

A BRIDGE TOO FAR? THE HUNGARIAN REGULATION OF ECONOMICALLY DEPENDENT WORK

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Introduction

Hungarian employment regulation has traditionally been divided legal relationships aimed at employment to two clusters, employment relationships on the one hand, and civil law relationships on the other hand. First of all the study will review the reasons, development and peculiarities of this binary system.

This *binary system of working relations* was asserted by labour legislation of the last decades, but labour law harmonization had also deepened the gap between employment contracts and civil law contracts (contract of service and contract for service). At the same time bogus self-employment have generated more and more difficulties in the labour market, moreover, misguided financial policy specifically incited employers and employees to by-pass labour law by opting for cheaper working relationships combined with less employment rules and lower social burdens. Nevertheless, legal responses to this damaging phenomenon were weakened by unstable labour law concepts as well as an unpredictable judicial practice.

On that account the *central topic* of the study is, whether it is essential to remodel the binary system of work relationships by the enactment of economically dependent work in the near future. Is there a real chance to create the third employment category in Hungarian labour

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law? The general labour law notion of economically dependent, employee-like person was included in the first Draft of the new Labour Code in 2011, even so this attempt failed.

Seeing that the concept of employee-like person is well-founded, innovative and beneficial both from a theoretical and practical viewpoint, therefore, I try to offer the detailed and constructive critique of the proposal on quasi employees. In my opinion there are two fundamental conditions of the effectiveness of this third labour law definition between employment and independent contracts. The first condition is the precise, but also fairly broad definition of the personal scope covered by the category of an employee-like person. Secondly, a set of substantive employment rights should be adhered to this group of workers, which may effectively better their working conditions and employment situation. According to my conclusions, the 2011 proposal could have only partially complied with these requirements.

The definition of employment relationship and prohibition of false civil law contracts

Are the parties free to choose the type of contract?

In theory *the parties may freely choose* between employment contracts, civil law contracts (construction, supply contracts etc.), respectively other types of work contracts (e.g. contract of independent commercial agent). If the nature of the work allows the parties to perform it equally in an employment relationship and a civil law (self-employed) relationship, then the declared will of the parties is going to be the decisive factor in relation to the assessment of the legal nature of the parties' relationship.² In this case they have the freedom to choose the type of contractual relationship.

Notwithstanding this free choice of contract type is not without limits, because the absolute, unrestricted autonomy of the two sides of working relationships would inevitably lead to abuses.³ The *fight against bogus civil law contracts*, which in fact disguise employment contracts, is simply indicative of the demand of Hungarian labour law of a certain level of cogency concerning the type of the contract. All contracts are bogus (false), in which the expressed will differs from the genuine, actual will of the parties.

² Published decision of the Supreme Court: BH 1982/347.

³ Kiss György (1999): A munkaviszony, a megbízási és a vállalkozási szerződés elhatárolása. Cég és Jog, 1999. 1. szám, 23. o.; Bán Péter (2003): A munkaviszony fogalmával kapcsolatos jogi problémák, különös tekintettel a leplezett munkaszerződésekre. www.jogiforum.hu, 10. o.

The Labour Code specifically denotes, that *false agreements shall be null and void*, and if such an agreement (civil law contract) is intended to disguise another agreement (employment contract), it shall be judged on the basis of the latter, the disguised agreement.⁴ If work is performed in accordance with labour law provisions and characteristics of an employment relationship, then the parties must conclude an employment contract and evidently the rules of the Labour Code shall be applied.⁵ The legal consequence of the false civil law contract is nullity declared by the court and the automatic application of the Labour Code. Accordingly the civil law contract must be considered as an employment contract, by which the parties established an employment relationship in fact, since the factual conditions of work shall prevail over the will and legal statements of the parties.

Nonetheless, a civil law contract may be deemed as a bogus contract, if both parties want to conclude a different contract from what they both signed, since „*unilateral pretense is indifferent* concerning the invalidity and interpretation of the debated contract”.⁶ 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 (not the one described by the signed contract).⁷

The peculiar and illusory common interest of the employer and the employee is to leave the personal scope of labour law, hence they want to minimize taxes and social security contributions. Meanwhile the employers will be the clean-cut winners of this game in the long run, contrarily the employees will sooner or later come off badly (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 mistaken decisions.

The Hungarian definition of employment relationship

The definition of employment relationship was needed in furtherance of the fight against bogus civil law contracts, albeit it also asserts the theoretical clarity of employment law. The insertion and clarification of the basic labour law definitions had been a *long time debt* of

⁴ 2012 Labour Code, article 27(2).

