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# How to Tackle New Form of Works for a Greater Employment Protection

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*Abstract.* Employment relationships in Slovenia as well as in Europe have become increasingly diversified. In addition to the prevailing typical employment contract, there is also a variety of atypical forms of work that are allowed under certain conditions and within legal restrictions. If the segmentation on the labour market was once limited to those who were employed for definite and indefinite period of time, the gap is now much greater. As can be observed and as statistics data confirm, more and more work is done outside the employment contract, on a civil basis. Digitalisation and internet have deepened the problem and in some cases workers cannot neatly be classified as either 'employees' or as 'self-employed'. There are concerns that such trends may result in lower employment and social standards, and the evolution of 'gig work' has given another perspective to the labour market. In practice it is not rare that atypical forms of work are used also in cases that do not meet the requirements for such work and outside of legal restrictions. This is especially true for false self-employed, single-member private limited liability company, job contract, contract for copyrighted work and student work. Most of those are deprived from employment protection and their social security is on a long run under a real threat. In the absence of a clear strategy on how to approach the diversification of employment relations, the Slovenian legislator enacted some legislative changes, which have created even more confusion. In 2013 the Slovenian *Employment Relationship Act* introduced the category of 'economically dependent person', extending the scope of some employment protections beyond 'employees'. The definition of the 'economically dependent person', however, appears to be impossible to apply in practice, as those potentially covered, in fear of losing work, have not demanded protection. Moreover, the legislator has extended some protections (for example, minimum hour payments) for some groups, like students and pensioners, but has ignored the interests of others, arguably equally in need of protection (like the 'false self-employed'). Thus, the crucial question whether to extend employment protection to more of those who work outside of the classical employment relationship is still on the table. Yet, two approaches should be considered: changing labour legislation and/or by extending the scope of collective agreements. In the paper we argue that a new law should be adopted and that collective agreements should be exempted from the antitrust law. By doing that the wages concluded in the collective agreements will not be considered as a price-fixing cartel.

*Keywords:* new forms of work, employment protection, false self-employment

## 1 Introduction

If decades ago, the work was mostly carried out on the basis of an employment contract and the workers were mostly members of the trade union, today this is no longer the case. Considering the situation in Slovenia, it can be observed that work is performed in different arrangements, lots of time on a civil basis; the membership of trade unions is declining and it is unevenly distributed across sectors (CJM 2018).[1] On the other hand, the collective agreements still apply only to workers, who are employed. Therefore the question is, what is the labour and social legal status of individuals who perform the work in a dependent relationship without an employment contract. At the outset, it is necessary to reject the belief that atypical employment contracts and other atypical forms of work necessarily mean the exploitation of workers. The form of an employment contract or form of work is not in itself unlawful, but from a legal point of view, it becomes problematic if such forms are misused, e.g. in particular to disguise an employment relationship. In this contribution we focus on the situation in Slovenia, so we analyse the Slovenian legislation as follows.

The Employment Relationship Act (hereinafter ERA) stipulates that the employment relationship exists if there are present all elements of the employment relationship defined in Article 4 of the ERA in connection with Articles 22 (conditions for concluding a contract of employment) and 54 ERA (fixed-term employment contract). Moreover, it is assumed that if an employment relationship exists, the work cannot be performed on the basis of civil law contracts, except in cases provided by law (second paragraph of Article 13 of the ERA). In this regard, two important aspects have to be mentioned. First, if the parties do not conclude a written employment contract, this does not affect the existence and validity of the employment contract as such (fourth paragraph of Article 17 of the ERA). Secondly, the actual relationship between the parties, regardless of the form of their agreement, is assessed: if for example the parties had concluded, a contractual agreement and the actual relationship has all the elements of an employment relationship, any party may require the conclusion of the employment contract. The most common practice among civil forms of work is the contract of business cooperation with a self-employed (or one-person limited company), work contract or copyright contract, student work, temporary and occasional work of pensioners. In addition to this the platform work is on rise, bringing several other legal challenges on the surface. However, in general it should be emphasized that this form by itself does not undermine the concept of decent work, but this can easily happen if it replaces the employment relationship or of the terms of cooperation do not comply with the concept of decent work.

In this contribution we focus on the legal perspective of the changes in the Slovenian labour market. Thus, we first present and analyse the atypical employment contracts, followed by the civil forms of work and concluding with some suggestion for possible legislative changes and development.

