is not possible to turn to court to change or abolish such decisions. However, such a decision is unenforceable through court, since it is not mentioned in Article 285 of the Labour Code as a subject matter of a rights dispute. Furthermore, the Act on Civil Procedure does not consider the dispute on the obligatory decision of the conciliation committee to be a labour rights court dispute. Therefore, this decision cannot be enforced in a court procedure.

5. Institution in charge: Labour Conciliation and Arbitration Service

The MKDSZ is a voluntary, autonomous conflict resolution body that was set up by the government and the social partners in 1996. Before the change of government in May 2010, the MKDSZ was supervised by the National Council of Interest Reconciliation (OÉT),[661] which used to be a tripartite body of social dialogue at national level. The issue of supervision was regulated only by the Statute of the MKDSZ,[662] which was passed in 1996 and last amended in 2008.

660 Article 27 of the 2012 Labour Code.

661 http://www.szmm.gov.hu/main.php?folderID=16238&articleID=30381&ctag=articlelist&iid=1

662 http://www.tpk.org.hu/engine.aspx?page=tpk_MKDSZ_Dokumentumok&switch-content=mkdsz_doku_szerv_muk_elj_szabaly&switch-zone=Zone1&switch-render-mode=full

However, the OÉT was abolished by the new Act on the National Economic and Social Council (Act No. 93 of 2011).

Presently, the MKDSZ forms part of the Social Dialogue Center,[663] a government institution including the MKDSZ and the Sectoral Social Dialogue Committees. However, the Statute of MKDSZ had not been amended accordingly. The nearly 80 members of the MKDSZ were elected by the OÉT in 2010 for 5 years.

The MKDSZ is a permanent body of professional and independent mediators and arbitrators. The criteria for membership are contained in the Statute of the MKDSZ. The MKDSZ organizes initial and continuous training for their members, financed by the budget of the MKDSZ. Their activity is remunerated by the MKDSZ, the daily fees and expenses are laid by the Statute of the MKDSZ. The participation of MKDSZ members is free of charge in case of mediation, while the employers pay in case of arbitration. The expenses of the MKDSZ member must be reimbursed by the parties to the dispute in case of mediation and the employers pay in case of arbitration. The MKDSZ is financed by the central (state) budget.

6. Critical assessment of out-of-court mechanisms for solving labour disputes

The new Labour Code came into force on 1 July 2012. Consequently, there is no experience and opinion by the parties involved on the implementation, application and acceptance of the new provisions. Part Four (only a few provisions) on labour disputes has not generated professional debates, as it was not in the focus of discussions. However, the new provisions are rather similar to those of the 1992 Labour Code, therefore, the following opinions and critics are based on the former Labour Code.

The provisions of the Labour Code are rather brief and vague, as they do not define the basic definitions (conciliation, mediation, arbitration). Especially the difference between conciliation and mediation is unclear. Therefore, many experts have proposed the detailed regulation (especially procedural rules) of conciliation, mediation, arbitration. According to the general critic and proposals, the detailed regulation of conciliation and mediation would increase the number of these alternative disputes. The detailed rules of arbitration are

663 www.tpk.gov.hu

also missing from the Labour Code. In case of mediation, it should also be clarified and stated, that the mediator shall be independent. As for the Mediation Act, any of the parties may go to court in spite of the agreement of the parties, which solution weakens the role of mediation.

MKDSZ is the only state institution for labour mediation and arbitration, however, it is not even mentioned in any Hungarian law. Therefore, the legal status of MKDSZ should be clarified, respectively the basic principles and procedural rules of MKDSZ should be regulated in the Labour Code (or in other law).

Hungary is characterized by the low use of ADR in labour rights disputes and interest disputes.[664] There is no data available on the use of these alternative mechanisms, except for the cases brought before MKDSZ. According to the available data, the number of disputes managed with the help of MKDSZ was 202 between 1996 and 2002: 52 mediation, 42 labour rights disputes, 4 arbitration, 21 advice requests, 84 other types of consultation. The reason for the low number of requests is unclear, since most of the organizations are familiar with the MKDSZ and its services.[665] According to the Report of MKDSZ on its activities in 2008,[666] they offered their service in 7 cases and as a result, the MKDSZ experts participated in 5 mediations. According to another research paper,[667] there were altogether 90 mediations and 5 arbitrations conducted by MKDSZ between 1996 and 2007. The number of mediations is about 7-10 per year (with stagnating numbers in the last 10 years).