⁵ Bankó Zoltán (2008): Az atipikus munkajogviszonyok – a munkajogviszony általánostól eltérő formái az Európai Unióban és Magyarországon. Pécs, Doktori Értekezés, Kézirat, 28. o.

⁶ Published decision of the Supreme Court: BH 1997/583.

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

Hungarian labour 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.). For instance the notion of employment contract could be puzzled out from the detailed articles on the rights and obligations of the parties.⁸

Therefore it is a noteworthy and very positive improvement, that the new Labour Code includes all the *relevant labour law definitions*. According to the new Labour Code, 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 required to provide work for the employee and to pay wages.⁹ *Employer* means any person having the capacity to perform legal acts who is party to employment contracts with employees¹⁰ and the *employee* is any natural person who works under an employment contract.¹¹

Accordingly 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 in the contract. The strong personal subordination between the parties within the employer's organisational hierarchy is evidenced by the obligation to provide work and the broad right 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. As it is obvious from this expanded description, the above mentioned normative definition of the 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 of personal performance of work and the existence of a written agreement.

Concurrently these criterias of the employment relationship may be undermined or at least weakened by the new *legal hierarchy* of Hungarian labour law norms, whereby the collective agreement may deviate from the dispositive rules of the Labour Code to the benefit as well as the detriment of the employee. Article 277 of the new Labour Code allows collective agreements to deviate from the Labour Code to both directions (in peius and in melius), if there is no altering provision of the Labour Code. However, article 57 of the Labour Code does not prohibit deviation to both directions regarding the provisions on basic rights and

⁸ This means the entire Part III. of Act 22 of 1992.

⁹ 2012 Labour Code, article 42.

¹⁰ 2012 Labour Code, article 33.

¹¹ 2012 Labour Code, article 34 (1).

obligations of the parties. For instance collective agreements may erase personal performance of work from the obligations of the employee.

Furthermore it is questionable, whether the assessment of the legal relationship, if it is an employment or a civil law relationship, may be based on the negotiations between the parties prior to the agreement, their declarations at the time of concluding the agreement and during work, respectively the actual characteristics of work performance. Article 75/A of the former Labour Code had expressly declared since 2003, that these circumstances of the case must be taken into account in the decision regarding the legal nature of the work relationship of the parties.

On the contrary, the new Labour Code is silent on this issue, what may lead to *uncertainty of interpretation*. In my view the above mentioned criterias, particularly the actual characteristics and conditions of work must be taken into account, when evaluating the type of the legal relationship. The will and intention of the parties cannot override the factual and substantive characteristics of the given work relationship so as to protect the employee's long-term interest, even against his/her own decisions.

Primary and secondary evaluation criterias: is the hierarchy of characteristics efficient?

In spite of the introduction of the aforementioned labour law definitions, it is still indispensable to define the criterias of an employment relationship in line with judicial practice of the last two decades.¹² Although the basic definitions of the Labour Code may help clarifying this list of criterias, but the definitions are not enough to adequately guide legal practice. In Hungarian labour law theory and practice as well, there is a tradition of *differentiating primary and secondary evaluation criterias* of an employment relationship. In my judgement such a hierarchy may be useful in helping legal practice to define the weight of the various criterions and their joint assesment may help us to avoid problems inevitably arising from their individual evaluation.

The system of primary and secondary criterions was introduced by a governmental guidance in 2005, which was a non-binding policy document of the ministries of employment and finance.¹³ This guidance described the taxative list of primary and secondary criterias based

¹² Gyulavári Tamás szerk. (2013): Munkajog. Budapest, Eötvös Kiadó, 35-43. o.

¹³ 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 is not in force from 1 January 2011 (repealed by Act 130 of 2010).

on formerly published decisions of the Supreme Court. In accordance with the guidance, but slightly amending its list, I propose the following list *primary criterias of an employment relationship*:

- a) subordination bond elucidated by the broad direction, instruction and control rights of the employer;
- b) an obligation of the employee to perform work personally;
- c) an obligation of the employer to pay wage in return for work;
- d) regular performance of work activity defined by the scope of work in the employment contract;
- e) an obligation of the employer to provide work and of the employee to perform work and be at the employer's service.

