

THE HUNGARIAN LABOUR LAW REFORM. THE GREAT LEAP TOWARDS FULL EMPLOYMENT?

La reforma laboral húngara. ¿El gran salto hacia el pleno empleo?

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Resumen

El Parlamento húngaro ha aprobado recientemente un nuevo Código de Trabajo, que entró en vigor el 1 de julio de 2012. El objetivo principal de la reforma es la flexibilización del Derecho del Trabajo, para conseguir un aumento de la tasa de empleo fomentando la competitividad de los empleadores. Esta nueva orientación de la política laboral ha sido ampliamente criticada, puesto que el efecto inmediato de la nueva Ley es la reducción de la protección de los trabajadores. En primer lugar, el artículo describe los principales objetivos de la reforma y su trasfondo. A continuación, se señalan los principales cambios conceptuales en materia de fuentes del Derecho del Trabajo, derechos colectivos y formas atípicas de empleo. La principal cuestión que deja abierta la reforma es qué efectos se derivarán de esta flexibilización de la protección de los trabajadores.

Palabras clave: Hungría, Derecho del Trabajo, flexibilidad, contrato de trabajo, derechos colectivos

Abstract

The Hungarian Parliament adopted the new Labour Code, which came into effect on the 1st of July 2012. The main objective of the reform is flexibilisation of labour law, in order to increase the employment rate by promoting competitiveness of employers. This new orientation of labour law policy has been widely criticised, since the immediate effect of the new Act is the reduction of employee protection. Firstly, the article describes the main objectives and background of the labour law reform. Secondly, we elucidate conceptual changes in the fields of sources of labour law, collective rights and atypical forms of employment. The main question concerning the reform is, what effects may be expected as a consequence of flexibilising employment protection legislation.

Keywords: Hungary, Labour Law, flexibility, work contracts, collective rights

SUMMARY¹

1. Background and objectives of the '2012 labour law reform'.- 2. New hierarchy of legal sources: enhanced role of collective autonomy.-3. Dual system of employees' representation: unions and works councils in the new Labour Code.-4. New dimensions in the parties' agreements.-5. Atypical forms of employment.-6. Conclusions.

1. BACKGROUND AND OBJECTIVES OF THE '2012 LABOUR LAW REFORM'

After the Second World War, Hungarian labour law, as the other socialist labour laws in the region, was characterised by a Labour Code. The Hungarian Labour Codes, following the soviet pattern, contained the fundamental labour law provisions. During the socialist period (1948-1990) two Labour Codes were passed, the first Code in 1951² and the second in 1967³. This legal tradition, concerning the legal structure, was continued by passing the 1992 Labour Code⁴, which brought about conceptual reforms two years after the political changes.

The 1992 Labour Code broke with the socialist concept based on the dominant regulatory role of the state and introduced new rules, which were necessary in a market economy. The 1992 Labour Code intended to achieve an essentially private law based regulation of employment relationships, thus, it laid down minimum standards, and other rules might have been regulated by collective agreements, which were more favourable to employees. The original text of the 1992 Labour Code was amended many times in the past 20 years. In the last 10 years these amendments primarily focused on the implementation of EU Directives.

The 1992 Labour Code was fiercely criticized by all actors, including legal practitioners, academics and politicians as well. These critics may be summarised in the following three points:

- a) The social and economic background of the Act has dramatically changed. The large state companies have disappeared and the present Hungarian labour market is dominated by small enterprises. The dominant role of the former socialist industry has been taken by the third sector with micro and small businesses. The provisions of the 1992 Labour Code tailored for large companies cannot be applied in the new economic situation.
- b) The original text was amended too many times, thus, in many cases the original meaning of the rule has been lost and it is hard to apply, which results in serious insecurity of interpretation. Consequently, simplification and clarification of the existing

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²Statutory Rule 7 of 1951 on the Labour Code.

³Act 2 of 1967 on the Labour Code.

⁴Act 22 of 1992 on the Labour Code.

'patchwork' regulation became a general desire, developing the new rules on the basis of the case law of labour courts.

c) The main problem of the Hungarian labour market is the low employment rate, which is a result of high cost of employment. In the opinion of employers' organizations and several labour law practitioners, this cost shall primarily be cut by the flexibilisation of employment law. Accordingly, they argued, that diminishing the rights of employees and trade unions would considerably increase the employment level. Evidently, this judgment was not shared by the trade unions and many of the academics.

Since the government fully agreed with the last statement (point c. above), flexibilization of labour law became the central pillar and also the main 'battlefield' of the 2012 reform of Hungarian labour law. The simplification of legislation (point b. above) was handled as a secondary issue and the critic on the changing social, economic background (point a. above) was simply 'lost in translation'.⁵ Thus, the main issue concerning the 2012 labour law reform is, whether 'rigidity' of the Labour Code has been the main obstacle of increasing competitiveness of employers and the number of employees in the Hungarian labour market. The employment rate was 55,4 % in 2010, the second lowest in the EU after Malta (EU average 64,6 %) and it is very far from the targets of the Europe 2020 Strategy.⁶ After 2010 the employment rate slightly increased (57,2% in 2012), however, mostly in the form of public work programs.⁷ Evidently, it will be rather hard to isolate the impact of the new Labour Code on employment growth in the coming years, as it is a complex issue influenced by several policies beyond labour law, such as economic trends, taxation, active labour market measures, etc.

Consequently, the main objective of the reform is flexibilisation of employment protection, in order to increase the employment rate by promoting competitiveness of employers. This strategy is in contrast with studies, which show that the Hungarian Labour Code has been quite flexible in international comparison in the last two decades.⁸ In spite of this analysis, the government declared, that the Hungarian labour market shall be 'the most flexible in the world'⁹, which will help to create one million new jobs in ten years.¹⁰

The above described debate lasted only half a year between June and December of 2012, as a consequence of the rapid elaboration and passing of the new Labour Code. The Parliament adopted Act I of 2012 on the new

⁵There are only a few minor regulatory changes treating the problem of small enterprises.