664 Source: EIRO national centres, 2009 In: *Individual disputes at the workplace: alternative disputes resolution*. Eurofound, p. 3.

665 Rúzs Molnár, Krisztina: *Mediáció a munkajogban*. Szeged, Pólay Elemér Alapítvány, 2007. 142–145.

666 "Beszámoló a Munkaügyi Közvetítői és Döntőbírói Szolgálat 2008. évi tevékenységéről" http://www.apk.org.hu/engine.aspx?page=tpk_MKDSZ_Dokumentumok

667 *Az MKDSZ társadalmi hasznossága.* Rézler Gyula Mediációs Intézet, Kutatási Beszámoló, http://www.apk.org.hu/engine.aspx?page=tpk_MKDSZ_Hirek_rolunk_irtak, 57.

BIBLIOGRAPHY

Agut García– González

Carmen Agut García – Cayetano Núñez González: The Regulation of Economically Dependent Self-Employed Work in Spain: A Critical Analysis and a Comparison with Italy. *E-Journal of international and comparative Labour Studies,* 2012/1–2.

Arató

Arató, Krisztina: *A középszintű érdekegyeztetés változásai Magyarországon a PHARE projekttől napjainkig, illetve az Ágazati Párbeszéd Bizottságok kapcsolatai a makroszintű érdekegyeztetés intézményeivel.* Kutatási zárótanulmány. Budapest, Civil Európa Egyesület, 2010.

Bankó (2004)

Bankó, Zoltán: A távmunka a munka törvénykönyve speciális szabályainak rendszerében. *Jura* 2004/2.

Bankó (2008)

Bankó, Zoltán: *Az atipikus munkajogviszonyok – a munkajogviszony általánostól eltérő formái az Európai Unióban és Magyarországon.* Doktori Értekezés. Pécs, Manuscript, 2008.

Bankó (2010)

Bankó, Zoltán: *Az atipikus munkajogviszonyok.* Budapest–Pécs, 2010.

Bankó–Berke–Kajtár–Kiss–Kovács

Bankó, Zoltán – Berke, Gyula – Kajtár, Edit – Kiss, György – Kovács, Erika: *Nagykommentár a munka törvénykönyvéhez.* Budapest, Wolters Kluwer, 2012.

Bán (2003)

Bán, Péter: A munkaviszony fogalmával kapcsolatos jogi problémák, különös tekintettel a leplezett munkaszerződésekre. 2003. www.jogiforum.hu, 10.

Bán

Bán, Péter: Harmonizáció és jogbizonytalanság – a határozott idejű munkaviszony aktuális kérdései. *Liber Amicorum: Studia Ida Hágelmayer dedicata. Ünnepi dolgozatok Hágelmayer Istvánné tiszteletére. I.* 2005. 35–61.

Berke–Kiss–Pál–Pethő–Lőrincz–Horváth

Gyula Berke – György Kiss – Lajos Pál – Róbert Pethő – György Lőrincz – István Horváth: Theses for the regulatory concept of the new Labour Code. *Pécsi Munkajogi Közlemények*, 2009/3.

Berke–Bankó

Berke, Gyula – Bankó, Zoltán: A munkaerő-kölcsönzési tevékenység folytatásának feltételei Magyarországon – uniós követelmények. *HR&Munkajog,* 2013/3.

Berke–Kiss

Berke, Gyula – Kiss, György: *Kommentár a munka törvénykönyvéhez. A munka törvénykönyve magyarázata*. Budapest, CompLex, 2012.

Bitskey–Gyulavári

Botond Bitskey – Tamás Gyulavári: Hungary. In: Malcolm Sargeant (ed.): *The Law on Age Discrimination.* The Netherlands, Kluwer Law International, 2008.

Carinci

Maria Teresa Carinci: The Italian Labour Market Reform under the Monti Government (Law No. 92/2012). *European Labour Law Journal,* 2012/4. 308.