Contrarily the *list of secondary criterions* is as follows: a) organization of working time by the employer; 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 my view the real difficulties in judicial practice were not induced by this hierarchy of criterions, but rather the lack of clarification of the *central role of personal subordination* and the unsteady interpretation of its variable signs. The main task of future judicial review shall be to shed light on that all these primary and secondary criterions 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 criterias must be evaluated and assessed altogether, in accordance with all the conditions and circumstances of the given case in order to decide, whether the working relationship is featured by the necessary grade of personal subordination of an employment relationship.¹⁴

The primal features of the Hungarian system of work relationships

The division of the working population into two spearate groups has become the *classic paradigm* of Hungarian labour law. The first group includes subordinated working

¹⁴ All working relations are characterized by a certain level of personal subordination, thus evaluation as an employment relationship depends on the quality of such a 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 criterias.

relationships in typical and atypical forms of employment relationship. The second group consists of civil law working relationships, that lack strong personal subordination and characterized by mostly independent economic activities.¹⁵ The *typical employment relationship* has been the dominant and decisive legal form of work in labour law regulations and also in the labour market. Typical employment relationship means working for one employer according to his/her instructions, with the employer's equipments and materials, at the employer's place, in fixed working hours, and integrated within the employer's organization.¹⁶

Beyond employment relationships, the rapid spread of bogus self-employment has two fundamental reasons: firstly *by-passing the Labour Code* to diminish indirect production costs, secondly *exploit 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, but at least a certain level of labour law provisions is the very substance of employment regulation, thus the cost of labour law is inevitably present in any working relationship characterized by personal subordination.

Although the strength and rigidity of labour provisions and thereby the level of indirect costs may be different depending on labour law policy. During the financial crisis national legislations stood for *flexibilisation of labour law to reduce the indirect cost* of employment and increase competitiveness of employers in Hungary and in most of the EU Member States, which legislative process will result in shifting the risks of employment from employers to employees. Therefore, this flexibilization process is widely criticised by academics.¹⁷

At the same time, the gap between employment and civil law relationships concerning direct costs of employment could be reduced or even filled in, since the lower social burden (taxes and contributions) of civil law working relationships is simply the *detrimental consequence of the wrong-headed financial legislation*. The lower cost of non-employment (means not protected) work relationships is contrary to ILO Recommendation No. 198, which requires

¹⁵ 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, 140. o.

¹⁶ Kiss György (2005): *Munkajog*. Budapest, Osiris, 95. o.

¹⁷ See for example: Escande Varniol, Marie-Cécile – Laloum, Sylvaine – Mazuyer, Emmanuelle eds. (2012): *Quel Droit Social dans une Europe en Crise?* Larcier, Bruxelles.

Members to develop effective measures aimed at removing incentives to disguise an employment relationship.¹⁸

It is easily understandable, that taxation policy-makers would like to perceptibly reduce the production expenditure of a narrow circle of economic actors (e.g. individual entrepreneurs, small and micro companies) at the lowest cost for the state budget. However, this *financial policy inevitably causes enormous damage to labour law* by enticing many of the working persons from the scope of the Labour Code to worse (less protected) working relationships.

Consequently, this unequal financial regulation is very harmful in the long term. In such a legal environment only those will employ workers in an employment relationship, who are really obliged to do so or frightened by 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 working relationships (and taxation forms) in order to scale down bogus self-employment. Even though there have been attempts to countervail taxes of the various working relationships, however, several new taxation forms recently gave new impetus to false self-employment by extremely low taxes of small private companies and individual entrepreneurs.¹⁹

At the same moment it would be an illusion to believe that false self-employment may be terminated by an ideal financial legislation or any other legal measures (laws, sanctions, investigations etc.). For that very reason the elaboration of a reliable and predictable evaluation test of employment relationship will always be an essential task of labour legislation and judicial practice. The elementary requirements to meet by this judicial test are compliance with labour law dogmas and predictability.

The *compliance with labour law doctrines* means that the clear, uniformly interpreted notion of employment relationship must exist, which shall be based on personal subordination though with a broad reading. The new Labour Code has made a great stride towards such a definition, but it is still an open question, what changes the new definition will induce in case law, if any at all. It may result in a narrow understanding of personal subordination similar to the control test in English law, but hopefully it would rather contribute to a wider and more foreseeable interpretation of an employment relationship.

¹⁸ ILO Recommendation No. 198 (2006): „17. Members should develop...effective measures aimed at removing incentives to disguise an employment relationship”.

¹⁹ See for example Act 147 of 2012 on small taxpayers.

As for predictability, the above mentioned *governmental guidance of 2005* on the evaluation of working relationships may be criticised because of lacking 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 that judicial decisions may become more stable and reliable to save a lot of cost for all parties, including for the society as a whole.