⁶Hungarian Work Plan p. 9.

⁷<http://www.ksh.hu/docs/hun/xftp/gyor/fog/fog21206.pdf>

⁸CAZES, S. – NESPOROVA, A.: *Flexicurity: a relevant approach in central and Eastern Europe*. ILO, Geneva, 2007, p. 147; WALLACE, C.: *Work Flexibility in Eight European Countries: A Cross-national Comparison*. *Czech Sociological Review*, 2003, Vol. 39, No. 6.

⁹As note 5 above p. 4.; respectively the Prime Minister's lecture

(<http://index.hu/belfold/2012/04/23/>).

¹⁰Government Program 2010 (Nemzeti Megújulás Programja), p. 18. (www.kormany.hu).

Labour Code (hereinafter referred to as the new Labour Code) on the 13th of December 2011 and it came into effect on the 1st of July 2012. Therefore, one year passed between the publishing of the first proposal and the taking into effect of the new Labour Code, which is a very short time having in mind the complexity, importance and general impact of this Act.

We may refer to the legal tradition described above in terms of keeping the Labour Code as the central element of labour law regulation. Exactly the same areas of labour law are regulated by the new Labour Code as the former one (individual employment relationship, collective rights, labour disputes etc.). Therefore, only the content was changed, but the format remained the same. In our opinion, this is a good choice by the legislature, because this solution may contribute to the internal coherence as well as the accessibility of labour legislation. Another important value could have been the simple language to help employees (but also employers, legal practitioners) to understand their rights and obligations, however, the new Act is far from perfect in this respect, as its legal language is even more complex and complicated, than the widely criticized 1992 Labour Code (see the critics above on the former Code).

As for the legal traditions, the relationship between the Labour Code and the Civil Code¹¹ has always been vague and obscure. Therefore, the new Labour Code clarified, which provisions of the Civil Code may be applied in labour law.¹² At the same time, it is one of the objectives of the legislature to approximate labour law to civil law. This effort is tangible in many rules, especially the general provisions of the Labour Code.¹³

The flexibilisation strategy of the government identified the following areas, where the provisions of the 1992 Labour Code shall be fundamentally changed: termination of employment, working time, wages and liability of employers for damages.¹⁴ It is the crucial question concerning the success of this governmental policy, whether these new flexible rules will generate one million new jobs. However, the new Labour Code may be a successful element in regional competition for foreign investments, since large, predominantly multinational companies may profit the most from these flexible labour provisions. The small and micro enterprises hardly apply the Labour Code in practice, as the enforcement of the Labour Code is in general problematic in this part of the economy.¹⁵

The main critic of the new Labour Code is that the new rules degraded the protection of employees. In our opinion, approximately half of the former labour law rules were fully changed or fundamentally amended, and the majority of the modified provisions are disadvantageous for

¹¹Act 4 of 1959 on the Civil Code.

¹²Article 31 of the new Labour Code: 'Furthermore, legal acts shall be governed by the provisions of Chapters XVII–XXII of the Civil Code, with the exception that agreements may not be amended in the court of law.'

¹³Article 1-31 of the new Labour Code (Part One).

¹⁴As note 5. above pp. 44-45.

¹⁵LAKY T.: Azatipikusfoglalkozásokról.

(<http://people.mokk.bme.hu/~kornai/laky/Cikk/atipikus.pdf>) p. 14.

employees. For example the chapters on working time and wages provide many examples, how the amendments affect negatively working conditions. Obviously, it would be impossible to give a comprehensive analysis of the new Labour Code in this article. Therefore, the chapters below briefly present some conceptual changes in the fields of sources of labour law (collective agreements and agreements of the parties), termination of employment, collective rights and atypical forms of employment.

2. NEW HIERARCHY OF LEGAL SOURCES: ENHANCED ROLE OF COLLECTIVE AUTONOMY

One of the most fundamental changes of the new Labour Code is reshuffling the role of agreements in the regulation of the employment relationship. The main consequence of this conceptual change is the enhanced role of contractual sources of labour law, above all collective agreements (collective autonomy), but also the agreement of the parties. It is a remarkable amendment of the former regulatory structure, since the regulatory function of collective agreements and the employment contract had been rather weak in the last two decades. Therefore, the main objective of the new Labour Code was to enhance the role of collective agreements.

The 1992 Labour Code laid down minimum labour standards, and altering rules could be regulated by a collective agreement, provided that it was more favorable to employees than the given provision of the Labour Code.¹⁶ Exceptionally, amendments of the 1992 Labour Code introduced dispositive rules after 2001, from which the parties could derogate to the detriment of the employees as well, however, this was true only for a few working time provisions. Subsequently, employers were simply not interested in concluding collective agreements, as it would have increased their costs without real offset. Certainly, there are further reasons behind the low number of collective agreements, such as the lack of collective bargaining tradition, weakness of trade unions, respectively the dominance of small and medium sized workplaces.

As a result, collective agreements are not playing a significant role in the regulation of employment relationships. According to 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 2/3 of the Hungarian employees are not covered by a collective agreement, and this coverage rate has been constantly decreasing in the last few years.¹⁷ Although the scope of collective agreements may be extended to an entire sector of the economy as well, in spite of it only 8,6 % of Hungarian employees were covered by such sector level agreements.

¹⁶Article 13 of the 1992 Labour Code.

¹⁷NACSA Beáta: *Az Ágazati Párbeszéd Bizottságok működésének jogi-munkajogi elemzése*. Kutatási Zárótanulmány. Budapest, 2010, p. 39.