Cazes–Nesporova

S. Cazes – A. Nesporova: *Flexicurity: a relevant approach in central and Eastern Europe*. Geneva, ILO, 2007.

Czeglédy

Czeglédy, Csaba: A munkaerő-kölcsönzés és az iskolaszövetkezetek. *HR&Munkajog,* 2013/10.

Countouris
Nicola Countouris: *The Changing Law of the Employment Relationship.* Aldershot, Ashgate Publishing, 2007.

Czuglerné Iványi
Czuglerné Iványi, Judit: Az információs és konzultációs jogok szabályozása Magyarországon. In: *Liber Amicorum – Studia Stephano Kertész dedicate.* Budapest, ELTE ÁJK Munkajogi és Szociális Jogi Tanszék, 2004.

Cséffán
Cséffán, József: *A Munka Törvénykönyve* és *magyarázata* Szeged, Szegedi Rendezvényszervező Kft., 2012.

Daubler
Wolfgang Daubler: Working People in Germany. *Comparative Labour Law and Policy Journal,* 1999/1.

Davidov
Guy Davidov: Who is a worker? *Industrial Law Journal*, 25., 2005/1. 57–71.

Deakin
S. Deakin: Labour Law as Market Regulation: the Economic Foundations of European Social Policy. In: P. Davies – S. Sciarra – S. Simitis (ed.): *European Community Labour Law: Principles and Perspectives.* Oxford, Clarendon Press, 1996.

Dudás
Dudás, Katalin: Önfoglalkoztató – kényszervállalkozó – munkavállaló. Menekülés a munkajog hatálya alól. In: Rácz, Réka – Horváth, István (ed.): *Tanulmányok a munkajog jövőjéről.* Budapest, Foglalkoztatáspolitikai és Munkaügyi Minisztérium, 2004.

Engblom
Samuel Engblom: Equal treatment of employees and self-employed workers. In: Ann Numhauser-Henning (ed.): *Legal Perspectives on Equal Treatment and Non-Discrimination*. Kluwer Law International, 2001.

Engblom (2003)
Samuel Engblom: *Self-employment and the Personal Scope of Labour Law. Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States.* EUI, Thesis Paper, Florence, 2003. 12. http://cadmus.eui.eu/bitstream/handle/1814/4616/2003_Engblom.pdf?sequence

Escande Varniol– Laloum– Mazuyer
Marie-Cécile Escande Varniol – Sylvaine Laloum – Emmanuelle Mazuyer (eds.): *Quel Droit Social dans une Europe an Crise?* Bruxelles, Larcier, 2012.

Farkas–Kádár
Lilla Farkas – András Kádár: *Report on measures to combat discrimination in Hungary.* Migration Policy Group, 2003.

Fazekas–Benczúr–Telegdy
Károly Fazekas – Péter Benczúr – Álmos Telegdy (eds.): *The Hungarian Labour Market 2013.* Budapest, Hungarian Academy of Sciences, 2013.

Fodor–Nacsa–Neumann
Fodor, T. Gábor – Nacsa, Beáta – Neumann, László: *Egy* és *több munkáltatóra kiterjedő hatályú kollektív szerződések* összehasonlító *elemzése.* Országos összegző tanulmány. Budapest, Kende Ügyvédi Iroda, 2008.

Garcia–Alhambra–Haar–Kun
M. Antonio Garcia – Munoz Alhambra – Beryl ter Haar – A. Kun: Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law. *The International Journal of Comparative Labour Law and Industrial Relations*, Vol 27. December 2011., Vol. 4. 334–367.

Grzebyk
Piotr Grzebyk: Legal position of trade unions in Polish Collective Labour Law: enterprise-based trade union. *Hungarian Labour Law E-Journal* (http://www.hllj.hu), 2014/1. 73–86.

Gyulavári (2006)
Gyulavári, Tamás: Speciális foglalkoztatási formák. In: *A munkajog nagy kézikönyve*. Budapest, CompLex, 2006.

Gyulavári (2007)
Gyulavári, Tamás: Három évvel az antidiszkriminációs jog reformja után. *Esély*, 2007/3.

Gyulavári (2012)
Gyulavári, Tamás (szerk.): *Munkajog.* Budapest, ELTE Eötvös Kiadó, 2012.

Gyulavári (2013)
Gyulavári, Tamás (szerk.): *Munkajog.* Budapest, ELTE Eötvös Kiadó, 2013.