The effect of legal harmonization on labour law structure

The limited impact of labour law Directives

EU Directives on working conditions have a restricted personal scope, since labour law harmonization is limited to employment relationships, thus labour law harmonization amendments have effected exclusively the Labour Code. Hungarian labour law strategy strived for *minimum harmonization*, which meant the implementation of the obligatory EU norms at the minimum level and only in the regulation of employment relationships.²⁰ Legal harmonization with the focus on employment relationships was remarkably facilitated and eased by the existence of a labour law codex (Labour Code), which contains most, even if not all of the relevant provisions on employment relationships.²¹

The new Labour Code remarkably increased the number of atypical employment relationships, but this development is unattached to legal harmonization, since the new atypical forms of employment do not have an EU law basis. The new atypical employment relationships derive from *three different sources*. Firstly, there are three brand *new forms* of atypical employment: on-call work, job sharing and employee sharing.²² Secondly, *simplified (casual) employment* is now regulated by the Labour Code, which was considered as an employment relationship earlier as well, however, it was formerly regulated exclusively by a separate Act.²³ Thirdly, *outworkers* are now formally regulated by the Labour Code²⁴ as an employment relationship, however, it is rather a legal relationship between employment

²⁰ See especially the following harmonization amendments of the Labor Code and the relevant other employment Acts: Act 16 of 2001, Act 20 of 2003.

²¹ 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 Promotion of Employment and Act 93 of 1993 on Labour Safety.

²² 2012 Labour Code, articles 193-195.

²³ 2012 Labour Code, articles 201-203. Other technical provisions are contained by: Act 75 of 2010.

²⁴ Outworkers may be employed in jobs that can be performed independently, and that is remunerated exclusively on the basis of the work done (articles 198-200 of the 2012 Labour Code).

relationship and civil law relationship belonging to the grey zone (economically dependent work).

The above detailed expansion of atypical employment relationships leads to the extension of the personal scope of employment. This policy change clearly indicates the intention of the legislature to keep and even *reinforce the binary division* of working relationships. Especially the regulation of outworkers 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.

Furthermore, legal harmonization improved only the employment protection of employees. Thus, implementation of EU law even increased the gap between the protection of employees and non-employees, because the labour law Directives did not affect the employment rights of independent contractors (self-employed)²⁵ and economically dependent workers (formally self-employed). Though employment rights of economically dependent workers have been analysed and proposed by several EU documents and reports, but the regulation of this category is still only recommended by the European Commission, and it is not an EU law requirement. Consequently the regulation of economically dependent work is rather an opportunity for the Hungarian legislation and it is not an obligation deriving from international labour law instruments.

The non-existent legal notion of self-employment

The notion of *self-employment* is not defined in Hungarian labour law²⁶, just like in most of the national laws of the Member States and in EU law. Self-employment is not a legal notion, therefore it is really hard to define, and it is primarily used to ensure the wide scope of certain EU law instruments. The notion of self-employment is usually perceived in EU law as an economic activity which is not subordinated employment, thus this definition also serves the delimitation of the free movement of employees and the free establishment of self-employed persons.

In practice self-employed persons are *independent contractors* working under a civil law contract. This wider, practical concept includes economically dependent workers as well,

²⁵ At this stage we do not take into account the freedom of establishment, because it is irrelevant regarding the assessment of employment protection.

²⁶ Hajdú József (2002): Social security protection of the self-employed persons in Hungary. In: Nagy Károly-emplékkönyv. Szeged, 175. o.

since they are formally self-employed persons if the third category is not regulated by the national law, for example as *arbeitnehmeranliche* person, worker, *parasubordinati*, Trade etc. 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 above).

The meaning of self-employment had to be clarified concerning the scope of the application of the equal treatment principle regarding the implementation of the Sex Equality Directives. Thus, the notion of self-employment was dealt with Hungarian legislation only in the course of legal harmonization, otherwise it would not have been relevant at all. Therefore, the interpretation of the notion of self-employment is still not a theoretical issue in Hungarian labour law, but only a *technical problem confined to legal harmonization*.²⁷

It must be mentioned, that there is a *common misunderstanding* in relation to the meaning of self-employment, namely it is very often understood within the Hungarian labour law profession as the grey zone between employment contracts and independent contracts, so it is recognised as a *synonym* of economically dependent work. In my view it is obviously a misunderstanding, since self-employment means merely independent work under a civil law contract, who will be self-employed persons irrespectively of their legal status (personally working member of a company, individual entrepreneur etc.).

Minimum floor of rights

All working people are entitled to a short list of minimum rights, such as *equal treatment, health and safety at work and social security* in Hungarian law, so these rights have a wider scope than employment relationships. The general scope of the Equal Treatment Act²⁸ is the result of the implementation of the Equal Treatment Directives. Nevertheless, the Health and Safety Act²⁹ and the Social Security Act³⁰ have had a very broad personal scope for a longer period of time going back even to the socialist regime before 1990.

At present there is the following group of employment related rights, which are provided for *all working persons regardless their legal relationship* aimed at employment: equal treatment,

²⁷ Kiss György (2001): Az Európai Unió munkajoga. Budapest, Osiris, 115–125. o.