Collective agreements in Hungary (2009)¹⁸

Scope of the collective agreement	Number of employees covered by the collective agreement	Coverage index (proportion of all employees covered by the collective agreement)
Collective agreement covering one employer	631.227	23,8%
Collective agreement covering two or more employers	77.798	2,9%
Collective agreement concluded by an employers' organization	135.250	5,1%
Collective agreement with an extended scope to an entire sector	227.805	8,6%
ALL TOGETHER	899.454	33,9%

Moreover, the substance of the collective agreements is rather inadequate and poor. Most of the collective agreements just repeat the rules of the Labour Code or include meaningless conditions.¹⁹ Therefore, the practice shows double unfavorable pictures. On the one hand, the number of collective agreements is very low, on the other hand, the content of existing agreements is also far from desirable.

The above described situation has not been changed by the detailed regulation of sectoral level collective bargaining in 2009 in the separate Act on Sectoral Social Dialogue Committees.²⁰ This Act introduced the possibility, that sectoral level collective agreements may be concluded in a Sectoral Social Dialogue Committee. However, experience showed the failure of this attempt, since these Sectoral Social Dialogue Committees has managed to conclude only a few such agreements.²¹ This deficiency may be partly explained by the fact, that employers' organizations represented in the above mentioned committees employ only a small

¹⁸Source: Labour Relation Information System. Quoted: ARATÓ Krisztina: *A középszintű érdekegyeztetés változásai Magyarországon a PHARE projektől napjainkig, illetve az Ágazati Párbeszéd Bizottságok kapcsolatai a makroszintű érdekegyeztetés intézményeivel. Kutatási zárótanulmány.* Civil Európa Egyesület, Budapest, 2010, appendix.

¹⁹NACSA Beáta - NEUMANN László: A kollektív szerződések ereje, a szabályozás hatékonysága. In: FSZH Társadalmi Párbeszéd Központ: *Szociális párbeszéd új keretek között.* Budapest, 2009, p. 40.; FODOR T. Gábor - NACSA Beáta - NEUMANN László: *Egy és több munkáltatóra kiterjedő hatályú kollektív szerződések összehasonlító elemzése. Országos összegző tanulmány.* Kende Ügyvédi Iroda, Budapest, 2008, 17-19.; UNGI Noémi: A kollektív szerződések elemzésének tapasztalatai I-II. rész. *Munkaügyi Szemle*, 2007. január-február.

²⁰Act 74 of 2009 on sectoral social dialogue committees and certain issues on medium level social dialogue.

²¹NACSA Beáta: *Az Ágazati Párbeszéd Bizottságok működésének jogi-munkajogi elemzése.* Kutatási Zárótanulmány. Budapest, 2010, p. 36.

proportion of employees, therefore it would be senseless to conclude a sectoral level collective agreement in order to establish uniform working conditions in the entire sector. Besides, many employers' organizations were influenced by the economic crisis to emphasize the difficulties in long-term planning, what would be an inevitable condition of concluding such an agreement. Thus, the Sectoral Social Dialogue Committees gave an adequate institutional framework for sectoral level social dialogue, in spite of that it could not change in itself the motivation of the parties and the low interest in concluding higher level collective agreements.²²

The new Labour Code introduced radical changes in the relationship between the statute and collective agreements. Collective agreements may derogate from most of the rules on the employment relationship and on collective rights to the detriment of employees as well.²³ This will most probably increase the number of collective agreements, since employers will be interested to conclude such agreements. The new soft representativity criteria of trade unions also fosters collective bargaining: a trade union shall be entitled to conclude a collective agreement if its membership reaches ten per cent of all workers employed by the employer; or of the number of workers covered by the collective agreement concluded by the employers interest group.²⁴

The good news is that these changes will promote collective bargaining at workplace level and collective autonomy will play a much more significant role in the regulation of employment relationships, than ever in the history of Hungarian labour law. Even if it is rather questionable, that the players on the two sides of industry (employers as well as trade unions) are well prepared for such an intense collective bargaining process. At the same time, collective bargaining will remain at workplace level, since the conclusion of sectoral level collective agreement are not facilitated by the new legal framework either, and the detailed rules are missing from the Labour Code on the procedure of concluding such an agreement.

As an exception to the lack of special provisions on sectoral collective agreements, the Labour Code regulates the relationship between sectoral and workplace level collective agreements. According to the 1992 Labour Code, a collective agreement concluded at the workplace level may only depart from one with a broader scope (sector, subsector) insofar as it specifies more favorable regulations for employees.²⁵ Although the new Labour Code retained this principle, however, added an important exception, giving floor to decentralization of collective bargaining. Namely, a collective agreement of limited effect (concluded at the employer) may derogate from one with a broader scope (concluded at sectoral or

²²ARATÓ Krisztina: *A középszintű érdekegyeztetés változásai Magyarországon a PHARE projektől napjainkig, illetve az Ágazati Párbeszéd Bizottságok kapcsolatai a makroszintű érdekegyeztetés intézményeivel. Kutatási zárótanulmány.* Civil Európa Egyesület, Budapest, 2010, pp. 57-58., 64.

²³Article 277 of the new Labour Code.

²⁴Article 276 of the new Labour Code.

²⁵Article 41 of the 1992 Labour Code.

subsectorallevel) insofar as it contains more favorable regulations for the employees, unless otherwise provided in the higher level collective agreement.²⁶ Therefore, the sectoral (subsectoral) level collective agreement may contain a provision allowing the employer level collective agreement to derogate from its provision to the detriment of employees. This new possibility will weaken the capability of higher level collective agreements to standardise working conditions in the entire sector.