## 2 Atypical employment contracts

Atypical employment contracts are not something new in the existing legislation, but the way and the scope of the use of a particular form of atypical employment contracts have changed. It should be emphasized that a decade ago one of the main problems in the Slovenian labour market was the segmentation of workers between those who were employed for an indefinite period of time and those who had a fixed-term employment contract. Even though this gap has remained, other atypical

[1] There are no official statistics in the Republic of Slovenia on trade union membership. Data on trade union membership in Slovenia are obtained on the basis of the survey, so they cannot be completely accurate. According to the latest data from the Center for the Exploration of Public Opinion and Mass Communication (CJM 2018), 12.8% of respondents stated in April 2018 that they are members of the trade union.

employment contracts have increased to a greater extent, in particular agency work and part-time employment. On the other hand, the employment contract for work at home is not used as often as it might be considering the digital possibilities.

### *2.1 Fixed-term employment contract*

Fixed-term employment is one of the most important forms of atypical employment contracts in Slovenia (16.2% of all employees in 2016) and is mainly common among young people (SORS, 2018a). One of the main problem of fixed-term employment contract is the so-called 'chaining of contracts'. Employees remain employed by the employer on the basis of fixed-term employment contracts for several years, even for a decade, despite the fact that there is a permanent need for work. Moreover, ERA does not specify the minimum duration of a fixed-term employment contract. The practical consequence is that employment contracts are not rarely concluded for a very short period of time, like for 14 or 30 days. In terms of the concept of decent work this practice is not suitable as the worker is in constant uncertainty whether he will have a job or not - his position would be significantly different if he had a job for a year and not just for 14 days. Such uncertainty can have significant psychological consequences due to repeated stress, whether or not a new employment contract will be concluded. Likewise, from the point of view of the concept of decent work, it is not a good practice to terminate the collaboration with an employee for at least three months with and (informal) promise that the employee will receive a new fixed-term employment contract after three months. According to paragraph 6 of Article 55 of the ERA, a three-month or shorter interruption of the employment contract does not constitute an interruption of the successive conclusion of fixed-term employment contracts. In addition, in such cases, employees do not have certain rights in full scope or only in proportion to the time they are employed, such as, for example, annual leave, holiday allowance, Christmas bonus/thirteenth salary, the right to participate in profit sharing and similar.

### *2.2 Agency work*

Agency work in Slovenia has increased since 2011 - the total number of agency workers has increased from 5,000 in January 2011 to 15,900 in December 2016 (Vodopivec, Laporsek, Vodopivec, 2017). From the labour law perspective there is a legal uncertainty of the temporary nature of this kind of employment contract and the use of this institute with the employer - the user. Contrary to fixed-term employment, when this limit is set at two years of performing the same work, there is no such direct provision for agency work. Article 60 of the ERA states that an employment contract may be concluded for a fixed or indefinite period, considering the restrictions set out in Article 54 and the second and third paragraphs of Article 55 of the ERA. This sets a boundary for those workers who are employed by the agency for a limited period of time, while for workers who are employed by the agency for an indefinite period, there is no explicit statutory provision that would temporarily prevent the permanently work by the employer – the user. Thus, in practice, workers employed by the agency work for the employer - the user for several years. In such cases, there is a permanent need for work, and consequently such a workers should be employed directly by the employer - the user. This practice is not appropriate either with regard to the purpose of legal provisions or the concept of decent work. In addition, such a long-term cooperation between the worker and the employer – the user opens other relevant questions, such as who is the real employer, where an how participatory rights should be exercised and similar (more in Franca, 2017).

Although agency workers are employed and, as such, protected by labour legislation, in practice, they are often treated as 'second-class workers', especially if they come from other countries. Although the Article 63 of the ERA is clear: for the time when the work is performed at the employer - the user, provisions of collective agreements that bind the employer - the user or the provisions of the general acts of the employer, also applies to the agency workers, the practice is not always alike. Similarly, in

the third paragraph of that article, it is explicitly stipulated that this also includes the right to benefit from the advantages that the employer – the user provides to his employees in relation to the employment (more on this in Kresal Šoltes, 2017). There are not rare cases when the workers employed by the agency receive lower pay compared to the worker employed by the employer – user and do not enjoy the same benefits as, for example, Christmas bonus/thirteenth salary. This practice it is not just inadequate from the point of view of the concept of decent work, but it is also illegal.

### *2.3 Part time work*

In Slovenia, part-time employment has expanded with the arrival of foreign companies with their specific business models, especially in certain sectors, such as retail. Despite the increase, the proportion of part-time workers is still small - in 2016 only 6.1 % of the employees in the labour market were working part-time (SORS 2018). In case of part-time employment (special features for disabled, partially retired and parents are excluded from this analysis) one of the problem is that part-time workers are often expected to work even after the agreed shorter time. Article 65, paragraph 6 of the ERA clearly stipulates that an employer may not impose work on a part-time worker over the agreed working time, except in the cases referred to in Article 145 of ERA (additional work in cases of natural or other accidents) or if the worker and the employer agree about it in the employment contract. In practice nearly all the part-time employment contract have this provision, thus turning the purpose of part-time work into full time when the employer needs it. This trend is strongly connected with the idea of 'on-demand work', which presents the basis of the development of platform work (more in chapter 3.3).