²⁸ Act 125 of 2003 on Equal Treatment and the Promotion of Equal Opportunities.

²⁹ Act 93 of 1993 on the Labour Protection of Employees.

³⁰ Act 80 of 1997 on Social Security Services and Entitlement to Private Pensions.

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 excluded from this protection. Thus the amendment of the Health and Safety Act would be necessary (see later).

This list of minimum rights for all is *rather limited* and employment protection is absolutely missing from this list, and labour law harmonization did not contribute to the improvement of such a minimum rights catalogue concerning labour law protection. Consequently, the labour law protection of independent workers, including economically dependent workers are very far from that of employees under the scope of the Labour Code.

Equal treatment for all workers

The provisions of the Equal Treatment Act (ETA)³¹ on its scope are extremely complicated. The only exception is the labour market, because the equal treatment principle must be applied to *all legal relationships aimed at employment*.³² This result is achieved by the ETA by using two clusters of working relationships: a) employment relationships³³ and b) other relationships aimed at work³⁴. Employers shall observe the principle of equal treatment in respect of employment relationships and persons entitled to give instructions in respect of other relationships aimed at work.³⁵ These two groups of working relationships cover all possible legal relationships aimed at work.

There has been an academic debate regarding the limitless scope of the equal treatment principle, since it included all *civil law contracts* (independent contractors, self-employed persons) as well. Some academics argued³⁶, that such a wide scope of equal treatment provisions covering civil law contracts aimed at work is not essential and it violates the basic doctrines of private law. In their view the application of the equal treatment rules in case of

³¹ <http://www.egyenlobanasmod.hu/data/SZMM094B.pdf> (in English).

³² Gyulavári Tamás: Három évvel az antidiszkriminációs jog reformja után. *Esély*, 2007. 3. szám, 4–5. o.

³³ 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”.

³⁴ 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 professional group, and elements of the co-operative membership and partnership activities under economic and civil law involving personal contribution and aimed at employment”.

³⁵ ETA, article 5 d).

³⁶ Vékás Lajos: Egyenlő bánásmód polgári jogi jogviszonyokban? *Jogtudományi Közlöny*, 2006. 10. szám, 355–364. o.; Kiss György (2002): Az egyenlőségi jogok érvényesülése a munkajogban. *Jura*, 2002. 1. szám, 48–61. o.

employment relationships, as an exception in private law, may be explained by the weaker market position of the employee.³⁷

In my view the weak labour market position is often true for those independent contractors as well, who may be deemed as economically dependent workers, what may justify the wider scope of the ETA. In addition the Race Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC) shall be applied to conditions for access to employment, to self-employment and to occupation.³⁸ Thus the criticised rule on the broad scope of the equality provisions simply *implements the EU Directives* in Hungarian law and national legislation does not have freedom in this respect, as 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, because there has not been any litigation or even administrative procedure concerning an allegedly discriminatory civil law contract.³⁹

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 *as broad as possible* going far beyond employees. In this way all self-employed persons (individual entrepreneurs, working members of companies etc.) have statutory insurance, except 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 if the income from this economic activity is at least 30%⁴⁰ of the minimum wage.⁴¹ In consequence the scope of the statutory social security scheme extends over all working persons regardless their legal status with the above described limited exceptions.

Restricted right to health and safety protection

The scope of the Health and Safety Act is somewhat narrower than of the equal treatment and social security laws. The scope of health and safety law covers all organised work activities disregarding its organisational or ownership structure⁴², but the work of individual entrepreneurs is not considered as organised work, thus they do not fall under the scope of the

³⁷ Vékás (2006) id. mű 359. o.

³⁸ Article 3 of Directive 2000/43/EC and 2000/78/EC.

³⁹ See the case law of the Equal Treatment Authority: <http://www.egyenlobanasmod.hu/jogesetek/jogesetek> (in English).

⁴⁰ It is about 120 euros in 2014.

⁴¹ Social Security Act, articles 4-5.

⁴² Act 93 of 1993 on the Labour Protection of Employees, article 9 (1).

Health and Safety Act.⁴³ Although the extension of the scope of the Health and Safety Act to all self-employed persons including *individual entrepreneurs* has been planned by the government since 2001⁴⁴, however, it has still not been accomplished.

Proposal on quasi employees: a feasible concept?