The real 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. Before the 2012 reform works council agreements had a very different nature, since only 'the issues pertaining to the privileges of a works council and its relations with the employer' shall be set forth in such an agreement.²⁷

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. However, works council agreements may contain provisions to govern rights and obligations arising out of or in connection with employment relationships (normative part of the collective agreement). There is only one exception, works council agreements must not derogate from the provisions on wages. Such works council (almost collective) agreements may be concluded on condition that the employer is not covered by the collective agreement it has concluded, or there is no trade union at the employer with entitlement to conclude a collective agreement.²⁸ The secondary role of these agreements is shown by the fact, that they may regulate terms and conditions of employment, if there is no collective agreement or any trade union that could conclude one. Furthermore, wage bargaining is excluded from the scope of these agreements.

As it was mentioned above, the number of collective agreements is very low, so the clear aim of this measure is to promote the conclusion of 'almost' collective agreements in medium sized companies. A works council shall be elected if the average number of employees at the employer or at the employer's independent establishment or division is higher than fifty.²⁹ Usually there is no trade union at these employers, as employee organizations are concentrated in large companies, mostly in multinational firms (eg. Tesco, Audi) and in state-owned firms (eg. Hungarian Railways and other public service companies). Consequently, all the other firms have not really had a tradition, practice or even interest in collective bargaining. This situation will remarkably change, as these smaller employers will be definitely motivated to conclude a works council agreement in order to profit from the flexibility of the working time, wages etc. provision by way of derogation.

²⁶Article 277 of the new Labour Code.

²⁷Article 64/A of the 1992 Labour Code, introduced by an amendment of the original text in 1995.

²⁸Article 268 of the new Labour Code.

²⁹Article 236 of the new Labour Code.

Although, the above described legislative objective, the promotion of collective bargaining in a wider range of medium sized companies, may be acknowledged, at the same time this legal solution raises serious dogmatic problems and doubts. Above all, the legal nature of works council, as a labour law institution, must be the starting point: the works councils are designed to foster 'cooperation between employers and workers, and taking part in the employers' decisions'.³⁰ This idea of participation seriously contradicts with the attributes of collective bargaining.

Furthermore, works councils shall remain unbiased in relation to a strike organized against employers, and they may not organize, support or obstruct strikes. The mandate of works council members participating in a strike shall be suspended for the duration of the strike.³¹ The lack of effective collective actions weakens the bargaining position of works councils.³² The labour law protection of the members of works councils is also missing, since only the chair of the works council enjoys protection against termination of employment.³³ Moreover, there is a danger, that certain employers will urge the election of 'friendly' works councils in order to create a partner for concluding a works council agreement derogating from the Labour Code in the employer's interest. First and last, the works council agreement, substituting a collective agreement, is a dogmatic failure and entails serious risks, however, it is hard to assess the prospective harm of this legal solution.

Finally, we may refer to the hastily elaboration of the new Act, which led to several technical mistakes. As for the works council agreement, the legislature 'forgot' to clarify the relationship between the works council agreement and the Labour Code in case the former is considered as a collective agreement. This question could have been answered by a simple sentence, whereby their relationship is the same as of the collective agreement and the Labour Code (see the general rule and the exceptions above). Although this provision is missing from the text, it is the only feasible and logical solution, which will most probably be applied by the labour courts.

3. DUAL SYSTEM OF EMPLOYEES' REPRESENTATION: UNIONS AND WORKS COUNCILS IN THE NEW LABOUR CODE

Hungarian labour law regulates four institutions of employees' representation:

- trade union: autonomous legal entity, typically a 'confronting' organization of employee's representation.
- works council: assures the participation of employees in management, without separate organization or legal entity.

³⁰Article 235 and 262 of the new Labour Code.

³¹Article 266 of the new Labour Code.

³²GYULAVÁRI T.: Munkajogi jogforrások in.: GYULAVÁRI T. (szerk.) *Munkajog* ELTE EötvösKiadó, Budapest, 2012. p. 53.

³³Article 260 (3)-(5) of the new Labour Code.

- representatives of employees in the board of supervision in a business organization: exists as a special form of employee's participation, only if the business organization employs more than 200 employees.
- representation in health and safety matters: special organization of employee's participation, its function is to facilitate employee participation in safe working, as prescribed in the framework directive on occupational health and safety.³⁴

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 they used to operate as interconnected in the last two decades.

The trade union provides representation by basically confronting the employer, and it is granted the legal authority needed for such a role. On the contrary, the works council cooperates with the employer and lacks rights which would enable confrontation. A basic difference is that the trade union is an autonomous legal entity, a special form of civil organization, which aims to protect and facilitate the interests of employees. As a result, trade unions have their own organizational structure, which is independent from the employer's, and designed autonomously by the union. Oppositely, the works council is not a legal entity, has no own organizational structure, and operates simply as a special part of the employer's organization.

Legal rights of the two organizations are designed in accordance with their attributes mentioned above. Trade unions, in compliance with their confronting nature, may take collective actions (e.g. demonstration, strike) and the working conditions they achieve can be stipulated in a legally binding collective agreement. The bargaining position of the trade union mostly depends on how the workforce is organized and what conditions can it achieve 'in fight', but much less on union rights prescribed by the Labour Code (like information and consultation). On the contrary, the works council is primarily entitled with rights for information and giving opinion, its influence on the employer's operation is of participational nature, as it may engage in the process of decision making, but can hinder it only in a very narrow range if any.

Even though Hungarian labour law and academic literature treated trade unions and works councils as having different functions, interestingly in the former legislation the two organizations were connected. 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.³⁵ 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 raise as many candidates to the elections as possible and to facilitate their effectiveness

³⁴Council 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.

³⁵Article 33 of the 1992 Labour Code.

by all means. The union's candidates generally were members or officials of the union. As a result, if such union-candidates were elected as works council members, the personnel of the two different organizations were 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 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 not based on the results achieved at the works council's elections any more. So it has a lower chance that trade unions and works councils fuse together. However, as works council has many important rights, it could still be useful for trade unions to get as many mandates in works councils as possible.