Gyulavári (2014)
Tamás Gyulavári: A bridge too far? The Hungarian regulation of economically dependent work. *Hungarian Labour Law E-Journal* (www.hllj.hu), 2014/1.

Gyulavári–Kádár
Gyulavári, Tamás – Kádár, András Kristóf: A magyar antidiszkriminációs jog vázlata. Egyetemi jegyzet. Miskolc, Bíbor, 2009.

Gyulavári–Kun
Gyulavári, Tamás – Kun, Attila: Munkáltatói jogalkotás? A munkáltatói szabályzatok szerpe a munkajogi szabályozásban. *Magyar Jog*, 2012. március

Gyulavári–Hős–Kártyás–Takács
Gyulavári, Tamás – Hős, Nikolett – Kártyás, Gábor – Takács Gábor: *A Munka Törvénykönyve 2012, egységes szerkezetben állásfoglalásokkal és magyarázatokkal.* Budapest, Kompkonzult, 2012.

Hajdú
József Hajdú: Social security protection of the self-employed persons in Hungary. In: *Nagy Károly-emlékkönyv.* Szeged, 2002.

Halmos
Szilvia Halmos: Requirement of reasonable accommodation under Hungarian employment law. *Hungarian Labour Law E-Journal* (www.hllj.hu), 2014/1.

Hágelmayer
Hágelmayer, Istvánné: *A kollektív szerződés alapkérdései*. Budapest, Akadémiai Kiadó, 1979.

Hárs
Hárs, Ágnes: Atipikus foglalkoztatási formák Magyarországon a kilencvenes és a kétezres években. *Közgazdasági Szemle,* 2013/2. 224–250.

Horváth
Horváth, István: Fényárnyék. Húsz percben az új Munka Törvénykönyvéről. In: Kun, Attila (ed.): *Az* új *Munka Törvénykönyve dilemmái.* [Acta Caroliensia Conventorum Scientiarum Iuridico-Politicarum V.] Budapest, 2013.

Hovánszki
Hovánszki, Arnold: A tipikus és atipikus foglalkoztatás Magyarországon. *Munkaügyi Szemle*, 2005/7–8.

Kádár
Kádár, András: Az Egyenlő Bánásmód Hatóság függetlenségéről. *Fundamentum*, 2010/2.

Kárpáti
Kárpáti, József: Az utolsó próbatétel. Ítélet a Háttér Társaság kontra Károli Egyetem ügyben. *Fundamentum,* 2005/3.

Kártyás (2013a)
Kártyás, Gábor: Kollektív szerződés. In: Gyulaváři, Tamás (szerk.): *Munkajog.* Budapest, ELTE Eötvös Kiadó, 2013. 491.

Kártyás (2013b)
Kártyás, Gábor: Csorba kiegyenlítés: a kölcsönzött munkavállalók egyenlő bánásmódhoz való joga az új munka törvénykönyve után. *Esély* ,2013/3.

Kártyás (2013c)
Kártyás, Gábor: Az iskolaszövetkezeti munkaviszony helye a foglalkoztatási formák között. *Pécsi Munkajogi Közlemények*, 2013/2.

Kártyás–Takács
Kártyás, Gábor –Takács, Gábor: Pellengér vagy piedesztál? A kiterjesztett hatályú kollektív szerződések normatani értékelése. *Pécsi Munkajogi Közlemények,* 2011/2. 91–111.

Kártyás–Répáczki–Takács
Kártyás, Gábor –Répáczki, Rita – Takács, Gábor: *A munkaerő-kölcsönzés és az iskolaszövetkezeti munka szerepe a fiatalok foglalkoztatásában.* Kutatási zárótanulmány. Budapest, 2012. http://pazmanymunkajog.com/images/files/kutatas/ZRTANULMNY.pdf

Kelemen
Kelemen, Melinda: A háztartási alkalmazottak foglalkoztatásának kérdései Magyarországon – a láthatatlan munkaerő. *Esély*, 2013/3.

Kenderes –Bányai
Kenderes, György – Bányai, Krisztina: A munkajogi és polgári jogi kérdések és ellentmondások a munkaerő-kölcsönzés szabályrendszerében. *Munkaügyi Szemle,* 2002/7–8.