The part-time worker has the right to conclude more part-time employment contracts with more employers to reach the full working time determined by the Article 66 of the ERA. Providing full-time employment presents the basis to access the social rights granted from the social security system. However the actual practice in the Slovenian labour market deviates from this, since most part-time workers do not seek the second (or third) part-time employment contract. The reason for this is that the supply of part-time employment on the Slovenian labour market is modest. Considering the unpredictability of the working time at the current workplace, part-time workers are practically locked by their employer. Not knowing the schedule of work well in advance poses a high hurdle to arrange work by the possible second employer. The Labour Inspectorate (2017) has also come to similar conclusions, finding that in practice there are numerous abuses of the institute of a part-time employment contract. In terms of decent work, the problem is, in particular, the provision of adequate social security, or more precisely, pension insurance. Lower payment of social contributions leads to lower pensions and poverty.

Another challenge that has to be addressed in connection with the part-time employment is the prohibition of competition (Article 39 ERA). The current provisions of ERA does not provide any exception for part-time workers, who can conclude more employment contract in order to reach full working time (Article 66 of the ERA). They can conclude the second (or third) employment contract just with employers, who are not competitive with the first employer. In the case of low skilled workers or in specific jobs, such as hairdresser, this practically makes it impossible to work part-time with the goal to reach full working time according with the ERA. Therefore, in this respect, an exception should be allowed by a legislative change or by an interpretation.

### *2.4 Work at home*

Work at home as an atypical form of an employment contract that can be concluded for a fixed or indefinite period is barely used in Slovenia, which could be considered as an under-utilized option, especially in terms of facilitating the reconciliation of private and business life. The atypical nature of

this form of work is reflected in the fact that workers work outside the premises of the employer, at the worker's home or anywhere else. Labour legislation is in this respect rigid, since it regulates work at home as a peculiarity of the employment contract and does not differentiate or impose the same conditions for all. In fact, it is necessary to distinguish between a situation where an individual is working at home on a long-term basis and when this is just occasionally or short-term. In the first case, the current legal norms could be assessed as relatively appropriate. With the technology development and wide use of internet, workers can access to all company data from nearly everywhere, which offers high possibility for occasional or short-term work from home. In practice, these are the cases where workers do not need to be physical present at the workplace on certain days, and could work at home. For this kind of work, the legal regulation should be more flexible as there should be no need to conclude this kind of atypical employment contract of work and no need to inform the labour inspectorate as it is set in the current legislation (fourth paragraph of Article 68 of the ERA).

## 3 Civil forms of work

### *3.1 Business cooperation with a self-employed*

Fundamentally an independent entrepreneur, namely self-employed, operates on the market for himself and for his account, which is characterized by entrepreneurial freedom and a free economic initiative, which is constitutionally protected. However, recent trends on the Slovenian labour market (and also elsewhere in the European Union), indicate that the business cooperation with a self-employed largely replaces the employment relationship. Since this is a civil contract, parties can agree on the content of the contract freely and without major restrictions. For instance in the field of information technology, it is possible to find examples where self-employed find this form of work more than appropriate as it allows them to take greater amount of work as if they were employed. By having an employment they would be limited by weekly working hours and by the number of overtime work. Tax treatment of revenue of self-employed is also more favourable compared to regular employment. From the labour law perspective the main problem are the so-called 'false' self-employed. There are cases where the collaboration between the self-employed and the company has all elements of the employment relationship according to the Article 4 of the ERA. In this cases the workers has judicial protection, he can request the conclusion of the employment contract and subsequently, all connected rights from the first day of such collaboration. However, experience from practice shows that self-employed rarely seek such judicial protection, mainly because of the fear to lose their jobs. On the other hand there are some, as stated about in the information technology sector, that are comfortable with this form of cooperation and do not want to conclude an employment contract. The result is that we have a large number of individuals working in such a situation on the labour market, which is far from the concept of decent work. Nevertheless, more self-employed in the labour market means lower inflows into social security funds, especially in the health and pension fund.