Albeit the new Labour Code considers none of the two types of employee's representation primary 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 Code.
- According to the new law, monitoring the compliance with labour law became the general task of works councils and not of trade unions as it was before, even though the necessary authority is not assured for works councils (e.g. the right to initiate proceedings before authorities).³⁶
- EU law calls for 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 for works council and not unions.³⁷
- Finally, as seen above, the new Labour Code allows the employer to conclude a works council agreement which is equivalent to the collective agreement, provided that there is no collective agreement at the employer or a trade union entitled to conclude one.

Considering the aspect of protection of employees' interests, the significance of trade unions is obviously higher than of works councils, as the later can influence the decisions of the employer only by its rights for consulting and informing. Thus it seems odd that the new Labour Code gives works councils a role to substitute unions. However, in our opinion, whatever authority is granted for works councils by law, it cannot supplement the organizing power of trade unions.

The most important change concerning the legal status of trade unions refers to union officials. As the trade union official is a central actor in the collective life at the employer, she is granted a special legal protection against otherwise unilateral measures of the employer, which could uproot

³⁶Article 262 of the new Labour Code.

³⁷Article 72 and 265 of the new Labour Code.

her among the workers whose interests she represents. Such protection shortly means that the employer is entitled to make unilateral decisions concerning the trade union official only if previously consulted with and got consent of the trade union. According to the new Labor Code such measures are dismissal and employment differing from the employment contract.³⁸ Especially the protection against dismissal has significance in practice, as the employer shall terminate the employment relationship of a trade union official only with the previous written consent of the union.

Whilst according to the 1992 Labor Code the labour law protection was granted for each and any office holders of the trade union, the new rules restrict the number of protected officials. At all autonomous establishment of the employer, based on the average statistic number of employees in the previous calendar year, the number of trade union officials protected by law is determined 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	

Not depending on the number of the employees, all unions which has representation at the employer are entitled to protect plus one official, who is selected by the supreme body of the union. This 'plus one' person can be selected not for all premises but for the whole employer. Whilst unions are allowed to decide unilaterally the number of officials elected, labour law protection can be given to a maximum of persons as determined by the chart above. It is the union who chooses which officials will enjoy protection, but may only alter its choice if the protected official's employment relationship or union mandate is terminated.

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, which reads as the establishment means a division of which leader is entitled with the employer's rights concerning the participation rights of works councils.³⁹ Basically this 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 concerning the rules of works councils. Such centralization of exercising the employer's rights can easily reduce

³⁸Article 273 of the new Labour Code.

³⁹Article 236 (2) of the new Labour Code.

the number of protected union officials thus hamper the aim of the law. Also, once again, here the operation of trade unions and works councils are connected, in spite of 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 in connection with the works council.

It frequently occurs that an employee is a trade union official and member of the works council too. In such situations, according to the previous court practice, the legal protection applied to the person by both titles, and both the union and the works council needed to be involved in the process.⁴⁰ Such 'overprotection' is not sustained by the new regulation: if the chair of the works council happens to be a protected trade union official as well, the labour law protection applies to him only by the latter title.⁴¹

While the new rules on trade union officials aim to decrease the number of protected employees, the transitory rules of the new Labour Code prescribed that all officials who were granted labour law protection the day before the new Code came to effect (that is 30th of June 2012), will stay under that protection until their employment relationship ends or lose their union mandate.⁴² Interestingly, the legislator made a step back at the last moment, and left the previously mandated union officials' protection unharmed.

4. NEW DIMENSIONS IN THE PARTIES' AGREEMENTS

In socialist labour law the employment contract and other agreements of the parties hardly had any relevance in the regulation of the employment relationship, beyond its obvious role of establishing this legal relationship. In this centrally directed economy every single condition of employment, even wages were regulated by the Labour Code or other laws, not the agreement of the parties.⁴³

Although the 1992 Labour Code slightly increased the regulatory role of the employment contract, however, it still had a complementary function compared to the Labour Code and the collective agreements. The main reason behind this limited relevance is the hierarchy between the agreement and the Labour Code. Unless otherwise provided for by the 1992 Labour Code, an agreement between the parties may deviate from the provisions set forth in Part Three of the Labour Code on condition that such deviation provides more favorable terms for the employee.⁴⁴ Therefore, the 1992 Labour Code could allow the derogation to the contrary, however, it was a rare exception before the 2012 reform.

Beyond collective agreements, the regulatory function of the agreement of the parties was also strengthened by the new Labour Code

⁴⁰See e.g. court decision BH 2000, 463.

⁴¹Article 260 (5) of the new Labour Code.

⁴²Act 86 of 2012 Article 14 (1).

⁴³KENDERES: *A munkaszerződés hazai szabályozásának alapkérdései*. Miskolc, 2007, 49–64. o.

⁴⁴Article 13 of the 1992 Labour Code.

by insertion of several exceptions to the general rule. Therefore, the general rule remained the same, derogation is allowed for the employment contract to provide more favorable terms for the employee, however, the number of exceptions considerably increased.