Kiss (1999)
Kiss, György: A munkaviszony, a megbízási és a vállalkozási szerződés elhatárolása. *Cég és Jog,* 1999/1.

Kiss (2001)
Kiss, György: *Az Európai Unió munkajoga.* Budapest, Osiris, 115–125.

Kiss (2002)
Kiss, György: Az egyenlőségi jogok érvényesülése a munkajogban. *Jura*, 2002/1. 48–61.

Kiss (2005)
Kiss, György: *Munkajog.* Budapest, Osiris, 2005.

Kiss (2008)
Kiss, György.: Munkajog a közjog és a magánjog határán – egy új munkajogi politika kialakításának szükségessége. *Jogtudományi Közlöny*, 2008/2. 70–81.

Kiss (2008b)
Kiss, György: A magyar munkajog megújulásának esélye az Európai Unió munkaügyi politikájának tükrében. *Pécsi Munkajogi Közlemények,* 2008/1.

Kiss (2013)
Kiss, György: A munkavállalóhoz hasonló jogállású személy problematikája az Európai Unióban és e jogállás szabályozásának hiánya a Munka Törvénykönyvében. *Jogtudományi Közlöny,* 2013/1.

Kovács
Kovács, Szabolcs: A kikölcsönzés megszűnése mint felmondási indok – egy bírósági ítélet tükrében. *HR&Munkajog,* 2014/5.

Kozma
Kozma, Anna: A több munkáltatóval fennálló munkaviszony. In: Kardkovács, Kolos (szerk.): *A Munka Törvénykönyvének magyarázata*. Budapest, HVG-Orac, 2012.

Kun
Kun, Attila: A munkáltató kártérítési felelőssége. In: Gyulavári, Tamás (szerk.) *Munkajog.* Budapest, ELTE Eötvös Kiadó, 2012.

Kulisity
Kulisity, Mária: Munkaügyi viták. In: Gyulavári, Tamás (szerk.): *Munkajog.* Budapest, ELTE Eötvös Kiadó, 2013.

Lacko
Milos Lacko: *Slovak Social Security Law.* Plzen, Ales Cenek, 2010.

Laky
Laky, Teréz: Az atipikus foglakozásokról. http://people.mokk.bme.hu/~kornai/laky/Cikk/atipikus.pdf

Laky–Neumann–Boda
Laky, Teréz–Neumann, László–Boda, Dorottya: *A privatizáció foglalkoztatási hatásai*. Budapest, 2001.

Lehoczkyné Kollonay (2003)
Lehoczkyné Kollonay, Csilla: *A magyar munkajog II.* Budapest, 2003.

Lehoczkyné Kollonay (2013)
Lehoczkyné Kollonay, Csilla: Génmanipulált újszülött – Új munkatörvény az autoriter és neoliberális munkajogi rendszerek határán. In: Kun, Attila (ed.): *Az új munka törvénykönyve dilemmái.* Budapest, KGRE ÁJK, 2013.

Nacsa
Nacsa, Beáta: *Az* Ágazati *Párbeszéd Bizottságok működésének jogi-munkajogi elemzése*. Kutatási Zárótanulmány. Budapest, 2010.

Pál (2007)
Pál, Lajos: *A munkavégzésre irányuló jogviszonyok minősítéséről.* Pécs, Justis, 7.

Pál
Pál, Lajos: A szakszervezeti kifogás gyakorlásával kapcsolatos kérdések. In: *Emlékkönyv Román László Születésének 80.* évfordulójára. Pécs, 2008.

Pennings– Bosse
Frans Pennings – Claire Bosse (eds.): *The Protection of Working Relations.* The Netherlands, Kluwer law International, 2011.

Pennings
Frans Pennings: The Various Categories of Persons Performing Work Personally. In: Pennings–Bosse op. cit.

Perulli (2011)
Adalberto Perulli: Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries. In: Giuseppe Casale: *The employment relationship. A Comparative Overview.* Geneva, Hart Publishing, 2011. 182.

Perulli (2002)
Adalberto Perulli: *Economically dependent/quasi-subordinate (parasubordinate) employment: legal, social and economic aspects.* European Commission, 2002.