### *3.2 Economically dependent person*

With the amendment of the ERA in 2013, the legislator regulated the position of an economically dependent person subject to limited labour protection. These are self-employed who do not employ other workers and who receive at least 80 % of their income from one company. With such a high income from one company, economic dependency is established, which is why these persons should be entitled to certain labour protection. However, there are no examples from practice that a person who acquires at least 80 % of the income from one company and consequently depends on him will assert his status by obtaining payment for contractually agreed work, which is comparable to the type, scope and the quality of the work undertaken, taking into account the collective agreement and general acts including the obligation to pay taxes and contributions (second paragraph of Article 214 of the

ERA). It is even less likely that he will enforce such a status at the end of the calendar year and request a back-payment difference, that is, for an entire calendar year. Because of the aforementioned fear of loss of work, individuals do not demand the right to work as an economically dependent persons under the ZDR-1. There is also no case in case-law regarding this third category on the labour market. A special law should have been adopted to regulate the work and protection of economically dependent persons, as foreseen in Article 223 of the transitional and final provisions of the ERA, but it has not happened so far. Therefore, these provisions have more or less remained a dead letter on paper.

### *3.3 Platform work*

Platform work has experienced its expansion after 2012, and now it appears in various forms around the world and covers a variety of jobs: from less (transport of people, food delivery, data entry, etc.) to more demanding, such as translations of professional texts, development of technology and computer programs etc. (Lehdonvirta, 2017). The fundamental idea of platform work is the so-called 'work on demand', meaning 'the job has to be done when there is a needs.' The background of this thinking is the fragmentation, casualisation of work. Instead of doing the work as such (as we know it in the context of a classical employment contract), the work is ‘broken down’ into smaller, simpler tasks – which are performed by individuals who are not in an employment relationship. From here, the most common name of this work comes from so-called ‘gig work’ or workers like ‘gig workers’. New business processes conducted via platforms like Uber, Deliveroo and Foodora are establishing new requirements for workers who in the end cannot be neatly classified as either “employees” or “self-employed”. In international literature, the study of this form of work is at the centre of attention both from the point of view of individual and collective rights (more in Berg, 2016, Davidov, 2017, De Stefano, 2016a, 2016b and 2017). Although this form of work has just entered Slovenia, the main dilemmas have already been presented in the academic literature (npr. Franca and Gliha Škrjanec, 2017a; 2017b; Kresal, 2017; Franca, 2018).

## 4 Trade union response

The response of the trade unions to the above mentioned developments has been scarce. In other words they have been struggling to define strategies to approach the issue of the diversification of work relations. On the one hand, unions are wary of eroding the benefits of ‘employee’ status, but on the other, in the context of membership decline, demonstrating relevance to increasing numbers of ‘atypical' workers is more important than ever. So far they have not taken a clear position on whether (and how) to extend employment protection to more of those who work outside of the classical employment relationship. On the other side, the employers organizations are taking advantage of the atypical forms of work, but similar as trade unions they have not adopted a strategy on how to engage them efficiently in businees and not breaching the law. Recently, there have been many cases in courts where false self-employed claimed employment protection and won. Moreover, the lack of workforce in certain sectors (such as catering, construction, metal industry) and similar, puts the use of atypical forms of work in a different light.

The trend of having more and more people outside of the employment relationship have consequences also in the system of employee participation. In Slovenia a person deemed as ‘not employed’ is unable to be involved in the system of employee participation neither exercising individual nor collective participatory rights. Similar applies to agency workers, which could exercise their participatory rights in the agency as their employer, but due to the nature of the sector it is practically unfeasible. Atypical forms of work are thus eroding the system of employee participation. Taking into account that these changes to the labour market disproportionately affect younger workers, the idea of employee participation is viewed very differently by such workers who are most likely not to understand the system at all.

## 5 Concluding remarks

Decent work is not merely related to certain forms of work, although it is indisputable that some forms of work lead individuals to a worse position on the labour market. The distinctive sign is to carry out work in an agreed and legally appropriate way. Decent work, which is supposed to be guaranteed by the contract of permanent employment, can also quickly turn into unworthy work with inadequate working conditions, for example, with the allocation of working time, which does not allow neither a quality rest nor a private life. Therefore, it is not possible to exclude any form in advance in determining whether a job is decent not. The crucial point is the implementation of the relationship between the employee and the employer.

In Slovenia, in the last decade, there has been an increase in new forms of work, including self-employed without employed persons, who mostly work for one client and at the premises of this client. In practice, this can also mean a disguised employment relationship. According to the development of technology, other forms of work can also be expected in the future, therefore the possibility of violations of legislation or deviations from the standard employment contract and protection. Therefore there is and will be a need to closely monitor the development on the labour market in terms of both the maintenance of workers' rights and the social security system. In particular, it is important to strengthen inspection by the Labour Inspectorate, which must ensure a sufficient number of inspectors and a set of sanctions provided to them by legislation.

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