The Hungarian concept of the employee-like person

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 to the vicinity of labour law.⁴⁵ Accordingly the first Draft of the new Labour Code (published in June 2011) contained in article 3 regarding the scope of the Act the *definition of the employee-like person* and also the list of the applicable provisions of the Code.⁴⁶

The material scope of the Labour Code is a key concept in this respect, which provided a good opportunity to extend the protection of labour law to a wider range of the working population. Accordingly, the first proposal of the Labour Code⁴⁷ suggested to extend the *application of some 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 also aimed at *fighting against undeclared work* and bogus self-employment.⁴⁸ This article strived for the improvement of employment protection of economically dependent workers and diminish the number of legal procedures regarding false self-employment (so-called disguised contracts). In this way employers could also have benefited from the proposal, as they could have chosen a third type

⁴³ Act 93 of 1993 on the Labour Protection of Employees, article 87 point 9.

⁴⁴ Resolution of Parliament No. 20/2001, point 5.2.a.

⁴⁵ Széll Kálmán Plan, 19 May 2011, www.euroastra.hu (downloaded in Hungarian: 10 June 2013), 25. o.

⁴⁶ *A Munka Törvénykönyve (Labour Code). Javaslat (Draft)*, July 2011 (www.pazmanymunkajog.com), article 3.

⁴⁷ 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.

⁴⁸ *A Munka Törvénykönyve. Javaslat*, 2011. július (www.pazmanymunkajog.com), 3. § részletes indokolása.

of working relationship with a lower level of employee protection than in typical or atypical employment relationships.

At the same time this triple system of labour law definitions could have further complicated the evaluation work and case law of labour courts. The Perulli Report (2002)⁴⁹ opposed this solution for the very reason, that the regulation of the third category would lead to a number of *legal problems* (e.g. the classification of the relationship) and *social risks* (the reduction in numbers in subordinate employment).⁵⁰

According to the proposal in the first draft of the Labour Code 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, and whereby

- a) the individual undertakes 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.

According to György Kiss the above mentioned presumptions ensure the theoretical basis of the delimitation of independent work and economically dependent work.⁵¹ In my opinion it would have been a better solution to handle this problem on the basis of distribution of *market risks* instead of this presumption of working for only one person. Economic dependency exists in those market situations as well, when the worker usually works for one main client, but also has low, but regular income from another small client. I do not think, that the exclusion of working for any other client is a good way to regulate economically dependent work, since this condition is too rigid and strict, thereby many economically dependent workers might be excluded from the scope of the provision genuinely designed for them.

⁴⁹ Perulli, Adalberto: 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

⁵⁰ Pennings, Frans (2011): The Various Categories of Persons Performing Work Personally. In: Pennings, Frans – Bosse, Claire (eds.): The Protection of Working Relations. The Netherlands, Kluwer law International, 12–13. o.

⁵¹ Kiss György (2013): A munkavállalóhoz hasonló jogállású személy problematikája az Európai Unióban és a jogállás szabályozásának hiánya a Munka Törvénykönyvében. Jogtudományi Közlöny, 2013. 1. szám, 12. o.

The above described definition was supplemented by a few *explanations* so as to refine some elements and also to prevent abuse.⁵² Accordingly „*personal work*” also means working on behalf of the worker’s own company or the company in the majority ownership of the worker’s relative. Moreover the „*same client*” includes the relative or the regular business partner of the client, respectively joint companies in accordance with tax law.⁵³ These explanations slightly opened out the limitations of the rather narrow proposal. However, they still kept several vague notions for judicial interpretation, for example work and remuneration „on a regular basis”.

It is also notable that the proposal excluded the application of these rules if the income from the contract in question exceeded 500% of the *national minimum wage* applicable at the time of the performance of the contract.⁵⁴ There was no official explanation of this income limit, and the above described aim of the draft was to fight against unlawful forms of work, beyond the social protection of economically dependent workers. I do not see any solid dogmatical basis of this limitation⁵⁵ and the reason behind the amount is also obscure. The amount is about gross 1.700 euros, which is more or less the double of the national average wage, so it is not a high remuneration at all.

Presumably this provision was based on the assumption, that only low paid economically dependent workers may need employment protection due to social reasons, and this low payment was fixed by 500% of the national minimum wage. Whether the person needs *social protection* similar to an employee depends on different factors. Low income normally is a strong indication of the need for social protection. However, a relatively high income did not prevent German courts from treating someone as an employee-like person. The fact that an agent received 10.000 US a month plus value added tax of 16% was without legal significance.⁵⁶

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, what could be adjudicated by the labour courts. In addition the technical implementation of the pay limit

⁵² A *Munka Törvénykönyve (Labour Code)*. Javaslat (First Draft), July 2011 (www.pazmanymunkajog.com), Ministerial Reasoning of article 3.

⁵³ See article 178.7 of Act 92 of 2003 on tax procedure, respectively article 4.23 of Act 81 of 1996 on company taxation.

⁵⁴ Article 3 of the first proposal of the new Labour Code.