Probably the most important derogation concerns place of work. The workplace of the employee shall be defined in the employment contract. Failing this, the place where work is normally carried out shall be considered the workplace.⁴⁵ Since there are no other limitations on the regulation of the workplace, thus the parties may freely include 'Hungary' or even 'Europe' in the employment contract, which can be questioned exclusively by the general principle of 'wrongful exercise of rights'.⁴⁶ Moreover, the employee shall provide the necessary working conditions, if it is agreed by the parties.⁴⁷ Another good example of possible derogations is splitting the working time, as 'by agreement of the parties, the employer may schedule daily working time in up to two periods split up over the day'.⁴⁸ By agreement of the parties, the employer may also allocate one-third of the vacation time by the end of the year following the year when due.⁴⁹

As for wages, by agreement of the parties, the basic wage may include most of the wage supplements⁵⁰ and the amount of wage supplements may be calculated based on a much lower amount than the employee's basic wage.⁵¹ In addition, the employee may 'agree' on giving an 'employee guarantee'. If so agreed by the parties in writing, employees may be required to provide one month basic wage guarantee to the employer if their job involves the handling of cash, valuables or the exercise of supervision of these transactions referred.⁵² The above described concept and provisions are widely criticised, since the positions of the contracting parties are unequal, thus the employer may abuse these derogations.

Furthermore, the new provisions on the hierarchy between the Labour Code and the agreement of the parties are rather defective. The Labour Code makes a distinction between the employment contract and other types of agreements between the employer and the employee (non-competition agreement, study contract, agreement on wage-supplement or vacation etc.). 'Unless otherwise provided for by law, the employment contract may derogate from the provisions of Part Two⁵³ and from

⁴⁵Article 45 (3) of the new Labour Code.

⁴⁶Article 7 of the new Labour Code: 'Wrongful exercise of rights is prohibited. For the purposes of this Act 'wrongful exercise of rights' means, in particular, any act that is intended for or leads to the injury of the legitimate interests of others, restrictions on the enforcement of their interests, harassment, or the suppression of their opinion.'

⁴⁷Article 51 (1) of the new Labour Code.

⁴⁸Article 100 of the new Labour Code.

⁴⁹Article 123 (6) of the new Labour Code.

⁵⁰Article 145 of the new Labour Code.

⁵¹Article 139 of the new Labour Code.

⁵²Article 189 of the new Labour Code.

⁵³Part Two is on the employment relationship.

employment regulations⁵⁴ to the benefit of the employee.’ Accordingly, the Labour Code clarifies the general rule of lawful derogations concerning the employment contract, but it simply forgets to do so regarding the other types of agreements. In case of the above mentioned exceptions, it is possible to derogate to detriment of the employee (eg. vacations, wage supplements, employee guarantee). However, it is not possible to deviate from the dispositive rules of the Labour Code in these ‘other’ agreements, since any agreement that infringes upon any employment regulation shall be null and void.⁵⁵ As an example, the study contract may not deviate from the provisions of the Labour Code, even if it is to the benefit of the employee, as it is not expressly allowed by the Code, thus this derogation shall be null and void. In our opinion this is not the concept of the legislature, but rather a mistake, which is the consequence of the abrupt work.

In practice, the interpretation of ‘in peius’ and ‘in melius’ derogations will also be difficult. According to the Code, derogations shall be adjudged by comparative assessment of related regulations.⁵⁶ However, it will be rather problematic to sort out and isolate these ‘related regulations’. These may be the provisions of the same chapter (eg. termination of employment), respectively the contractual terms on wages and working time may also be considered as related conditions. These open questions will have to be answered by court practice, as a result the influence of case law will considerably increase.

Finally, we may also mention the employment contract of so-called executive employees (eg. managers). The employment contract of executive employees may derogate from the provisions of Part Two of the Labour Code (on employment relationship), save collective agreements must not apply to them. The Labour Code contains many cogent provisions, however, the employment contract of executive employees may derogate from these cogent provisions as well. For example, their employment contract may not include wage. In our opinion, this unlimited contractual freedom is not explained by their relatively stronger bargaining position.

As it was described above, the contractual freedom of the parties has been considerably increased by the new provisions, which freedom hides dangerous traps for employees.

5. ATYPICAL FORMS OF EMPLOYMENT

By seeking more flexible ways of employment and to escape from the rules of typical employment relationships, more and more people work in atypical employment relationships in Hungary. Such forms of employment

⁵⁴For the purposes of the Labour Code, ‘employment regulations’ shall mean legislation, collective agreements and works agreements, and the binding decisions of the conciliation committee (Article 13).

⁵⁵Article 27 (1) of the new Labour Code.

⁵⁶Article 43 (2) of the new Labour Code.

are still employment relationships, but differ from the classical picture, due to some significant, special attributes.

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. Besides, many other laws determined other forms of atypical employment (e.g. home workers, simplified employment). The new Labor Code – in compliance with the practical need for more various ways of employment – expanded the list of atypical employment relationships. The appraised employment relationships according to the Law 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 employer's premises	Telework Home work
Work for one employer	Temporary agency work School association employment relationship Employment relationship with more employers

The chart can be supplemented with those atypical employment relationships, which differ from the typical because of the special nature of the employee's position, and therefore require different regulation (e.g. executive employees or employees without legal capacity). Because of similar reasons, on the employer's side, special regulation is needed in case of a publicly owned employer. These employers are financed by the public, so the law allows way less possibilities to differ from statutory provisions.

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. According to our point of view, the expanded interpretation of the conception of atypical employment is not favored. Generally also employees in typical employment perform their duties differently (e.g. due to their personal attributes, or by the special type of their work), but by separating all of these groups the conception of atypical employment would lose its meaning. As a result, an employment relationship can be

considered as atypical if it differs from the typical by at least one significant attribute.

Below we present the most significant atypical employment relationships in the Hungarian labor market, emphasizing the changes introduced by the new Labour Code.