Peszlen
Peszlen, Zoltán: Próbaper a diszkrimináció ellen. In: Gyulaváři, Tamás – Kiss, Róbert – Lévai, Katalin (szerk.): *Vegyesváltó – Pillanatképek nőkről, férfiakról.* Budapest, Egyenlő Esélyek Alapítvány, 1999.

Prassl
Jeremias Prassl: 'All in this together?' UK Labour Market Reforms under the Coalition Government. *Hungarian Labour Law E-Journal* (http://www.hllj.hu), 2014/1.

Prugberger–Kenderes
Prugberger, Tamás – Kenderes, György: Az atipikus munkaviszonyok a munkaerő-kölcsönzés és a távmunka tükrében. *Miskolci Jogi Szemle*, 4. évf., 2009/2.

Radnay (1998)
Radnay, József: A vezetők munkavégzési jogviszonyának és a munkáltatói jogkör gyakorlásának egyes kérdései. *Gazdaság és Jog,* 1998/11.

Radnay (2004)
Radnay, József: A munkaerő-kölcsönzés egyes kérdései. In: *Ünnepi tanulmányok Bánrévy Gábor 75. születésnapjára.* Budapest, Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar, 2004.

Radnay (2004b)
Radnay, József: A látszólagos önállóság és a munkavégzési kapcsolatok jogszerű alakítása. In: Rácz, Réka – Horváth, István: *Tanulmányok a munkajog jövőjéről.* Budapest, Foglalkoztatáspolitikai és Munkaügyi Minisztérium, 2004.

Radnay (2008)
Radnay, József: Az üzemi tanácsok tevékenységének továbbfejlesztése. In: *Emlékkönyv Román László születésének 80. évfordulójára*. Pécs, 2008.

Radnay (2010)
Radnay, József: Munkajogunk helyzetéről. *Gazdaság és Jog,* 2010/9–10.

Rosioru
Felicia Rosioru: *The legal acknowledgement of the category of the economically dependent workers.* Manuscript, 2013.

Rúzs Molnár
Rúzs Molnár, Krisztina: *Mediáció a munkajogban*. Szeged, Pólay Elemér Alapítvány, 2007.

Sólyom–Brunner
László Sólyom: Introduction to the Decisions of the Constitutional Court of the Republic of Hungary. In: László Sólyom – Georg Brunner (eds.): *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court.* University of Michigan Press, 2000.

Swiatkowski
Andrzej Marian Swiatkowski: The protection of working relationships in Poland. In: Pennings–Bosse op. cit.

Szladits
Szladits, Károly: *A magyar magánjog vázlata*. 2. rész. 4., átdolg. kiad., Budapest, 1935.

Turowiec
Adam Turowiec: *Case Study: self-employment in Poland. The impact of new forms of labour on industrial relations and the evolution of labour law in the European Union.* Manuscript, 2007.

Újvári
Újvári, József: A papagájklauzula esete a munkaszerződéssel. In: *Tanulmányok Dr. Veres József egyetemi tanár 70. születésnapjára.* Szeged, 1999.

Ungi
Ungi, Noémi: A kollektív szerződések elemzésének tapasztalatai. I–II. rész. *Munkaügyi Szemle*, 2007. január-február

Varga

Varga, M. Péter: A munkaerő-kölcsönzés és a kirendelés. *HR&Munkajog,* 2013/10.

Vékás

Vékás, Lajos: Egyenlő bánásmód polgári jogi jogviszonyokban? *Jogtudományi Közlöny,* 2006/10. 355–364.

Wallace

C. Wallace: Work Flexibility in Eight European Countries: A Cross-national Comparison. *Czech Sociological Review*, Vol. 39., 2003/6.

Weltner

Andor Weltner: *A szocialista munkaszerződés (The socialist employment contract).* Budapest, Közgazdasági és Jogi Kiadó, 1965.

Is the Hungarian Labour Code the most flexible in the world? Beyond this issue, the book examines the most important elements of the Hungarian labour law reform of 2012. The critical analysis shares ideas on challenges of modern labour regulations, especially on how to serve the traditional goals of employee protection in a setting where economic efficiency emerged as an equally important requirement. The assessment of the most debated labour law institutions, such as the prohibition of discrimination, collective rights or agency work are presented in the light of EU legislation. Thus, readers are also supported by comments on EU level regulation from a new Member State's perspective.

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