⁵⁵ Opinion of the Workers’ Councils trade union on the first draft of the Labour Code, www.pofesz.hu (downloaded: 10 July 2013), 2–3. o.

⁵⁶ Daubler Wolfgang: Working People in Germany. *Comparative Labour Law and Policy Journal*, 1999/1, 89–90. o.

would be also problematic, since it is not clear whether this pay ceiling shall be calculated on an average or this monthly amount must not be reached even once a year.

The place of quasi employees in the structure of labour law definitions

According to the ministerial reasoning of the proposal, the above described criterias of an employee-like person shall be judged in accordance with all the circumstances of the case, just like regarding the notion of an employment relationship. At the same time it was not clarified by the draft, if there is a freedom of choice of the parties between hiring a person as an employee or an employee-like person.

In my view the same *cogency of the contract type* shall be applied as for employment contracts, thus labour courts and labour inspectors may consider the legal relationship of an employee-like person as an employment relationship (see article 27 of the Labour Code above), if the contract of the parties disguises an employment contract in fact. Consequently this new notion is not capable in itself to solve all the problems arising from bogus self-employment (see the warning of the Perulli Report in 2002). However, the precise definitions of employment relationship and economically dependent worker may contribute to the *dogmatical clarity of labour law*.

Even though the reasoning of the proposal refers to the similar regulations in German (Arbeitnehmerähnliche Person) and English labour law (worker), but the Hungarian proposal is more restricted. One of the fundamental issues was the exclusion of persons working for more than one client. As an improvement of this provision I would propose to include the requirement of acquiring the *majority of income from one client*, like it is in German law (minimum of 50% of income from one client) and in Spanish law (threshold of 75%). At the same time the technical problems of interpretation regarding the calculation of this threshold should also solved, for example by a general clause fixing simply „the majority of income from one client” rule without a fixed amount, which clause could be interpreted by the courts and authorities.

Furthermore, the *exclusivity of personal work performance* is also unduly strict and narrow. Some minor works could be done by subcontractors⁵⁷ or family members. At this issue the same solution could apply as above by simply stating, that work must be dominantly

⁵⁷ For example the translator may employ a typewriter to help with typing the translation of a book.

performed personally, which would not exclude some minor assistance from other contributors.

My main concern regarding the above criticised limitations of the employee-like person's definition is that these rigorous requirements are hard to comply with, therefore unduly constrict its potential personal scope. Bluntly, I do not believe that too many people would have used the opportunity to work as an employee-like person, but it could have become rapidly an empty clause. It seems to me that the substance was lost in these rather technical paragraphs, what is not the existence of one client or the exclusivity of personal work, but it is the very presence of economic dependency in the relationship of the parties and especially concerning the situation of the worker. It is economic dependency what makes similar the situation of employee-like persons to employees, and this is the dogmatical basis of extending employment rights to this group of the working population.

The proposed employment rights: unambitious advance

Beyond the definition, the second pillar of the proposal was the precise stipulation of the applicable Labour Code provisions. Accordingly, the proposal suggested to extend the *application of the rules* on minimum wage, holidays, notice of termination of employment, severance pay and the liability for damages. The application of the Labour Code provisions on holidays were explained by the reasoning of the proposal by regular performance of work. The inclusion of the articles on minimum wage, notice period and severance pay were reasoned by the social objectives of this legal institution.⁵⁸

On the whole the intention to extend a certain level of employment rights to economically dependent workers is warmly welcome, but the list of *applicable rights is highly ungenerous and too weak* to achieve the ambitious social objectives. However, the draft excluded many employment rights applied by several national legislations regarding employee-like persons, such as the 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 for the employee's wrongful breach of duty. Certainly I do not propose the automatic application of all these Labour Code provisions, but rather proposing topics for

⁵⁸ A Munka Törvénykönyve. Javaslát, 2011. július (www.pazmanymunkajog.com), 3. § részletes indokolása.

special regulation adjusted to the peculiarities of economically dependent work. For example the conclusion of a collective agreement at company level would be rather problematic by the present rules of the Labour Code.

Nevertheless, I 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 the extended employee rights shall be the *lack of personal subordination* between the worker and the client. Therefore, the latter does not have a broad right to instruct, direct, supervise and control the worker.

On the other hand, the reason to regulate this third, transitional form of work is to provide a level of protection falling in between employment and self-employment, thus it is weaker than of employees, but stronger than of independent, self-employed persons. The *adequately balanced protection* of quasi employees would guarantee a sensible level of employment protection, but would not burden employers with oversized labour law protection.

On the contrary, the Hungarian proposal would not have improved perceptibly 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 real social objectives. Consequently any future regulation should extend a far broader circle of rights to these persons, including all those Labour Code provisions, which do not require the strong powers of the employer to instruct and control as a result of personal subordination between the parties.