5.1. Fixed term employment

Fixed term employment is established for the period determined in the employment contract. Its specialty is that after the expiry of such period it ceases. The Labor Code considers open-ended employment as the general rule, so the parties shall expressly stipulate in the employment contract that it is concluded for a fixed period.⁵⁷ According to the data of Central Office of Statistics, in 2009 approximately 279700 employees worked in fixed term employment in Hungary. This is 8,5% of all employment.⁵⁸

The period of a fixed term employment relationship has no minimum, so it can last only for a couple of days, but shall not exceed 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 fixed term employment contract.⁵⁹ The period of fixed term employment shall be determined by calendar (e.g. till 31st December 2014) or by another appropriate way. Such 'another appropriate way' might be determined as until completing a certain task or until an absent employee returns to work again. According to the Labor Code, the date of expiry cannot exclusively depend on the will of one of the parties. For instance, the employment contract lasts for an employee's vacation for childcare, which is anticipated to last for two years. On the contrary, it is against the law to determine the fixed term as the employment relationship lasts until the employer terminates its premise where the employee generally works.

Labour law has to avoid the substitution of the constant, open-ended employment relationship by a chain of fixed term employment relationships.⁶⁰ For that aim, according to the Labor 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 one is possible only if it is based on the rightful interest of the employer and shall not violate the rightful interests of the employee.⁶¹ Hence Hungarian labour law does not exactly determine the number of possible prolongings 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

⁵⁷Article 45 (2) of the new Labour Code.

⁵⁸See: KSH: Labour market in Hungary A munkaerőpiac alakulása Magyarországon (www.ksh.hu).

⁵⁹Article 192 (2) of the new Labour Code.

⁶⁰Just 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.

⁶¹Article 192 (4) of the new Labour Code.

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.

According to the previous regulation, in case of an unlawful chain of fixed term employment contracts, the employment relationship was considered by law as open-ended.⁶² Such sanction is not included in the new Labor Code any more. Instead, in such cases, the general rules of invalid agreements shall apply. This means an unfavorable 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.⁶³ However, after the expiration of the fixed term contract, the employment relationship will terminate automatically, and cannot be considered as open-ended.

5.2. Part time employment

As a rule the employment relationship is established for full time employment (eight hours a day, forty hours a week).⁶⁴ Part time employment means that the parties determine shorter working time than full time.⁶⁵ Part time employment has no minimum quantity determined by law. It derives from the concept of full time employment that part time has to be shorter than 8 hours a day, 40 hours a week, but within any working time can be stipulated. Even radically short working time is possible (e.g. 1 hour a week) but it is not reasonable in most situations. Thus parties can determine the amount of working time flexibly, according their own needs, but most common is 20 hours a week. In Hungary part time employment is not significant (5,5% in 2009⁶⁶), which is caused basically by the fact that it means no significant advantage in wage expenses, and more importantly common charges are specifically unfavorable for the employers employing in part time.

According to a new rule of the Labor Code, the employee can request the employer to reduce working time by half until his/her child is below 3 years, and the employer cannot refuse such request.⁶⁷ The purpose of the regulation is to help employees raising a child to return to work. However, the freedom of contract is violated on the employer's side, because it has to accept the alteration of working time, which might lead to serious problems in organizing working time. Naturally, the parties can change the amount of working time in any other situations too, but only by mutual agreement.

By principle employees cannot be discriminated against by being employed full or part time. The explicit prohibition of discrimination against part time employees is determined by the Law on anti-

⁶²Article 79 (4) of 1992 Labour Code.

⁶³Article 29 (2) of the new Labour Code.

⁶⁴Article 45 (4) and 92 (1) of the new Labour Code.

⁶⁵Article 92 (5) of the new Labour Code.

⁶⁶KSH: A munkaerőpiac alakulása Magyarországon (www.ksh.hu).

⁶⁷Article 61 (3) of the new Labour Code.

discrimination.⁶⁸The 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.⁶⁹ The principle of time-proportionality (*pro rata temporis*) was included in the 1992 Labor Code, declaring that in case of part time employment, as for the directly or indirectly granted wage or in kind allowance, at least the principle of time-proportionality has to be applied, if the authority for allowance relates to the measure of working time.⁷⁰ The new Labor Code explicitly does not refer to the principle of time-proportionality, so it can only be derived from the rules of the anti-discrimination act. Considering the aspect of practice, preserving the special rule declaring the principle of time-proportionality would have been subservient.

The new Labor Code introduced on-call work and job sharing. As these are new instruments in Hungarian labour law, their characteristics can only be judged after a couple of years of practice. The point 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 occurs. Wage has to be paid only for the hours actually worked. In case of on-call work, daily working time shall not exceed 6 hours and working time shall be scheduled 3 days prior.⁷¹

Due to the obligation to work personally, it is rare in an employment relationship that the employee's position is shared by more persons. Such special situation, called job sharing, is now introduced to Hungarian labour law. In such 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 incapacitation, one of the other contracted employees is obliged to perform.⁷²

5.3. Temporary agency work

Agency work can be temporary only. It was one of the specialties of the 1992 Labor Code that agency workers could be employed at the user company without any time limit. Thus it was not forbidden for users to employ an agency worker permanently, even for many years. This solution was against the aim of temporary agency work, which is to offer flexible solutions in case of urgent or unexpected needs in workforce. The limitation of temporariness appeared in Hungarian labour law at the end of 2011 by the transposition of directive 2008/104/EC.⁷³ The legislature determined the maximum period of assignment very widely, in 5 years. According to statistics, the average length of assignments does not even exceed two months, thus this upper limitation will not actually influence

⁶⁸Act 125 of 2003 Article 8 (point r).

⁶⁹Article 4 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.

⁷⁰Article 78/A (2) of 1992 Labour Code.

⁷¹Article 193 of the new Labour Code.

⁷²Article 194 of the new Labour Code.

⁷³Directive 2008/104/EC of the European Parliament and the Council of 19 November 2008 on temporary agency work.

the practice.⁷⁴ Harmonization of the agency work directive seems formal in this point.