Critiques and aftermath of the proposal

The proposal on employee-like persons was innovative and promising, although it was also much more restrictive equally in terms of its personal scope and the attached rights than the similar rules in Germany, Spain or the United Kingdom. In my opinion this form of work would not have been popular at all (as in Spain⁵⁹) and would not perceptibly improve the employment situation of economically dependent workers, so it was not suitable to achieve its own declared objectives. As for the personal scope of the proposal the main mistakes were the

⁵⁹ 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 until July 2009 (Agut García, Carmen – González, Cayetano Núñez (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. o.).

too restrictive conditions on one 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 critiques of trade unions and also employers' organizations, but it could have been the first such regulation in the Central-Eastern-European region.⁶⁰ This article could have been a large step towards the regulation of economically dependent work and the detailed provisions could have been revised step by step.

It is quite interesting to have a look into the arguments of the opposing actors. Firstly, the main *critique of trade unions* focused on the problems of interpretation regarding the definition. In my opinion trade unions rather opposed this concept, as they worried about the negative social consequences of this legislative change, namely the reduction in numbers in subordinate employment instead of the decrease of false self-employment and genuine self-employment. Trade unions usually look at the third labour law category as a new impetus for bogus self-employment. If we keep in mind the Italian experience concerning the effects of the employment rules on economically dependent work (*parasubordinati*)⁶¹, it is a real danger that this third category is also used for veiling employment relationships. Even so it is a badly mistaken decision to throw out the whole concept instead of careful regulation.

Secondly, the *employers' organizations* were not interested in supporting this concept because it would put extra burdens on employers by ensuring costly employment rights for a wider range of workers, who fell under the scope of civil law up to now. Interestingly the two sides of industry discouraged this legislative change on the basis of totally reverse reasons, on the one hand trade unions worry about diminishing employee rights, on the other hand employers are anxious about increasing worker protection.

Further intriguing question, why the *government backed off* this 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 objected by both

⁶⁰ The Draft of the new Polish Labour Code (published in 2006) also contained a similar article, but this Labour Code has not been passed yet (Swiatkowski, Andrzej Marian (2011): The protection of working relationships in Poland. In: Pennings, Frans – Bosse, Claire (eds.): The Protection of Working Relations. The Netherlands, Kluwer law International, 122–123. o.).

⁶¹ Carinci, Maria Teresa (2012): The Italian Labour Market Reform under the Monti Government (Law No. 92/2012). European Labour Law Journal, 2012/4, 308. o.

sides of industry.⁶² Most likely this issue was not so important for the government, if they relinquished it so easily after the first resistance of the social partners.⁶³ The probable reason behind this move is the basic concept of the new Labour Code, which is based on radically increased flexibility of the labour market to create new jobs. The concept of employee-like persons does not really fit in this *deregulation policy*, so it would have been an „alien” in 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 modernization of Hungarian labour law. Therefore, the government happily got rid of this strange provision, which move was helped and even promoted by the social partners.

Conclusions

Hungarian employment regulation has traditionally been divided legal relationships aimed at employment to employment relationships and civil law relationships. This *binary system of working relations* was reasserted on the one hand by labour legislation, which is formally divided to a Labour Code and a Civil Code. On the other hand labour law harmonization, which preoccupied the energies of labour legislation, had also deepened the gap between employment contracts and civil law contracts, since it improved 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 supported by misguided financial policy, which incited employers and employees to by-pass labour law by opting for a cheaper working relationship combined with less employment rules and lower social burdens. Nevertheless, legal responses to this damaging phenomenon were weakened by the unstable labour law concepts as well as unpredictable judicial practice. Consequently, the modernization of the definitional system of Hungarian labour law became an urgent task and the new Labour Code made an attempt. At the same time it must be realized that labour legislation cannot per se solve these problems.

⁶² See for example the provisions on legal consequences of wrongful termination of employment (article 82 of the Labour Code).

⁶³ György Kiss expressed a similar opinion in his article [Kiss (2013) id. mű 13. o.].

The gradual extension of some of the protection of the Labour Code to economically dependent workers would be a reasonable and positive development 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 deleted* later. This failure was the common consequence of the refusal by the social partners and the withdrawal of the government, as interestingly nobody seemed to be interested in this legislative development.

As I am convinced, that this is an *innovative and necessary concept*, therefore the detailed analysis of the governmental proposal was presented. Accordingly the rules on employee-like persons may only be successful 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. This would be the only efficient way to bridge employment relationships and self-employment, however, this still seems to be „*a bridge too far*” in Hungarian labour law.