The former Labor Code significantly altered the rights of an agency worker and a directly employed worker. Among others, it declared that the right for equal pay in case of agency workers applied only with two limitations. On the one hand, the application of equal payment required certain period of continuous working (time limitation), and on the other, it could be applied only to certain payment types but not to the full wage (content limitation).⁷⁵

Such different treatment of agency workers was not found unconstitutional by the Constitutional Court.⁷⁶ According to the resolution of the Constitutional Court, the aim and the conditions of the two employment relationships are different and so are the employment constructions themselves. The temporary work agency pays for a work which was accomplished not for itself directly, but for another party, chosen by the agency. Therefore, in agency work, the workload and the opportunity of continuous employment is less calculable, because all of these are determined by factors outside the legal employers' authority. The Constitutional Court found this special construction of employment to be of crucial importance, and on such grounds ruled that the difference in payment was justified. This approach authorized the regulations of the 1992 Labor Code, which had to be significantly altered during the implementation of directive 2008/104/EC.

Compared to the former regulation, a basic change is that as a main rule, the same payment has to be given to the agency worker as to those employed permanently, from the first day of the assignment, and in all types of payments, provided the two employees perform work of equal value. However, following the authorization of the directive, in the cases listed below the principle of equal payment has to be applied only from the 184th day (after the first term) of the assignment:⁷⁷

- if the employee's employment relationship is open-ended and is paid between assignments. The directive considers the common presence of these two conditions as such an advantage which compensates the agency worker for not being entitled for equal payment.⁷⁸ Though it has to be noticed, that this comparative advantage is lost if the employee, despite of the open-ended contract, is dismissed after a short period of time, or receives only a symbolic payment between assignments. By this exception, the principle of equal payment from the first day can be easily by-passed.
- if the employee is considered as an employee permanently absent from the labour market. Rules for leasing permanently unemployed persons are more flexible due to the desired function of agency work

⁷⁴Nemzeti Foglalkoztatási Szolgálat,
http://www.afsz.hu/engine.aspx?page=stat_osszefogl_munkaero-kolcson_tevekeny.

⁷⁵Article 193/H (9-11) of the 1992 Labour Code.

⁷⁶Resolution 67/2009. (VI. 19.).

⁷⁷Article 219 (3) of the new Labour Code.

⁷⁸Article 5 (2) of directive 2008/104/EC.

to open a path to the labour market for “outsiders”.⁷⁹

- if the user company is owned by a local municipality or a registered public benefit organization. User companies of the non-profit sector are also given the benefit of exception from the principle of equal payment. Although, it must be added that a company owned by a local municipality can also be a profit oriented company, which is not authorized to benefit from this situation. Such exception might violate the directive on temporary agency work.⁸⁰

- finally, the collective agreement can overrule the principle of equal pay, even adversely for the employee.⁸¹ The parties concluding the collective agreement can determine different limitations for principle of equal payment. However, according to the directive, in such cases, the overall protection of agency workers’ interests must be guaranteed as well.⁸² Implementation of the directive is not totally accurate at this point, because this rule is missing from the Labor Code.

Given such wide range of exceptions, most of the leased employees are to be excluded from the scope of equal treatment. This will be especially common among agency workers who work for a short term only (below half a year). Unfortunately, according to statistics these short assignments dominate the Hungarian practice. Because of the flexible wording of the exception connected to open ended employment, one could expect that this exception is going to be stronger than the main rule.

Besides temporary agency work, Hungarian labour law regulates other cases when more subjects appear in the position of the employer. Such a case could be when more employers conclude an employment contract with one employee for accomplishing tasks for all of them.⁸³ In such a case the employee works for more employers, but within one employment relationship. This can happen by sharing the working time among the employers, as the employee works for them in different time periods (e.g. two companies employ one administrator). Such a situation is also possible when the employee works for the two employers simultaneously (e.g. four companies rent offices in the same building and employ one receptionist together). Unlike agency work, no employer’s rights are leased for a fee, but more subjects own the position of the employer originally, 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 employment in line with studying, for example in fast food restaurants or as administrators. Work organized by school associations

⁷⁹This exemption is based on Article 1 (3) of directive 2008/104/EC.

⁸⁰See the rules on the scope of the directive (Article 1).

⁸¹Article 222 of the new Labour Code.

⁸²Article 5 (3) of Directive 2008/104/EC.

⁸³Article 195 of the new Labour Code.

on the one hand can be an important income supplement and source of experience for students, and on the other hand it provides flexible workforce for the employers. A school association is authorized to lease employer's rights to the customer just like a temporary work agency.

From the customer's point of view, leasing students from a school association is equivalent with the services of an agency. However, there are still two important differences. First, a school association can only employ full time students, who are busy due to their studies, thus are unable to accept permanent work for 8 hours a day. Second, as the employee is a full time student, the school association does not need to pay social security contributions.⁸⁴ Such enormous privilege is strongly criticized by temporary work agencies as it results that in case of tasks which can be accomplished by either studying employees or agency workers, school association work is always the cheaper service.

6. CONCLUSIONS

Although the main aim of the new Hungarian Labour Code is clear, that is to rapidly increase the employment rate, whether a more flexible system of labour law is the proper vehicle to reach such a goal is rather doubtful. Notwithstanding, a shift from statutory regulation of employment towards regulation more based on the agreements of the parties, especially on the collective level, is a medicine for many problems apparent in the 1992 Labour Code, we reckon the obvious risks inherent in bargaining situations which involve a weaker party. Hungarian employees shall pay a lot more attention to what they sign when they conclude an employment contract, as quite many stipulations there may derive from the Labour Code to their detriment. Besides, given the low penetration rate of collective agreements and their poor content, the employees' side might be weaker also on the collective level. The new regulation sets an enormous challenge for Hungarian unions. Whether they can grow up to their new role in the changed legal circumstances and be an equal bargaining partner with employers is yet to be seen.

⁸⁴Act 80 of 1997 on social security, Article 5 (1) point b.